POINTS

IN THE

LAW OF DISCOVERY.

BY

JAMES WIGRAM, ESQ.
ONE OF HER MAJESTY'S COUNSEL.

SECOND EDITION.

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TO THE

SECOND EDITION.

THE decisions which, in the first edition of this work, it was principally the object of the author to review, were those in *Hindman* v. *Taylor*, *Sanders* v. *King*, *Thring* v. *Edgar*, *Pennington* v. *Beechey*, *The Attorney-General* v. *Ellison*, *Crowley* v. *Perkins*, and *Hardman* v. *Ellames*. Since that edition was published, each of these cases, except *The Attorney-General* v. *Ellison*, has been the subject of judicial notice; and the views of the author respecting them have been confirmed except in the case of *Hardman* v. *Ellames*. With respect to the decision in *Hardman* v. *Ellames*, it has been confirmed by the opinion of the Lord Chancellor, extra-judicially expressed, in the judgment in *Adams* v. *Fisher*; but that opinion, as will be seen, was grounded upon reasons differing ma-

terially from those of the Lords Commissioners, which the author in the first edition had presumed to criticise. With respect to the case of *The Attorney-General* v. *Ellison*, it is overruled, in principle, by the decision in *Adams* v. *Fisher*, and cannot stand with the cases of *Lambert* v. *Rogers*, *Grane* v. *Cooper*, and *Murray* v. *Walters*; the last two of which cases have been decided since the author's observations upon *The Attorney-General* v. *Ellison* were written.

Since the former edition of this work was published, several cases involving points of great importance have been reported; namely, *Adams* v. *Fisher*, before the Lord Chancellor; *Neate* v. *Latimer*, and *Pilkington* v. *Himsworth*, in the Exchequer; *Carter* v. *Goetze* at the Rolls; and *Latimer* v. *Neate* in the House of Lords. Upon each of these cases some observations will be found in the pages which follow.

For the numerous imperfections which he fears may be detected in his work, the author has no apology to offer but one, which ought, perhaps, to have deterred him from publishing it,—his

want of sufficient time to give the subject the close attention it deserves. He has been induced, however, to submit his labours, however imperfect, to the Profession, partly from the consideration that no one need be misled by them, who will take the trouble of examining for himself the authorities upon which the opinions of the author are grounded; and, because he has found that his former observations have been approved by a distinguished foreign jurist(*a*), and that they concur with those of Mr. Hare(*b*), whose Treatise on the Law of Discovery was strictly contemporaneous with that of the former edition of this work.

Lincoln's Inn,
Jan. 11, 1840.

(*a*) See Story's Commentaries on Equity Pleadings.

(*b*) In the case of *Irving* v. *Thompson*, 9 Simon, 27, the Vice-Chancellor, referring to Mr. Hare's Treatise, said it was an "excellent work."

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TO THE

FIRST EDITION.

A PRACTICAL TREATISE on the Law of Discovery, as administered in Courts of equity, has long been a desideratum amongst practitioners in those Courts. This work does *not* pretend to supply it. The author, in an early period of his professional life, collected together nearly all the reported cases on the subject of Discovery, and extracted therefrom what appeared to be the principles by which the Courts are governed in the administration of this important branch of the law. Having lately had occasion to reconsider the subject, in several of its bearings—with reference to certain modern decisions, to which he found it impossible to assent—it occurred to him (and under this impression the following pages have been written,) that an attempt to refer some leading points to their principles could not be otherwise than acceptable to the Profession, even if the speculations of the author (and such to a great extent he admits his suggestions to be) should be deemed inadmissible. His principal ob-

ject, at the outset, was, an examination of the rules laid down in *Hindman* v. *Taylor, Sanders* v. *King, Thring* v. *Edgar, Pennington* v. *Beechey, The Attorney-General* v. *Ellison,* and *Hardman* v. *Ellames.* In prosecuting this examination he found it necessary to advert with attention to rules of the most elementary character. These (which form the subject of the First Proposition) he has attempted to explain by way of introduction to points of a less obvious kind—involved in his objections to the cases referred to. With respect to three of these cases — *Sanders* v. *King, Thring* v. *Edgar,* and *Pennington* v. *Beechey*—the author has stopped far short of his original design (see page 164, in pl. 235). Deference to the opinion of the eminent and learned Judge by whom those cases were decided, has deterred him from the labour of *following out* his own views—until he shall have learnt how far those views are sanctioned by the opinion of the Profession.

Lincoln's Inn,
Jan. 11, 1836.

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ERRATA.

In note (*z*), p. 74, *for* " pl. 284," *read* " pl. 305—314."

In note (*m*), p. 176, *for* the cases cited in the note, *read* " Redes. Plead."

ADDENDA.

THE following cases, of which some have been decided, and others have come to the notice of the author since this work went to press, deserve the particular attention of the reader. He is requested to add references to them at the places indicated below.

In support of the author's observations upon *Harland* v. *Emerson*—

at pl. 115-120, p. 71-77, refer to *Clayton* v. *The Earl of Winchilsea*, 3 You. & Coll. 426

In support of the author's observations upon *Thring* v. *Edgar*—

at pl. 219, p. 146, refer to *Clayton* v. *The Earl of Winchilsea*, 3 You. & Coll. 426

Privilege of professional communications—

at pl. 136, p. 82, refer to *Greenlaw* v. *King*, 1 Beav. 137, and *Corporation of Dartmouth* v. *Holdsworth*, Appendix, infra

at pl. 137, p. 82, refer to *Greenlaw* v. *King*, 1 Beav. 137

at pl. 327, p. 244, refer to same case

at pl. 331, p. 254, refer to same case and to *Corporation of Dartmouth* v. *Holdsworth*, appendix, infra

As to the right of a plaintiff to call upon the defendant, before answering, to inspect documents left by the plaintiff with his clerk in Court—

at pl. 283, p. 197, refer to *Sheppard* v. *Morris*, 1 Beav. 175

As to the right of the defendant to compel the plaintiff to produce a document in his possession stated in the Bill—

at pl. 418, p. 341, refer to *Sheppard* v. *Morris*, supra

As to the general liability of a mortgagee to produce his securities before payment of his demand—

at pl. 312, p. 227, refer to *Brown* v. *Lockhart*, Appendix, infra

at pl. 374, p. 287, refer to same case

As to same point, where the mortgagee is plaintiff under a decree for sale—

at pl. 312, p. 222, refer to *Livesey* v. *Harding*, 1 Beav. 343

at pl. 374, p. 287, refer to same case

In support of the author's observations upon the case of *Latimer* v. *Neate*—

at pl. 312, p. 229, refer to *Brown* v. *Lockhart*, Appendix, infra

at pl. 317, 318, p. 239, 240, refer to same case

As to the right of a plaintiff to verify documents in the bill by affidavit upon a motion for the production of documents in the answer—

at pl. 239, p. 208, refer to *Addison* v. *Campbell*, 1 Beav. 251

POINTS, &c.

INTRODUCTORY OBSERVATIONS.

1. A LIMITED TREATISE on a subject of science is rarely entitled to the confidence of the reader. The language of such a treatise may mislead instead of instructing him, unless it is so adjusted, as not merely to express and define a given proposition, but also to be (at least) *consistent* with every proposition which a treatise extending over the entire subject would include. A capacity for doing this supposes the writer to have occupied a position from which *he* could command a view of the entire subject, although part only be brought under that of his reader. The writer of this limited treatise cannot however venture to hope that such has been the position which he has occupied; and he cannot too strongly caution his reader against extending to absent points in the law of discovery those observations which the writer has intended for specific application only. With this caution the following pages may, it is hoped, be read—if not to advantage—at least without prejudice.

2. A bill in equity (*a*) generally requires, and the Court enforces, the answer of the defendant or party complained of upon oath. An answer is thus required and enforced, with a view to furnish an admission of the case made by the bill, either in aid of proof, or to supply the want of it (*b*), and to avoid expense (*c*).

3. The discovery, which is thus required and enforced, is not confined to a discovery of facts resting merely in the knowledge of the defendant, but extends, within certain limits, to deeds, papers, and writings in his possession or power (*d*).

4. Such is the purpose and general scope of the jurisdiction exercised by Courts of equity in compelling discovery.

5. The exercise of a jurisdiction of this nature cannot be otherwise than pregnant with danger to the interests of those against whom it may be enforced, unless careful provision were made for guarding against its abuse. Upon a motion for the production of documents, in the case of *Cock* v. *St. Bartholomew's*

(*a*) The practice of the Court of Exchequer differs in some few particulars from that in Chancery. It is to the rules of the Court of Chancery that the following pages apply, except where the difference of practice in the two Courts may be incidentally noticed. See Hare, 298.

(*b*) Redes. Plead. 9. The fourth edition is referred to throughout.

(*c*) Id. 306. *Finch* v. *Finch*, 2 Ves. sen. 491.

(*d*) Common Practice; Hare, 194, 195, citing Domat.

Hospital(*e*), Lord Eldon said: "The Newcastle case is a good lesson upon this subject of production. They produced their charters to satisfy curiosity; some persons got hold of them, and the consequence was, that the corporation lost 7000*l.* a year." This observation applies to a specific case; but the mischief at which it points is not confined to cases in specie the same with that which produced it. Similar consequences *may*, in any case, ensue discovery—an observation which, without comment, proves the necessity of placing under strict regulation the jurisdiction exercised by Courts of equity in compelling discovery (*f*).

6. The argument which thus arises out of the possibility of mischief to an innocent party, from a discovery improperly enforced—if carried to its extent—would strike at the very foundation of the jurisdiction itself. The argument, however, is not all on one side. Suppose (to put an extreme case) a man wrongfully to possess himself of another's estate, and also of all the evidences of his title to it. No suggestion of *possible* mischief to an innocent party would support the conclusion that a Court of equity, rather than exercise a

(*e*) 8 Vesey, 141.

(*f*) In *Shaftesbury* v. *Arrowsmith*, 4 Ves. 71, Lord Thurlow says: "Permitting a general sweeping survey into all the deeds of the family would be attended with *very great danger and mischief;* and where the person claims as heir of the body, it has been very properly stated, *that it may shew a title in another person, if the intail is not well barred.*" And see 3 Ves. jun. 501, in *Wallis* v. *The Duke of Portland: Vansittart* v. *Barber*, 9 Price, 641; Hare, 185, 186.

jurisdiction attended with such risk, should permit the wrong-doer to withhold from the injured party his estate—by withholding the only means of *trying* his title to it.

7. Nor is the possibility of mischief of the nature suggested by Lord Eldon, in the case of *Cock* v. *St. Bartholomew's Hospital,* the only evil to be apprehended from the compulsory disclosure of evidence before the hearing of a cause. The danger of perjury, as will hereafter be seen, is the foundation of a settled rule of practice, by which the right of a party to discovery is limited to the evidence necessary to sustain his own case, to the exclusion of that by which the case of his opponent exclusively may be sustained.

8. To lay down a system of rules, which, in the most complete manner, shall produce the benefits and avoid the mischiefs incident to the jurisdiction in question, has been attempted by Courts of equity; and the object of the following pages is to investigate and explain some of the leading rules by which the exercise of that jurisdiction is regulated in practice.

9. The limited object thus proposed will enable the reader, in a great degree, to exclude from his attention many important points which would enter largely into a general and systematic treatise on the law of discovery; and it may be convenient here to notice some of these excluded points, with a view to the more precise definition of the questions to which, in the follow-

ing pages, it is desired that the attention of the reader should be confined.

10. Thus—"A bill of discovery (says Lord Hardwicke, sitting in Chancery) lies *here* in aid of some proceedings in *this* Court, in order to deliver the party from the necessity of procuring evidence, or to aid the proceedings in some suit relative to a civil right *in a court of common law* (*g*), *as an action; but not to aid the prosecution of an indictment or information, or to aid the defence to it* (*h*)." The proposition here asserted,—that Courts of equity compel discovery in aid of civil rights only, is subject to very limited qualifications, perhaps to none which may not be referred to waiver or voluntary submission on the part of a defendant (*i*). The point (however important in itself) may be disregarded in the present inquiry, the object of which is not precisely to define in all its parts the jurisdiction exercised by Courts of equity in compelling discovery, but to examine the regulations under which discovery is enforced, in cases falling within the ascertained and admitted limits of that jurisdiction.

11. Again—Bills in equity are commonly divided into two kinds, namely, bills of *discovery*, and bills for

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(*g*) Of the Courts in aid of which discovery will be given, Hare, 119.

(*h*) 2 Vesey, sen. 397, in *Lord Montague* v. *Dudman*; and see acc. Redes. Plead. 186; Hare, 116; *Glyn* v. *Houston*, 1 Keen, 329, Dec. 1836.

(*i*) Per Lord Eldon in *Macaulay* v. *Shackell*, 1 Bligh, N. S., 126, et seq.

relief (*k*). This division, however familiar in practice, may without prejudice,—except with reference to two cases noticed hereafter (*l*),—be also disregarded by the reader. It suggests a distinction, which, so far as *principle* is concerned, has no real existence. "Every bill is in reality a bill of discovery (*m*);" and the only difference between the two kinds of bill to which the above division is applied, consists in this:—that in the former, discovery alone is sought by the bill in aid of some distinct proceeding for relief, at law or in equity, by or against the plaintiff;—in the latter, the discovery and relief are sought by one and the same bill. The right of discovery, however, is, in both cases, founded upon one and the same principle; and the distinction between bills of discovery and bills for relief is, in this respect, merely artificial (*n*). The accurate mode of expressing this division would be:—bills for discovery *only;* and, bills for discovery *and* relief.

12. Further: — A class of cases noticed by Lord Redesdale should be attentively considered and distinguished. "A defendant," says Lord Redesdale, "may demur to one part of a bill, plead to another, answer to another, and disclaim as to another. But all these defences must clearly refer to separate and distinct

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(*k*) Hare, 1, 2; what constitutes a prayer for *relief*, Hare, 18.

(*l*) See the observations on *Hindman* v. *Taylor*, infra, pl. 67, 68, et seq.; and upon *Lowndes* v. *Davies*, infra, pl. 377, 378, et seq.

(*m*) Redes. Plead. 53.

(*n*) But see *Lowndes* v. *Davies*, infra, pl. 377.

parts of the bill (*o*)." The class of cases here contemplated by Lord Redesdale may be thus illustrated.—Suppose a bill to pray the conveyance of lands and an account of by-gone rents and profits. Suppose further, that, as to specific parts of the lands, the defendant was a purchaser for value without notice of the plaintiff's title, and that, as to the residue of the lands, he was affected with such notice. Here the defendant, as to so much of the bill as sought to effect the former part of the estate, might have a good defence; as to the residue, he might be without defence. Now, each of these two parts of the bill relates to distinct parts of the subject of the suit, and each is, obviously, capable of complete separation from the other, and of being treated as an integral suit. Either part might, indeed, be the subject of a separate suit. The abandonment by the plaintiff of one of these distinct and integral parts of the cause, would not derange or interfere with the effectual prosecution of the other. The *division*, of which an equity cause may *thus* be susceptible, does not appear to give rise to any observations which can affect the present inquiry. For, where one part of a cause is, in itself, so separate and distinct from all other parts of the same cause, that the rights of the parties as to such part are absolutely independent of and unconnected with the others — though all be properly included in one suit—the circumstance that they are associated together on the same piece of paper, will

(*o*) 1 Redes. Plead. 106, 319.

not affect that right to discovery as to any given part to which the plaintiff would have been entitled, if it had been actually placed on a separate record. And the present inquiry may be simplified, by assuming, for the purposes of observation and experiment, a case which in its constitution is *single*, (as not admitting of *division* in the sense above explained), and the observations which are applied to such assumed simple case will be applicable to each integral part of any cause of a more complex character.

13. This *division* of a suit into its *integral* parts must carefully be distinguished from a process considered hereafter, namely, the *analysis* or resolution of a suit, which in its constitution is single (*p*) into its *component* parts,—a process which is applicable as much to each of the *integral* parts into which a suit may be *divisible*, as to a suit which in its scope is single, so as not to admit of a *division* of the nature just referred to. Upon a correct understanding of this *analysis* depend some of the most important points in discovery. The rules of pleading indeed, so far as they enable a defendant, by *demurrer* or *plea*, to protect himself against discovery, mainly depend upon it. A detailed examination of the point will be found hereafter (*q*) in the observations on the first proposition which follow.

14. Other distinctions (which would form important branches of a systematic treatise on the law of disco-

(*p*) Supra, pl. 12. (*q*) Infra, pl. 54, 55, 90.

very) will be missed by the learned reader, in his perusal of the following pages. His attention is directed to the fact, in order that he may, once for all, be reminded, that in the following pages he will find only what they profess to contain—"*Points* in the law of discovery."

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15. For the present, then, a case will be assumed—1, in which the *jurisdiction* of the Court over the subject-matter of the suit does not admit of controversy;—2, in which (except where it is otherwise expressly noticed) the distinction between a bill for discovery only and a bill for discovery and relief does not call for observation;—and 3, in which the scope of the cause is *single*, in the sense in which the word "single" has been explained in a former place (*r*).

16. Assuming, then, a simple case of the description just noticed, some further observations may usefully be made by way of introduction to the points about to be investigated.

17. A right understanding of many, if not of the majority of those points, requires that the attention of the reader should constantly be alive to a peculiarity which (excluding a defence by demurrer or disclaimer) for the most part distinguishes a defence in equity from a defence at law. At law, a defendant has merely to put upon the record the case upon which he relies as

(*r*) Supra, pl. 12.

an *answer* (i. e. *as his defence*) to the plaintiff's claim in the action; and to this the record containing his defence is confined. In equity, it is otherwise. In equity, as at law, the defendant must not only put upon the record the case which he relies upon as an *answer* (i. e. *as his defence*) to the claim made against him, but he is also obliged—*in addition* to and *upon the same record* (*s*) with this defence—to give that discovery to which the common rule, already noticed (*t*), entitles the plaintiff. The word *answer*, then, as applied to a defence in equity, is a complex term,—embracing two things *essentially* distinguishable from each other: namely, 1. The *defence*, i. e. *the defendant's case;* and, 2. The *examination* of the defendant, consisting of the *discovery sought by the bill.* Such are the distinct parts of which an answer in equity may be said, in general, to consist. But, in practice the word "answer" is applied, almost indiscriminately,—to the defence,—to the discovery or examination,—to the record which comprises both,—and to that thing which is technically called an answer *in subsidium* (as distinguished from an answer in *support*) of a plea (*u*), and

(*s*) Hare, 223.—"In the Ecclesiastical Courts," says Mr. Hare, "where the defendant is required to make an answer or discovery upon oath, the answer is wholly distinct from the responsive allegation which contains the defence." It is to be regretted that this division is not made in equity proceedings. The difficulty of finding out the issue in the present mode of pleading is alone a sufficient reason for desiring it.

(*t*) Supra, pl. 2, 3.

(*u*) Infra, pl. 221; and see Hare, 30, S. P.

which, though admissible in pleading, is neither an examination nor (properly speaking) a defence. To the general and loose sense in which the word "answer" is thus used, without due regard to the essential distinctions just pointed out, may be traced much unprofitable argument and much of the confusion which appears to exist as to a plaintiff's right to discovery. An answer, so far as it is a *defence* only, *and a plea in bar,* as will hereafter be seen, stand upon precisely the same footing as to a plaintiff's *right* to discovery. Where the defence is by *plea,* the plaintiff is entitled to all such discovery (if any) as may be necessary to try the truth and validity of the defence so made (*x*); and this right, so far as the matter of the plea is concerned, is just as extensive (*y*) when the defence is made by plea, as when it is made by answer. In fact, the only difference between the two modes of defence, so far as the right to discovery is concerned, will be found to consist in this—that, in the former, (the defence by plea), the point made by the plea is tried *in the first instance,* and the discovery *therefore,* in the first instance, is confined to that point; whereas, if

(*x*) As to the right of plaintiff to all such discovery as is necessary for trial of plea, see Hare, 27, 28, 29.

(*y*) Sir John Leach ruled in a case before him, that a defendant who pleaded to a bill was not at liberty to answer facts *incompatible* with the truth of the plea, *unless* they were charged in the bill (*in terms*) "as evidence." A *condition* like this, imposed by rule of Court, would not (if the rule were admitted) limit the plaintiff's *right* as between him and the defendant. But see this rule considered, infra, pl. 213, et seq.

the matter of the plea be insisted upon by answer, *other points*, in the cause, unconnected with the matter of the plea, go to trial *simultaneously* with that matter, and the discovery *therefore* is extended to those points also.

18. The distinction between that part of the record called an answer which constitutes the *defence*, and that part of it which contains the *discovery* required by the bill, is of the essence of some of the most important rules in the law of discovery. To a neglect of this distinction may be traced the confusion in which some important points in that law have become involved.

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19. Where a plaintiff seeks to obtain discovery to which he has no right, or to obtain it by a form of proceeding not in accordance with the practice of the Court, the defendant, as will hereafter be seen, may object to give the discovery required, and demand the judgment of the Court whether he should give it or not.

20. In addition to objections challenging the plaintiff's right of suit, or the regularity of the proceeding by which he seeks to obtain discovery, Courts of equity in many cases refuse to enforce *particular* discovery upon objections founded in the nature of the discovery sought, and in that alone;—as where it would subject the defendant to penalties,—where it is immaterial,—where it relates exclusively to the defendant's case,—and upon other grounds which will be noticed hereafter.

21. As the appropriate mode of taking an objection to discovery varies in many cases with the ground and nature of the objection itself, it is of importance to distinguish between those objections to discovery which challenge the plaintiff's right of suit, or the regularity of the proceeding by which he seeks to obtain it, and those objections to discovery which are grounded upon the nature of the particular discovery objected to (*z*). It is one thing for a defendant to say, 'I will not answer because you have no title to relief against me at law or in equity, or because you seek it in a manner not warranted by the practice of the Court,' and another to say, 'I am not bound to make this discovery, even admitting your title were as you have asserted, and your manner of seeking it to be free from all objection.' The fourth and fifth propositions, stated below, are founded upon the above distinction. The fourth, relates to the appropriate mode of objecting to discovery, where the objection is founded upon a denial of the plaintiff's right of suit, or to the manner in

(*z*) Objections to discovery may conveniently be classed under three heads:—1st, Those which are grounded upon *merits;*—2nd, Those which refer to the *form* of proceeding;—and, 3rd, Those which are grounded upon the *nature* of the discovery objected to. The first class is described in the following pages, as "objections founded upon a denial of the plaintiff's right of suit." The second as "objections founded upon a denial of the plaintiff's right to proceed with his suit in its existing state." And the expression "particular discovery" is used to denote the third class of objections. See the "General conclusions" at the end of this work.

which he proceeds to obtain it; and the fifth, relates to the appropriate mode of objecting to discovery, where the objection is founded exclusively upon the nature of the discovery itself.

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22. The above general observations being premised, the subject of discovery appears conveniently to divide itself under two heads of inquiry: namely, 1. An inquiry as to the discovery which a *plaintiff* may *exact;* and, 2. An inquiry into the *means* by which a *defendant* may protect himself against discovery improperly required.

23. The first of these heads of inquiry will be found, for the most part, to be involved in what may be justly described as the two cardinal rules in the law of discovery: namely—1st, The right, as a general proposition, of every plaintiff to a discovery of the evidences which relate to *his* case; and, 2nd, The privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own. The second head of inquiry is of a more technical character, and involves in it two distinct questions:—1st, The appropriate mode by which a defendant should object to discovery to which the plaintiff may not be entitled;—and, 2nd, The consequences to a defendant of his neglecting the appropriate mode of taking the objection (*a*).

(*a*) See "General conclusions," at the end of this work.

24. The five following propositions will furnish conclusions sufficient to exhaust the above points of inquiry, together with the exceptions and qualifications to which they are subject.

25. PROPOSITION I. The pleadings in a cause and rules of practice, unconnected with the laws of discovery, determine *a priori* what question or questions in the cause shall first come on for trial. And the right of a plaintiff to discovery is in all cases confined to the question or questions in the cause, which, according to the pleadings and practice of the Courts, is or are about to come on for trial.

26. PROPOSITION II. It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit.

27. PROPOSITION III. The right of a plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the "*plaintiff's case*," and does not extend to a discovery of the manner in which the "*defendant's case*" is to be exclusively established, or to evidence which relates exclusively to his case.

28. PROPOSITION IV. Every objection to discovery which is founded upon a denial of the plaintiff's right of suit, or of his right to proceed with it in its existing

state, should regularly be taken by demurrer or plea, according to the circumstances of the case; — and, where the objection is not so taken, and the defendant *answers* the bill, he will, in general, be held to have waived the objection, and will be obliged to answer the bill "throughout."

29. Proposition V. Every objection to discovery which is not founded upon a denial of the plaintiff's right of suit, or of his right to proceed with his suit in its existing state, but depends exclusively upon the nature of the discovery sought (*b*), may regularly be taken by *answer* as well as by demurrer or plea. As the mode of taking objections of this nature is thus unfettered by rules of form, a defendant who has not actually answered an interrogatory or interrogatories to which the objection may apply, cannot, as a general rule, be held to have waived it upon any merely technical ground.

30. An examination of each of these propositions will now be gone into.

(*b*) Supra, pl. 20, 21.

FIRST PROPOSITION.

The pleadings in a cause and rules of practice, unconnected with the laws of discovery, determine à priori *what question or questions in the cause shall first come on for trial. And the right of a plaintiff to discovery is in all cases confined to the question or questions in the cause, which, according to the pleadings and practice of the Courts, is or are about to come on for trial.*

31. The language of this proposition is open to criticism. It, apparently, assumes that a cause must involve more questions than one, and that the several questions in a cause may not come on for trial simultaneously. Neither of these assumptions would be correct. A cause may involve one question only; and where the questions are several, they may all come on for trial simultaneously, although upon such trial they must of necessity be considered by the court in succession. Cases of this simple kind, however, require no observations which are not included in the investigation of more complex cases, and it has, therefore, been thought more convenient to leave the first proposition open to the criticism which has been pointed at, than, for the sake of mere verbal accuracy,

to entangle it with qualifications, which would not tend to elucidate the subject to which the proposition applies.

32. To proceed, then, to explain the proposition:—Lord Redesdale in his Pleadings (*a*) has given the following summary of objections which may be taken to a bill in Equity:—

"From what has been observed in a preceding page, it may be collected that the principal grounds of objection to the *relief* sought by an original Bill" (which can appear on the bill itself, and may therefore be taken advantage of by demurrer) "are these: I. That the subject of the suit is not within the jurisdiction of a Court of equity; II. That some other Court of equity has the proper jurisdiction; III. That the plaintiff is not entitled to sue by reason of some personal disability; IV. That he has no interest in the subject, or no title to institute a suit concerning it; V. That he has no right to call on the defendant concerning the subject of the suit; VI. That the defendant has not the interest in the subject which can make him liable to the claims of the plaintiff; VII. That, for some reason founded on the substance of the case, the plaintiff is not entitled to the relief he prays. To these may be added: VIII. The deficiency of the bill to answer the purposes of complete justice; and IX. The impropriety of confounding distinct subjects

(*a*) Redes. Plead. p. 110, Demurrers.

in the same bill, or of unnecessarily multiplying suits. When the discovery sought by a bill can only be assistant to the relief prayed, a ground of demurrer to the relief will also extend to the discovery; but if the discovery may have a further purpose, the plaintiff may be entitled to it, though he has no title to relief. In considering, therefore, these several grounds of demurrer to relief, such as may and such as cannot extend to discovery likewise, will be distinguished." And in a later page he adds: "It remains, therefore, to consider the objections to a bill which are causes of demurrer to discovery only. These are, I. That the case made by the bill is not such in which a Court of equity assumes a jurisdiction to compel a discovery. II. That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery. III. That the defendant has no interest in the subject, to entitle the plaintiff to institute a suit against him even for the purpose of discovery. IV. Although both plaintiff and defendant may have an interest in the subject, yet that there is not that privity of title between them which gives the plaintiff a right to the discovery required by his bill. V. That the discovery, if obtained, cannot be material; and, VI. That the situation of the defendant renders it improper for a Court of equity to compel a discovery."

33. Lord Redesdale's treatise contains corresponding passages applicable to Pleas.

34. The objections to discovery suggested by Lord Redesdale are of two distinct classes, namely:—

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I. Those which deny the plaintiff's right of suit.

II. Those which deny his right to proceed with it in its existing state. These objections do *not* include:—

III. Objections to particular discovery founded only on the nature of the discovery sought (*b*).

35. The observations which follow under this first proposition are confined, and apply exclusively to the two first classes of the objections (*c*).

36. The *grounds* upon which a defendant may object to give discovery having been determined, convenience, as well as justice, require that where a suit is open, or supposed to be open, to any valid objection to discovery, the defendant should have the means of demanding the judgment of the Court upon it, *before* he is compelled to give discovery, to which, if the objection be valid, the plaintiff will have no title. And, accordingly, the ordinary rules of Courts of equity provide the defendant with these means.

37. If the bill be defective or informal, (which are the eighth and ninth points suggested by Lord Redesdale), and the objection be apparent on the face of the bill, the defendant may demur. And where a bill is met by this species of defence, the defendant, by the

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(*b*) Supra, pl. 20, 21.

(*c*) Propositions IV. & V., infra, assert that the objections falling within the two first classes should regularly be taken by demurrer or plea, but that objections of the third class may regularly be taken by answer.

practice of the Court, is entitled to have the question raised by the demurrer tried in the *first* instance, before he can be called upon to go into his defence, or give discovery, the right to which, this objection, if valid, would render unnecessary or improper.

38. If the demurrer is allowed, that is a decision of the Court that the suit ought not to proceed in its existing state, and regularly the bill is out of Court by the allowance of the demurrer.

39. If the demurrer be overruled, nothing is thereby finally decided between the parties, but the defendant is obliged to resort to other modes of defence.

40. If the bill be not defective or informal, or if the defendant should not be advised to demur to the bill upon either of those grounds, but the bill should, upon the face of it, be open to any other of the objections specified by Lord Redesdale, the defendant may demur, and may assign special grounds for his demurrer, or he may demur generally, and reserve his grounds of demurrer for the argument. In this, as in the former case, the defendant is entitled to have the judgment of the Court in the *first* instance, upon the question or questions raised by the demurrer, before the plaintiff can require him to go into any other defence, or give discovery, which the objection raised by the demurrer, if valid, would render unnecessary or improper (*d*).

(*d*) It may be stated generally, that a demurrer may extend to *all* matters in the bill, the admission of which is compatible with that mode of defence. Redes. Plead. 183, 184; Hare 8. But

41. If the demurrer is allowed, the bill is regularly out of Court, as in the example first stated.

42. In this case also, if the demurrer is overruled, nothing is thereby finally decided between the parties, but the defendant is merely thrown upon his defence to the suit under some other form of pleading.

43. If the bill be open to any of the objections stated by Lord Redesdale, but the objection be not apparent upon the face of the bill, the defendant may plead the matter necessary to bring the objection under the view of the Court (*e*). In this mode of defence also the defendant is entitled to have the plea adjudicated upon in the *first* instance (*f*). A plea, however, differs from a demurrer in many important points connected with the subject under discussion. A demurrer may rest upon several distinct grounds. A plea, regularly, must be confined to one. A demurrer will be disposed of upon one trial,—a plea may require more. A plea,

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a demurrer must not extend to facts, the admission of which is incompatible with the defence. *Scott* v. *Macintosh*, 1 Ves. & B. 503; *Hodle* v. *Healey*, 1 Ves. & B. 536; *Crow* v. *Tyrrel*, 2 Madd. 397. This, it may be observed, is a point in the science of pleading rather than in the law of discovery. As to the same point in the case of a plea, see *Sutton* v. *The Earl of Scarborough*, 9 Ves. 71.

(*e*) A plea (in effect) suggests, that the plaintiff has omitted to state in his bill a fact, which, if stated there, would have rendered the bill demurrable. Qu. *Hook* v. *Dorman*, 1 Sim. & Stu. 227. A plea is merely a special answer. *Roche* v. *Morgell*, 2 Sch. & Lef. 725.

(*f*) But see the argument upon *Hindman* v. *Taylor*, infra, pl. 68, et seq.

in order that it may be effectual, must be, 1. good in form; 2. good in substance; 3. true in fact. The two first of these points are questions of law, and for the purpose of trying these, the plea must be set down *for argument*. If, upon argument, the plea is overruled, nothing is thereby finally decided between the parties, but the defendant, as in the case of a demurrer, is thrown upon his defence under some other form of pleading. If the plea, upon argument, is held good in form and substance, the plaintiff may afterwards take issue upon the truth of the plea. In this case, the cause will go to a hearing, which is a second trial of the defence by plea, but upon a new ground, and the cause will finally be disposed of at that hearing.

44. If the defendant should not be advised to defend the suit by demurrer or plea, or if his attempt to defend himself by either of these forms of pleading should fail upon argument, the defendant must in general *answer* the bill. Under this form of pleading, every ground of defence in the suit which might have been taken by demurrer or plea may, where the relief is in equity, be again insisted on. And *that* whether the same points have been unsuccessfully taken by demurrer or plea or not, and, *at the hearing of the cause, all*(*g*) the grounds of defence will be open to

(*g*) This great advantage of a defence by answer over a defence by plea in bar, is not sufficiently attended to in practice. By an answer, a defendant may have the benefit of every possible ground of defence. A plea in bar rests the defence upon the single ground which the plea raises. It will often excuse the plaintiff from

the defendant,—they will come on for trial *simultaneously*,—and (subject to such inquiries as the Court may judge necessary to a full investigation of the right of the parties) will be finally decided. Where the relief is at law, the proceedings in equity will not of course affect any case which the defendant in equity may have at law.

45. If the defendant has no interest in the suit, and the plaintiff does not seek to charge him, he may disclaim. In this case no trial is necessary.

46. Such, then, by way of example only, are the rules of practice which, according to the pleadings, determine the order in which the questions in a cause shall come on for trial. This is the first branch of the proposition now under examination.

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proving his own title, and be a waiver of many grounds of defence which an answer might have made available. The late case of *Slaney* v. *Wade*, 1 Myl. & Cr. 338, is a strong instance of this. Again, "If a purchaser for valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favour which he cannot set forth by way of plea or of answer to support a plea, as the expending a considerable sum of money in improvements with the knowledge of the plaintiff, it may be more prudent to set out the whole by way of answer, than to rely on the *single* defence by way of plea, unless it is material to prevent disclosure of any circumstance attending his title." Redes. Plead. 309. A plea should never be resorted to where a defendant has a defence in addition to that raised by the plea, unless his interest in withholding the discovery which his plea may cover, be at least equal to his interest in defending the suit successfully. See infra pl. 98. *Bayley* v. *Adams*, 6 Ves. 594.

47. The second branch of the proposition asserts, that the plaintiff's right to discovery will in all cases be confined to the exigencies of the question or questions in the cause which, under the first branch, may be about to be tried. Upon this point little room for controversy can, it is conceived, exist.

48. The object of a Court of equity in compelling discovery, is, to enable itself or some other Court to decide on matters in dispute between the parties (*h*), and the right to discovery is limited by the purpose with reference to which alone it is conferred, and will not, for that reason, extend beyond the exigencies of the question or questions about to be tried. To determine what such question or questions may be, the ordinary rules of practice (unconnected with the laws of discovery) must be separately consulted. By these rules, if the defence be so framed as to raise an issue in law only, as by demurrer, the plaintiff will not be entitled to any discovery. The very principle upon which a demurrer is founded excludes it. For, when a cause is so defended, the question first to be tried is that which the demurrer raises; and as this mode of defence admits the plaintiff's statement of his case (*i*), he gets by that admission, for the purposes of the demurrer, all the discovery which is necessary for the trial about to

(*h*) Redes. Plead. 191, S. P. infra; Commentary on the word "material," pl. 224, et seq.

(*i*) Redes. Plead. 211, 212.

take place, and no actual discovery will, therefore, be required. If an issue or issues of fact be raised by the defence, (as by plea), the point to which the attention of the pleader will then be directed must be—what question or questions in the cause will first come on for trial? for, to such question or questions alone will the object of the Court in compelling discovery apply. Now (by the rules of practice before referred to) the effect of a plea in bar (for example) is to reduce the whole cause to the trial of a single question—that raised by the plea (*j*). This question the defendant who pleads has a right to have tried by itself singly, and in the first instance, suspending, until this shall have been tried, all questions in the cause which are unconnected with it, whether principal or subordinate. Now a plea, for the purposes of the argument, admits all the statements in the bill, which are well pleaded, to be true, and the plaintiff gets by that admission, for the purposes of the argument of the plea, all the discovery which the argument requires. Where the defence therefore is made by plea, the plaintiff will not be entitled to any discovery which may not be necessary for the trial of the plea itself. Where the defence is by answer, the rules of equity (as a general proposition) put the parties in a different position. By these rules, a defendant who defends by answer, carries all the questions in the cause to trial simultaneously. No

(*j*) Redes. Plead. 219.

implied admission is made by this form of defence, and there is nothing, therefore, in the first proposition by which the plaintiff's right to discovery as to any part of the bill is excluded.

49. To illustrate the above by cases of common occurrence, suppose a plaintiff by his bill to claim an estate, and the defendant to insist specially by demurrer, that the plaintiff was not entitled to sue by reason of some personal disability, which is one of the grounds of defence put by Lord Redesdale. The question raised by this mode of defence would be the question to be first tried under the rules of practice before referred to, and as no discovery upon any other point could assist that trial, the plaintiff's right (if any) to discovery upon other points would be suspended until the question raised by the demurrer was decided.

50. So, of a plea, mutatis mutandis, unless the bill were so framed as to render some answer necessary for the trial of the plea itself; and, in that case, the right of discovery would be confined to the exigencies of that particular point.

51. Again, suppose the plaintiff to claim an estate, and to pray the *consequential* account of rents and profits, and suppose his title to the estate to be disputed by the defendant by *demurrer or plea*. The plaintiff's title to the estate would, in such a case, necessarily be the first (*k*) question for investigation, and his right

(*k*) The questions in a cause, it will be observed, may all

to discovery *relevant only to that account*, would be subordinate to or dependent upon the result of that inquiry. So (for example) in a bill suggesting a partnership and praying an account, the fact of partnership or no partnership, if controverted by demurrer or plea, would be the first question to be decided, and discovery *relevant to the account only* would follow or not, according to the result of the decision upon the principal point. So, in any bill for an account, if met by a suggestion of a stated account, or of a release of the demand in question; the effect or the fact of the stated account or release, if raised by demurrer or plea, would be the first question to be tried, and discovery relevant to the account only would await the result of such trial.

52. Other cases might be put, to which similar observations would apply; and as, in all these cases, in which the plaintiff's title is supposed to be disputed, discovery applicable to the account alone would be irrelevant to the question of title to that account, the plaintiff's right to discovery, for the purposes of the account, would be suspended until after the trial of the question raised by the demurrer or plea.

53. In cases like those suggested in the two preceding paragraphs, where discovery is sought as to

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come on for trial simultaneously, though adjudicated upon (as they must be) in succession.

matters of account, the discovery involves for the most part a production of documents and papers, and the disclosure and setting forth of accounts, which, unless the plaintiff has a right of suit to some extent, is in the highest degree inconvenient and objectionable.

54. The question whether a plaintiff has a right of suit, or a right to proceed with his suit in its existing state, is obviously unconnected with that of the amount or extent of his demand. His right to discovery, for the purpose of determining the right in both cases, may well be conceded by a defendant, who may, at the same time, insist, that until the plaintiff's right to relief is established in a suit properly framed, he ought not to be compelled to give discovery, the right to which is plainly *subordinate* to, or *dependent* upon, the decision of that previous question, as its *principal*(*l*).

55. As reference must often be had to this distinction, it may be convenient in future to adopt the term *principal* to describe points in a cause, which, if established, would exclude the plaintiff's right of suit altogether, or his right to proceed with his suit in its existing state;—and to apply the term *subordinate*, or *dependent*, to those points in the cause which do not necessarily call

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(*l*) The reader will bear in mind, according to an observation in a former place, that, whether the relief sought by the plaintiff is sought by the same bill in which the discovery is sought, or in some other proceeding, the reasoning upon this part of the subject will be the same.

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for adjudication until such principal question or questions as may arise shall first have been decided (*m*).

56. The result of the preceding observations may be thus stated:—

57. If a defendant demurs, the demurrer will arrest the progress of the cause until the point or points raised by the demurrer shall have been tried. And as a plaintiff cannot want discovery for the purposes of a trial in which his own statement of his case is admitted, he will not be entitled to discovery before such trial.

58. If the defence be by plea, the plea, in like manner, will arrest the progress of the cause until the plea shall have been argued; and if the bill be not so framed as to make discovery necessary for the trial of the plea itself (*n*), the case will fall within the same reasoning, and be in the same predicament, as that of a demurrer.

59. If the defence be by plea, but the bill be so framed as to make discovery necessary for the trial of the plea,—here, also, the plea will arrest the progress of the cause until the plea shall have been tried (*o*); but the first proposition does not determine that such dis-

(*m*) See, as to principal point, *Jacobs* v. *Goodman*, 2 Cox, 282, and 3 Brown, C. C. 488, n.

(*n*) See observations upon this infra, pl. 90, 98.

(*o*) Vide pl. 90, 98.

covery as may be necessary to try the plea itself shall not be given. The plaintiff's right to such discovery will be considered presently.

60. If the defence be by *answer*, the progress of the cause to a hearing will not be suspended by the form of the defence, and there is nothing in the first proposition by which the plaintiff's right to discovery is excluded from any point in the cause.

61. The observations which have been made explain the meaning and limits of the common rule, that a demurrer or plea to relief covers the discovery also. Each of these modes of defence, if well pleaded, covers all discovery which is unnecessary to the trial of the point raised by the defendant's pleadings (*p*).

62. Although a defendant may by demurrer protect himself against discovery, it is now settled by authority (*q*), though formerly held otherwise (*r*), that a defendant against whom relief is sought in equity may demur to the relief, and give the discovery sought by the bill.

63. The same observation applies also to a plea (*s*).

64. In the case of *James* v. *Sadgrove* (*t*), which came before the Court upon a plea, Sir John Leach decided

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(*p*) Supra pl. 40, note.

(*q*) Redes. Plead. 103, 183; *Hodgkin* v. *Longden*, 8 Ves. 2; *Todd* v. *Gee*, 17 Ves. 273; Hare, 8.

(*r*) Redes. Plead. 183.

(*s*) Redes. Plead. 231.

(*t*) *James* v. *Sadgrove*, 1 Sim. & Stu. 4.

that a defendant who *might* by plea have covered all the discovery required by the bill, but elected to give part of it, was bound to give the whole. The same reasoning would necessarily apply to a demurrer. The author, however, presumes to think the decision in *James* v. *Sadgrove* questionable. The question depends upon the proper meaning of the technical expression, "Discovery *covered* by a demurrer or plea,"—a point upon which some observations will be found in a later page (*u*).

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65. To the generality of some of the preceding observations a caution upon one or two points must be opposed.

66. And,—First,—a question (already adverted to) has long existed, whether the defendant to a bill seeking discovery only, in aid of an action at law, can plead in bar to the discovery, that which is merely matter of legal defence to the action at law. This question is founded upon the high authority of Lord Thurlow's opinion, judicially expressed in the case of *Hindman* v. *Taylor*.

67 The case of *Hindman* v. *Taylor* (*x*), the facts of which are very loosely stated in Brown, appears to have been this. The plaintiff had agreed to resign to the defendant, and get him appointed to the command

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(*u*) Infra, pl. 219.

(*x*) *Hindman* v. *Taylor*, 2 Bro. C. C. 7.

of an East India ship. The defendant was appointed, and made a voyage. After this, a second agreement in writing, by which the first agreement was superseded, was come to between the parties, and signed by both. This second agreement was deposited in the hands of Wildman, and, when in his hands, was cancelled under circumstances which the defendant relied upon as being equivalent to or a full release in law of the agreement. The plaintiff afterwards brought his action upon the second agreement, insisting that it was still a subsisting agreement, and filed a bill of discovery in support of his action. To this bill the defendant pleaded the cancellation of the agreement and the circumstances attending such cancellation, and relied upon this transaction as a bar to the plaintiff's demand at law. Lord Thurlow overruled the plea, upon the ground that a *legal* bar to an action cannot be pleaded in equity in bar to a discovery sought in support of the action at law. The judgment of Lord Thurlow is as follows:—"As a plea this cannot stand. *A plea in bar to the action is not a plea in bar to the discovery.* The matters pleaded are all special objections, not a general plea to the discovery. If you can plead that which is a bar to the action, and have it tried as a bar to the discovery, the whole is wrong. The more I think of it, the more I am convinced it cannot be set up as a bar to the discovery. The reason for permitting a plea in bar to the relief is, to prevent the going into the whole cause by that, which, if it stood *per se*, would put an end to it; but, where the bill is

for discovery, the cause ends with the answer (*x*). Then the whole remedy being upon the face of the transaction *at law*, the question is, whether you shall, by the plea, bring the whole merits on here. I strip the case of this matter of answering improper questions, because that is to be judged of in a different manner. I take it upon the general prayer. If he had prayed relief, it would have been *demurrable;* and now you say, he shall not have a discovery because his relief is at law. This is a case where he has no election, he must sue at law. The dry question is this:—whether there is any objection, in natural justice, to a defendant giving a discovery in order to found a relief at law. The question whether he shall answer improper inquiries being out of the case, I think he cannot bar the plaintiff from giving him the trouble of an answer. Where the bill is for relief, the discovery is merely ancillary to the relief; therefore, if the defendant can shew that, without going further, there is one point which will bar the relief, the Court will first look into that point. The Court there takes the plea as the first method of getting at that justice, which the subject has a right to obtain. *Where the remedy is legal, to let the defendant refuse the discovery, is putting matters out of their train,* for the Court can ultimately do nothing as to the remedy. If the bill be for equitable relief, and the plea be overruled, the defendant

(*x*) This argument supposes that discovery may not of itself be a serious mischief. Supra, pl. 5.

has this objection, that the Court has put him to a great expense, in going through a cause, where he had brought it to a point which ought to have decided it in his favour. In the same case, *if the remedy is at law, he has only to complain that he has been put to the expense and trouble of putting in a longer answer.* As to the expense of the copy and answer, that the Court exempts him from; for, the moment the answer comes in, he must be paid all the expense he has been at; and as to the trouble, the Court cannot relieve him from that. *Therefore, I think myself founded in declaring, that where the bill is for a discovery leading to relief at law, the defendant cannot plead* in bar here to the discovery, what will be a bar to the relief there."

68. From this judgment the writer presumes to dissent. The plaintiff would of course in such a case be entitled to all such discovery (if any) as might be necessary to the trial of the plea itself. Lord Thurlow's judgment, however, goes further; it affirms that the defendant cannot avoid giving that discovery to which the plea (if good) would be a bar, i. e. discovery as to the original *subject* of action (*y*). To this alone it is that the author's objection applies (*z*), and he presumes to say that if the case of *Hindman* v. *Taylor* had been decided by a Judge of less eminence than Lord

(*y*) The defendant denying the plaintiff's title would, according to this, be bound to set out accounts which had been discharged by the matter of the plea itself. See as to *principal* and *subordinate* points, supra, pl. 51—55.

(*z*) See Hare, 46, 56.

Thurlow, it would not at this day have remained unreversed by a direct decision. If, indeed, Lord Thurlow had begun by asking, what *right* the plaintiff had to sue the defendant, either at law or in equity, it is not improbable that he might himself have come to a different conclusion (*a*). The reasoning of the able counsel who argued in support of the *plea* in *Hindman* v. *Taylor* appears unanswerable. "Where the relief is equitable, the plea to the relief is a bar to the discovery; therefore, if the plea be of matter which will be a bar at law, it ought, upon the same principles, to be a bar to the discovery. *If it be not, a man without any legal claim may have a discovery of all the transactions of another's life.*" "To what end should the defendant be harassed with questions which can answer no purpose? Unless the plaintiff *has a right,* the Court will never suffer the defendant to be compelled to answer (*b*)."

69. The argument thus urged in favour of the plea is fully supported by the general rules of the Court in analogous cases. By those rules, a want of title in the plaintiff is the *first* objection which every defendant has a right to take (*c*); and if—to come more closely to the point—a bill be filed in support of an action at law, and it appear upon the face of the bill

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(*a*) This observation is supported by the language of the Vice Chancellor in *Mendizabel* v. *Machado*, 1 Sim. 68; infra, pl. 74.

(*b*) *Hindman* v. *Taylor*, 2 Bro. C. C. 8.

(*c*) Redes. Plead. 154, 191. This principle was carried to its full extent in the case of *Jones* v. *Goderich*, Myl. & Craig. not yet reported.

that the action is not maintainable, a demurrer will lie (*c*). Now, assuming that the matter pleaded, if true, would be a bar to the action, it follows, that the bill would be demurrable if the facts pleaded had been stated in the bill; and, consequently,—if a plea do not bar the discovery,—the plaintiff in equity escapes from a demurrer, and obtains discovery to which he is not entitled, only by suppressing material facts in the case (*d*). But it is against every principle of pleading, as well as of justice and common sense, that a party should by law be permitted to gain advantage by any perversion of the truth of a case (*e*). The necessity of avoiding such an anomaly has induced Courts of Equity to admit of negative pleas (*f*).

70. Lord Thurlow's reasoning, it will be observed, proceeds upon a supposed absence of all inconvenience to a plaintiff in being compelled to answer a bill, as if discovery alone, extending as it often does to the production of documents, might not be a serious mischief (*g*), independently of its certain vexation. Another, and perhaps the most forcible, objection to Lord Thur-

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(*c*) Redes. Plead. 191, 192; *Cholmondeley* v. *Clinton*, 1 Turn. & Russ. 107.

(*d*) Supra, pl. 43, note.

(*e*) It has indeed been doubted whether it be not an offence at law for a plaintiff knowingly to state his case more favourably than the truth warrants. *Wallis* v. *The Duke of Portland*, 3 Ves. 494.

(*f*) Redes. Plead. 233.

(*g*) Supra, pl. 5.

low's judgment, is, that the mere suggestion of an *intention* to bring an action—which is not traversable,—will support a bill of discovery as effectually as an action actually commenced (*h*). Indeed, an action actually commenced may be discontinued at the will of the party suing out the writ.

71. Although the high authority of Lord Thurlow has hitherto deterred subsequent judges from expressly overruling the principle of his decision in *Hindman* v. *Taylor*, it is obvious that the difficulty of supporting that decision has been strongly felt and acknowledged in later cases; and the author confesses his inability, as a question of principle, to reconcile the decisions in some modern cases with that in *Hindman* v. *Taylor*, although the Courts, in those modern cases, have professed not to overrule Lord Thurlow's judgment.

72. *Baillie* v. *Sibbald* (*i*), (1808), is the first case to which the reader may be referred as an authority opposed to Lord Thurlow's reasoning.

73. In *Gait* v. *Osbaldeston* (*j*), (1820), a bill was filed for a discovery in aid of a trial at law, and for an injunction to restrain the defendant from setting up outstanding terms in ejectment. The Vice-Chancellor said, "The plea of title would have been good as to the relief sought by the injunction against the outstanding terms, *but it is not good as to the discovery*; because, here the discovery is not incidental to that

(*h*) Redes. Plead. 187. (*i*) 15 Ves. 185.
(*j*) 5 Madd. 428.

relief, and as to the discovery in aid of a legal title, the plea of no legal title is no defence, for *that is the very question which is to be tried at law.*" This decision was reversed on appeal by the Lord Chancellor (*k*).

74. In *Mendizabel* v. *Machado* (*l*), (1826), (before referred to), the plaintiff brought an action against the defendant, and filed his bill for a discovery, and a commission to examine witnesses in aid of the action. To this bill the defendant pleaded facts, which shewed that the plaintiff had not, *and never had,* any right of action against him, in respect of the matters in question; and the Vice-Chancellor (Sir J. Leach) allowed the plea. The plea in this case, it will be observed, differs from that in *Hindman* v. *Taylor,* in this respect: *That* was a plea which confessed and avoided the original right of action; whereas the plaintiff in *Mendizabel* v. *Machado* negatived all original right. The two cases, however, agree in this—which alone seems material to the point at issue—that the plea, in each case, tendered an issue *of fact* as a *legal* bar to the plaintiff's demand, and thereby transferred into equity the trial of the legal matter; and, if it be once admitted, that a plea having this effect may be pleaded in equity, in bar to a bill of discovery in aid of an action, it is difficult to understand the principle, which—sustaining such a plea where the facts pleaded amount to a denial of original title in the plaintiff—denies the same right to a defendant where the plaintiff, by his own act, has

(*k*) 1 Russ. 158. (*l*) 1 Sim. 68.

destroyed his original right. If Lord Thurlow's principle be carried to its extent, a release of the very demand in an action could not, in the simplest case, be pleaded in equity as a bar to discovery in aid of such action. The judgment of the Vice-Chancellor, in *Mendizabel* v. *Machado,* adopts the arguments which have already been suggested against Lord Thurlow's decision in *Hindman* v. *Taylor,* but professes to leave that decision untouched. His Honor, after shewing that the plaintiff had no right of action, proceeds thus:—"The plaintiff, however, contends that, if he were to admit that his case is such that he can have no title to be relieved in equity, yet he is still entitled to discovery, and a commission, which is all he seeks by this bill in aid of his action at law; and that the defendant cannot, by plea, protect himself from the discovery. This is surely a singular proposition. For, the consequence would be, that any person first suing out a writ at law against another (*m*), *might by a bill in equity for a discovery compel such other person to disclose, upon oath, all the particulars of any transactions, however secret and important, with which the plaintiff had no manner of concern, merely by introducing into his bill the false allegation that he had an interest in the transaction;* since, according to the doctrine of the plaintiff, it would not be permitted to the defendant to protect himself from such discovery, by proving to the Court the falsehood of the allegation that the plaintiff had any interest in the transaction. But

(*m*) Or by suggesting that he *intended* to do so.—Author.

the law of the Court, as well as the reason of the thing, is directly the other way; and a defendant is entitled to protect himself from a discovery by a plea, that the plaintiff has no interest in the subject of his suit; and such is the nature of this plea. This is stated by Lord Redesdale to be the doctrine of the Court (*m*); and the case cited by the plaintiff in support of his proposition, when it is carefully considered, will be found consistent with this doctrine."

75. The cases of *Daubigny* v. *Davallon* (*n*), *Albretcht* v. *Sussmann* (*o*), and *Macgregor* v. *The East India Company* (*p*), may here be referred to as opposed to the decision in *Hindman* v. *Taylor*.

76. In *Robertson* v. *Lubbock* (*q*), (1831), the Vice-Chancellor, in giving judgment, said:—"I apprehend that if a right of action is founded upon a variety of circumstances put together, a plea which attempts to shew that the action cannot be maintained, by confessing and avoiding some of the circumstances, and denying the rest, cannot be good, *for this reason*—it reduces the plaintiff to the necessity of proving *in a Court of Equity, without a discovery,* that he has a right to support that action." This seems to acknowledge that the *legal* bar is triable in *equity*.

77. In the course of the argument of *Robertson* v.

(*m*) Redes. Plead. 283. (*n*) 2 Anstr. 462.
(*o*) 2 Ves. & B. 323. (*p*) 2 Sim. 452.
(*q*) 4 Sim. 161.

Lubbock (*r*), just referred to, Mr. Pepys (*s*), *amicus curiæ*, said, "In the *King of Spain* v. *Hullett*, precisely the same plea was put in, as in *Mendizabel* v. *Machado*, and Lord Lyndhurst in the course of the argument on that plea had some inquiry made as to *Hindman* v. *Taylor*, and his Lordship's impression was that it was displaced as an authority for the proposition, which, according to the report, it appeared to establish." Upon which the present Vice Chancellor observed "*Hindman* v. *Taylor* is one of the cases in Brown, upon which no reliance can be placed with regard to the statement." The above was brought to the attention of the Lord Chancellor at the hearing of the cause of *Hardman* v. *Ellames*, and his Lordship again said that the case of *Hindman* v. *Taylor* had been fully inquired into by Lord Lyndhurst. In *Hardman* v. *Ellames* the plaintiff sought to restrain the defendants from setting up an outstanding term of years in an ejectment brought by the plaintiff. The defendant insisted, that although the term should not be set up in the ejectment, the plaintiffs were barred by lapse of time from recovering the estate. To this the plaintiff replied, that the effect of lapse of time was a legal question, and that a Court of equity would not therefore try it; and *Hindman* v. *Taylor*, *Leigh* v. *Leigh*, *Jermy* v. *Best*, were referred to. The Lord Chancellor, however, dismissed the bill in

(*r*) *Robertson* v. *Lubbock*, 4 Sim. 172.
(*s*) The present Lord Chancellor.

Hardman v. *Ellames* (*t*) expressly upon the ground that the plaintiff's claim was barred by an adverse possession of more than twenty years, thereby overruling, in effect, the reasoning of Lord Thurlow in *Hindman* v. *Taylor*.

78. Upon the whole, the writer submits, that a legal bar to an action at law may be pleaded in equity, in bar to a bill of discovery in aid of such action, except so far as (under the common rule (*u*) discovery may be required by the bill to try the truth or validity of such plea itself. The cases of *Leigh* v. *Leigh* (*v*), and *Jermy* v. *Best* (*x*), should be referred to in connexion with *Hindman* v. *Taylor*.

79. Another point, upon which a caution may be proper in this place, arises in those cases in which, from the frame of the bill, the defendant is prevented from defending himself by a pure plea in bar, and is compelled to support his plea by an answer to some part of the bill.

80. It has been already observed, that a plea may be the subject of trial in two stages: first, *upon argument;* and, secondly, upon a trial of its *truth at the hearing*. Upon the first of these occasions, the truth of the plea is assumed for the purposes of the argument; and nothing comes on for trial but the form and substance of the plea. Now, in order that the plea may be good in

(*t*) Myl. & Craig, not yet reported.
(*u*) Supra, this proposition.
(*v*) 1 Sim. 349.
(*x*) 1 Sim. 373.

form, it is necessary that it should not purport to cover discovery as to any allegations in the bill, which, if admitted, would shew, or tend to shew, the plea to be bad in substance, or untrue in fact. But, supposing the plea not to cover any such discovery, and to be *accompanied* by an answer as to all such allegations in the bill as, if admitted, would shew the plea to be bad in *substance*, can it be objected to the *form* of such a plea upon argument, that it is not actually *accompanied* by an answer as to those other uncovered parts of the bill which relate only to the *truth* of the plea? The general terms of the first proposition require that the answer to this question should be given in the negative, because, upon argument of a plea, its truth is assumed, and the only points to be tried are its sufficiency in form and substance; and therefore an actual answer as to matters relevant only to the truth of the plea would be irrelevant to the only question or questions which the Court can try upon argument of the plea. And this the author conceives is the correct view of the subject. But, as a full consideration of the point involves questions of pleading, which it would not be convenient to notice in so early a stage of this work, the reader is referred to a later page, at which the subject is resumed in connexion with some other points of pleading.

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81. Assuming, then, that a plaintiff's right to discovery in a cause is excluded from all parts of the

bill, except such as may seek discovery relevant to the question or questions about to be tried, it remains to be seen what is the extent of the plaintiff's right to discovery for the purposes of the trial of such question or questions.

SECOND PROPOSITION.

It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit (*a*).

82. The first proposition, which has been considered, is restrictive only. It confines the right of discovery to such matters as are relevant to the question or questions in the cause which is or are about to come on for trial.

83. The second proposition is *affirmative*. It purports to ascertain, to some extent, the discovery to which the plaintiff is entitled for the purposes of the trial to which, under the first proposition, his right to discovery is confined.

84. The attentive reader, in examining the authorities which follow, may perhaps satisfy himself that the

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(*a*) The result of the observations on the first two propositions will be found to be—that it is the right of a plaintiff to have every question in the cause, as it comes on for trial, tried upon a full answer, express or implied.

second proposition is restrictive also (*b*), unless the obligation which a defendant is under to make his *defence* upon oath should be considered as part of the plaintiff's right to discovery—a point which will be noticed hereafter (*c*). Proof of the *affirmative* aspect of the proposition is, however, all which the author here attempts to establish. The scope of the proposition will best be understood by an examination of the terms in which it is expressed (*d*).

85. The right to discovery which the second proposition asserts, is, that which, in the reported cases, is commonly expressed by saying, that a plaintiff is entitled to a "full answer." But as a rule, which determines only that a full answer must be given, cannot possibly determine what a full answer is, it has been thought better, in the first instance, to drop that expression, and to embody in a distinct proposition the points which the expression embraces.

86. "*It is the right of the* plaintiff." The question of *a plaintiff's right* to discovery is commonly raised by asking—Whether *the defendant is bound* to give it? Considering right and obligation as reciprocal, it may appear hypercritical to insist that the *plaintiff's right,*

(*b*) Infra, pl. 224.

(*c*) Infra, pl. 345.

(*d*) In the examination of each term of the proposition in succession, those which remain to be examined will, of course, be taken to be true.

and not the *defendant's obligation,* is the proper form in which the question should be propounded. A preference for the former expression—"*the plaintiff's right*"—might, perhaps, be justified upon strictly logical grounds, but (without contending for this) it may be sufficient, to observe, that the writer has found (*e*), and he believes his readers will find, a practical convenience in preferring it; particularly with reference to a point insisted upon below—the *indefeasible* character (within certain limits) of a plaintiff's right to discovery—and with reference also to the important question determined by this *right,* the extent to which a party who defends *by answer* may refuse to give discovery called for by the bill.

87. "*The plaintiff* in equity." Adopting, then, the form of expression thus preferred,—the "*plaintiff in equity*" is the party to whose right alone the attention of the reader need be here addressed. The party seeking discovery may be the same who is seeking *relief* in equity; or he may be the defendant in an original equity suit, seeking by a cross bill to obtain a discovery in aid of his defence to that suit; or he may be *plaintiff* or *defendant* in a proceeding at common

(*e*) Had Lord Thurlow, in *Hindman* v. *Taylor*, supra, pl. 67, (as did the Vice-Chancellor in *Mendizabel* v. *Machado*, supra, pl. 74), begun by asking himself what *right* the plaintiff had to sue the defendant in *any* Court? the question might, perhaps, have suggested to his mind considerations which would have led to a decision in accordance with the more modern cases.

law seeking discovery in aid of proceedings there (*f*). In each of these cases, whatever the situation of the party seeking discovery may be in the suit in which *relief* is sought, he becomes *plaintiff in equity* for the purpose of the discovery he wants. It is not, therefore, except in special instances (*g*), necessary, in canvassing the right of a *plaintiff in equity* to discovery, to advert to the position which he may occupy, as plaintiff or defendant in the suit in which he seeks relief, or to consider in what Court that relief may be sought.

88. Similar observations apply to those cases, such as *The Princess of Wales* v. *The Earl of Liverpool* (*h*), and *Jones* v. *Lewis* (*i*), in which a *defendant* has been permitted to move in the suit in *which he was defendant,* for the production of a document in the hands *of the plaintiff,* without filing a cross bill for the purpose —which is the regular course of proceeding (*k*). It may be doubted whether the relaxation of practice permitted in these cases will be followed (*l*). But, however that may be, it is clear that a defendant

(*f*) Supra, pl. 10, 11.

(*g*) Supra, pl. 67, *Hindman* v. *Taylor;* and pl. 377, *Lowndes* v. *Davies.*

(*h*) 1 Swans. 114; and see *Pickering* v. *Rigby*, 18 Ves. 484.

(*i*) 2 Sim & St. 242.

(*k*) *Wiley* v. *Pistor*, 7 Ves. 411; *Micklethwaite* v. *Moore*, 3 Mer. 292.

(*l*) See memorandum, 4 Sim. 324, in *Jones* v. *Lewis; Penfold* v. *Nunn*, 5 Sim. 409; *Anon.* 2 Dick. 778; *Milligan* v. *Mitchell*, 6 Sim. 136. (July, 1833.)

cannot, in *that* character, be entitled to the production of a document, or any other discovery, to which he could not entitle himself as *plaintiff* in a cross suit—and an investigation of the *plaintiff's* general right will, therefore, for the present purpose, embrace the class of cases just referred to, whatever the ultimate decision respecting them may be.

89. "*It is the* right *of the plaintiff*" (*m*). By the *right* here spoken of is intended that *original* right which every plaintiff may be said to have *à priori*, i. e. independently of any adventitious right to discovery which he may acquire in the progress of a cause, by the mode of pleading or other concession of the defendant. This original *right* is of the strictest kind. For, it is one of which the *defendant cannot by any mode of pleading* deprive him.

90. How (it may asked) can a rule which thus concedes to a plaintiff a right to discovery *indefeasible by the defendant*, be reconciled with the common rule (*n*), that a plea (for example) to relief covers the discovery incidental to that relief? The answer to this question is,—that the two rules are conversant about *different* subjects. Discovery—the *indefeasible right* to which is here contended for—is that discovery which, in the case of a plea (for example) the plaintiff sometimes requires for the purpose of trying the validity or truth of the plea it-

(*m*) Hare, 187, 190. (*n*) Redes. Plead. 281.

self. The discovery which (under the common rule referred to) the plea would cover, is not discovery wanted for *this or any similar purpose,* but discovery relating to points in the cause unconnected with and irrelevant to the validity or truth of the plea. The distinction may be thus stated. A good plea is a reason *in law* why a plaintiff is not entitled to some discovery called for by his bill. It is a *special answer,* differing from an answer in the common form, in that it demands the judgment of the court, *in the first instance,* whether the special matter urged by it do not debar the plaintiff from his title to that answer which the bill requires(*o*). Now, a plea, in order that it may be *good,* must (as a defence) be valid *in law,* and true *in fact. Both* these points may admit of controversy; and discovery may be necessary to the trial of both or either. The rule which determines that a plaintiff shall not have discovery relating to matters with which, *if the plea be good,* he has no concern, does not conflict with the proposition which asserts his right to discovery, *for the purpose of trying whether the plea be good or not.* The force of the rule—*exceptio ejusdem rei,* &c.—will suggest itself to the reader, and enforce the point for which the writer here contends. The analysis of a cause into its *component* parts, *(principal* and *subordinate* or *dependent)* (*p*), here becomes of practical importance. It is to *that* discovery only

(*o*) *Roche* v. *Morgell,* 2 Sch. & L. 721, (1803), in Dom. Proc.
(*p*) Supra, pl. 13. 54, 55.

which is necessary to the trial of some *principal* point raised by plea that an *indefeasible* character is in the first instance ascribed. If that *principal* point should be determined in the plaintiff's favour, his right to discovery as to the principal points, and also as to the *subordinate or dependent points* in the cause, would then, but not until then, become equally absolute. The effect of this is, that the right of a plaintiff to discovery as to the matter of the plea itself, is just as extensive where the defence is by plea as where it is by answer; and it is less extensive in case of a plea than where the defence is by answer, in respect only of the *lesser number of distinct points* in the cause to which, in the former case, the right of discovery may extend. The *extent* of this latter right will be examined hereafter.

91. The precise extent of the *indefeasible* right to discovery here contended for, cannot be fully understood without adverting, by anticipation, to the meaning of the "*plaintiff's case*" in the words of the proposition.

92. This expression, the "*plaintiff's case,*" may, perhaps, be objected to as not sufficiently explaining itself; and the reader may be tempted to ask—why clog the argument by the use of an expression, (arbitrary to some extent), the right understanding of which requires explanation and illustrations so extensive as those which follow? The answer is, that *some* form of expression was found indispensable—if only as a name by which *to speak of* the cases in which discovery is enforced,—and that no expression suggested itself better adapted than this, at once to describe the cases in which discovery is enforced,

and (by contrast) to exclude those to which a plaintiff's *right* to discovery does *not* extend, namely, the evidences exclusively relating to the defendant's case.

93. To proceed then—By the first proposition, the "*plaintiff's case,*" must for the present purpose be a case which, according to the state of the pleadings and the practice of the Court, is about to be tried. This, indeed, is involved in the terms of the second proposition.

94. Next, the "*plaintiff's case,*" must be a case (positive or negative) *made by the bill.* This is of necessity; for, by a settled rule of pleading, a point *not* made by the bill cannot be the subject of interrogation in the bill (*q*).

95. Supposing the last requisition to be complied with,—what is the next consideration to be attended to in determining what is the "*plaintiff's case*" for the purpose of discovery? Pleadings at common law commence with a declaration which contains a short statement of the plaintiff's case. To this case (assuming it not to be demurrable) the defendant may plead. To this plea (upon a similar assumption) the plaintiff may reply, either by taking issue upon the *truth* of the plea, or his replication may *confess and avoid* the plea; and this mode of pleading (excluding demurrers) may go on through the successive stages of rejoinder, surrejoinder, rebutter, surrebutter, &c., until the parties get to issue. Now, in this mode of pleading, the declar-

(*q*) *Duncalf* v. *Blake*, 1 Atk. 52; *Attorney-General* v. *Whorwood*, 1 Ves. sen. 534; *Bullock* v. *Richardson*, 11 Ves. 373; and see *Somerville* v. *Mackay*, 16 Ves. 384, (not charge enough).

ation, the replication, and each alternate pleading, will in succession *have been* the "*plaintiff's case;*" but issue will ultimately be joined upon, and the evidence in the cause confined to, the point or points which the pleadings ultimately raise. From what is said by Lord Redesdale in the Treatise on Pleading (*r*), it appears, that special replications and rejoinders, and the other successive pleadings now in use in Courts of common law, were formerly in use in Courts of Equity also; and that the modern practice of amending bills —thereby bringing the whole of the plaintiff's statement into one record—is merely a substitute for that mode of pleading. Now, the *form* of pleadings cannot alter their real nature. The circumstance, that those parts of a bill in equity which (if the common law form of pleading were still in use) would be the subject of so many *distinct* pleadings at law, are (by the form of equity pleadings) blended together in one record, bearing the forms of *statement, pretence, or charge,* according to the nature of the case or the taste of the draftsman, cannot take from these different parts of a bill their real character, as constituent parts of the case of this or that party in the cause; and, accordingly in equity as at law, the evidence in the cause—including the discovery—will be limited to the point or points in the cause upon which the parties go to trial.

(*r*) Redes. Plead. 18, 321, 243, n.; Prac. Reg. 372, Wy. ed.: and see 3 Myl. & Cr. 482, in *Foley* v. *Hill.* (June, 1838.)

96. In further explanation of this, though at the expense of some repetition, the author ventures to apply the preceding observations to the different forms which causes in equity commonly assume; and he submits that the cases referred to clearly shew, that some right to discovery, express or implied, attaches upon all parts of a bill which constitute the "*plaintiff's case*" about to be tried.

97. First—Let the plaintiff be supposed to state in his bill a case which is demurrable; and let it be supposed that the defendant meets the bill by demurrer. Here the case stated in the bill will of course be the "*plaintiff's case.*" But the plaintiff (as already shewn) will not be entitled to any actual discovery. For, the demurrer (for the purposes of the argument) *admits* all matters of fact well pleaded in the bill to be true (*s*); and the second proposition confines the right to discovery to matters of fact which the pleadings do not admit. This explains the rule that a demurrer to relief extends to the discovery also (*t*).

98. Secondly—Suppose the defendant to meet the case made by the bill, by a pure affirmative plea (*u*),

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(*s*) Redes. Plead. 107.

(*t*) Redes. Plead. 183. And see *Stewart* v. *Lord Nugent*, 1 Keen. 201.

(*u*) A plea is a "special answer, shewing or relying upon one or more things as cause why the suit should be dismissed, delayed, or barred;" and the cases to which this mode of defence

i. e. a plea of something *not* anticipated by or mentioned in the bill. Here, also, the "*plaintiff's case*" remains as before. But, the bill cannot in this case be supposed to ask discovery *touching the matter of the plea*, because *that*, by the supposition, is wholly new, and no discovery need, therefore, be given, as to the *plaintiff's case.*" For, "the office of a plea in bar is to *confess* the right to sue; avoiding that by matter *dehors;* and giving the plaintiff an *acknowledgment* of his *right*, independent of the matter alleged by the plea (*x*)." There is not, therefore, any issue between the parties as to the truth of the "*plaintiff's case,*"—the defendant by his pleading admits it. So full and complete is this admission, (in the case of a plea in bar), that if, after argument, issue be joined upon the *truth* of the plea,

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is applicable, are those in which the matter so relied upon is *not apparent upon the face of the bill*, i. e. the plea brings forward *new* matter. It happens, however, not unfrequently, that a bill in equity anticipates the defence, and (sometimes admitting that defence to be true, and sometimes suggesting it only as matter relied upon by the defendant, but without admitting its truth) alleges matters which, if true, would avoid the legal consequences, or disprove the truth of the defence so anticipated. The form of pleading to such a bill is by pleading the *anticipated* defence, and coupling that plea with averments negativing the allegations in the bill by which the plea is sought to be avoided. Redes. Plead. 218, 239; and Beames on Pleas, 1, 2, 3. For brevity sake, the word *pure* is used to describe pleas of the former kind; and the word *anomalous*, to describe pleas of the latter kind.

(*x*) Per Lord Eldon, in *Bayley* v. *Adams*, 6 Ves. 594.

and the plea be found false, there is an end of the dispute (*y*), and the plaintiff is entitled to a decree upon this implied admission of his case (*z*). No discovery as to the "*plaintiff's case*" need, therefore, be given. If, however, the plea be found false, and the plaintiff cannot obtain complete relief as to other points in the cause, (an account for example), without further evidence, the Court will supply the defect, by allowing him to examine the defendant upon interrogatories as to these points, which, in consequence of the plea being found false, become "*the plaintiff's case* (*a*)." In fact, the plea (so far as the *admission* it affords is not sufficient) *suspends* only, (for the purpose of trying the plea *in the first instance*), but does not take away, the *right* of the plaintiff to that discovery, which he will require only in case the plea shall prove invalid or untrue.

99. Thirdly—Suppose the bill to anticipate the defence, and, admitting it to be true (*b*), to dispute its legal operation on some specific ground,—as, for example,

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(*y*) 6 Ves. 594, in *Bayley* v. *Adams*.

(*z*) *Wood* v. *Strickland*, 2 Ves. & B. 158. And see 2 Ves. sen. 247, in *Brownsword* v. *Edwards;* Redes. Plead. 302; *Slaney* v. *Wade*, reported upon another point, 1 Myl. & Cr. 338.

(*a*). Redes. Plead. 302; *Wood* v. *Strickland*, 2 Ves. & B. 150; *Sanders* v. *King*, 2 Sim. & St. 277.

(*b*) It is difficult to say why such a plea should *now* assume an *anomalous* form. Why should not a negative plea meeting the charge of fraud alone be sufficient? There is no other issue. Now that negative pleas are fully established, perhaps, the *anomalous* form of pleading would not be held *necessary* in cases of this class. These cases differ from the next.

that a deed (the anticipated defence) was obtained by fraud; and suppose the defendant to meet this case by *pleading the deed simpliciter*. In such a case, the charge (*c*) of fraud would be in the nature of a replication to the anticipated defence; and would constitute the "*plaintiff's case*," within the first proposition. The onus of proving the alleged fraud would be upon the plaintiff; and it is clear, both upon principle and authority, that the plaintiff would, in such a case, be entitled to a discovery as to the imputed fraud. And, clearly, if the bill charged special matters *as evidence* (*d*) in support of the charge of fraud, the plaintiff would be entitled to a discovery of those special matters also. Lord Redesdale is full upon this point (*e*), embracing in his observations a variety of analogous cases. The following may also be referred to in support of it:—

100. In *Jerrard* v. *Saunders* (*f*) (1793), the bill sought a discovery of deeds relating to the plaintiff's title, and

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(*c*) The words *statement*, *allegation*, and *charge*, are used indifferently throughout this volume.

(*d*) The words "*as evidence*" are here used to avoid for the present a point raised by the Vice-Chancellor in *Thring* v. *Edgar*, as to the necessity, as a *rule of pleading*, of using these or equivalent words. See infra, pl. 210 et seq.

(*e*) Redes. Plead. 239 et seq. And see Ib., as to plea of a stated account, 259; plea of award, 260; plea of release, 261; plea of the statute of limitation, 269; and plea of purchase for valuable consideration, 275; special matters being charged to avoid the defence, 239, 293.

(*f*) 2 Ves. J. 187. See acc. 14 Ves. 67, in *Claridge* v. *Hoare*.

an injunction to stay proceedings in ejectment. The bill charged that the person under whom the defendant claimed had constructive notice of the plaintiff's title, *stating circumstances from which such notice would be implied.* The defendant pleaded a purchase for value, without notice, but did not answer the facts charged as affecting him with notice. The Lord Chancellor said, "He must set forth the facts charged in the bill, from which the Court will construe notice; particularly whether the title deeds were delivered. He assumes to himself the proposition. He judges what is constructive notice, and then denies that, to his knowledge and belief, he had constructive notice. The bill does not impute direct notice to him. It is consistent with every thing he says in answer, that the very settlement itself might have been delivered. *He must let the Court judge of that.* The plea must be disallowed (*g*)."

101. The case of *Roche* v. *Morgell* (*h*), in Dom. Proc. (1809), contains much valuable information upon this subject.

102. It can scarcely be necessary to observe, that whether the plaintiff originally anticipates the defence, or introduces it into the bill by amendment, after plea pleaded, the point now under consideration will be the

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(*g*) The discovery in these cases, *so far as respects* the matter of the fraud or notice &c., would obviously be the same whether the defence were made by plea or by answer.

(*h*) 2 Sch. & Lefr. 721.

same. The like remark will apply to *all* cases in which the plaintiff is supposed to anticipate the defence.

103. Fourthly—Suppose the bill to state the anticipated defence (say a deed as before) only as a *pretence* of the defendant, without admitting its truth, and to avoid it, by stating, that *if* any such deed exist, it was obtained by fraud &c. In this case, as in the last, the fraud &c. imputed would be the "*plaintiff's case*" within the meaning of the first proposition, and the plaintiff in this as in that case would be entitled to discovery (*i*), and *to the same extent*, according as the charge in the bill was *general* merely, or supported by allegation of the particulars constituting the imputed fraud.

104. Fifthly—Suppose the defendant simply to traverse the *truth* of the plaintiff's case *by plea*. This is a *negative* plea, the validity of which mode of defence, though formerly doubted, is now fully established. Under such circumstances, the "*plaintiff's case*" is that stated in the bill, involving a negation of the truth of the plea; and his right to a discovery of *all matters necessary* to prove his own case, is clear upon principles analogous to those which apply to the cases already mentioned. The following statement of the authorities upon this point is given at length, on account of the observation to which they give rise in another place:—

(*i*) Redes. Plead. 241.

105. In *Jones* v. *Davis* (*k*), (1809), the bill prayed an account of stone (which under colour of right and without the plaintiff's permission) had been taken out of the plaintiff's quarry, by the Bristol Dock Company, to whom the defendant Davis was treasurer. The bill alleged, that, upon complaint made to the company, they had promised the plaintiff to pay the fair market price for what stone they had already taken and for a further limited quantity which they wanted, and that an account should be kept by the company of the stone which had been or should be raised out of the plaintiff's quarry; and that since such promise was made, the plaintiff had been repeatedly assured by the clerks of the company, *that regular and correct accounts were kept of the stone raised out of his quarry*. The defendant put in a plea, that neither the Bristol Dock Company, nor the defendant, nor any clerks or clerk, agents or agent of the company on behalf of the company, *ever promised the plaintiff* that any account should be kept by the company of the quantities of stone which had been or should be raised and taken up, by or for the company, out of the plaintiff's quarry, or that the plaintiff should be paid for the same, or to that effect. Lord Eldon, Chancellor, overruled the plea, saying—"In this case my opinion is, that the plea is bad, *since it does not contain a negation of the alleged accounts having been kept by the company*. If the accounts had been kept by the com-

(*k*) 16 Ves. 262.

pany, *that would have been evidence before a jury of such an agreement as that stated in the bill; and, therefore, it was not sufficient for the defendant merely to deny the agreement having been entered into.*"

106. In *Crow* v. *Tyrrell* (*l*) (1817), the Vice-Chancellor held it not sufficient to deny, by plea, that a person held as tenant; but that an answer must be given to the specific circumstances stated in the bill, as proving *the fact* that he did hold as tenant.

107. In *Sanders* v. *King* (*m*) (1821), the plaintiff filed his bill for an account of the dealings and transactions of an alleged partnership. The defendant, by *plea*, denied the partnership, but did not answer as to certain facts which were *specially charged* in the bill as *evidence* of the partnership. The judgment of the Vice-Chancellor went fully into the law of the case. "This is a bill for an account of the dealings and transactions of a partnership, in which the defendant King is alleged to have been concerned; and the defendant King has, to the whole of the discovery, pleaded that he was no partner." "Upon this plea the issue between the parties is, whether a partnership did or did not exist; and the plaintiff objects that, although the defendant does by his plea affirm, upon his oath, that there was no partnership, yet he is not thereby to deprive the plaintiff of that right to a discovery which the principles of a

(*l*) 2 Madd. 397.

(*m*) 2 Sim. & St. 277; S. C. 6 Madd. 61. And see *Yorke* v *Fry*, 6 Madd. 65, S. P.

Court of Equity give to every suitor as to the matter in issue between the parties; and that, notwithstanding his plea, the defendant is therefore bound to answer to all facts and circumstances which are stated in the bill as affording evidence to disprove the truth of the plea." "It is very singular that this question does not appear ever to have distinctly arisen before." "In the case of *Drew* v. *Drew* (*n*) (1813), Sir Thomas Plumer decided, generally, that a plea of no partner was a good plea; but the present point was not taken. "It is stated by Lord Redesdale, in the last edition of his treatise, as the result of several authorities, that, if a plea in bar be disproved at the hearing, the plaintiff is not to lose the benefit of his discovery; but the Court orders the defendant to be examined upon interrogatories to supply the defect." "This necessarily refers to discovery as to the *other* matters of the suit, and not as to the truth of the plea, which is already disposed of; but marks the care of the Court to maintain for the plaintiff that advantage of discovery which is the peculiar province of a Court of Equity." "The discovery which a Court of Equity gives is, not the mere oath of the party to a general fact, as partnership or no partnership, but an answer upon oath to every collateral circumstance charged as evidence of the general fact." "Where the defendant, therefore, pleads the general fact as a bar to the whole discovery as well as relief, either the plaintiff, in the par-

(*n*) 2 Vesey & B. 159.

ticular case, must lose the equitable privilege of discovery as to the circumstances which he has charged as evidence of the fact, or some special rule must be adopted, by analogy, in order to preserve to him that privilege." "If a plaintiff comes into equity to avoid a legal bar, upon the ground of some alleged equitable circumstances, as in the case of a release, the defendant is not permitted to avail himself of his legal defence, so as to exclude the plaintiff from a discovery as to the alleged equitable circumstances. He may, indeed, plead his release, but he must in his plea generally deny the equity charged in the bill, and must also accompany his plea with a distinct answer and discovery as to every equitable circumstance alleged. In such a case the issue tendered by his plea is, not the fact of his release, for that fact is admitted by the bill, but the issue is upon the equitable matter charged. Yet, inasmuch as the principles of a Court of equity entitle the plaintiff to a discovery from the defendant upon the matter in issue, here we find that, notwithstanding the defendant pledges his oath that there is no truth in the equitable matter charged, he is nevertheless compelled to accompany his plea by an answer and discovery as to every circumstance alleged as evidence of the equity." "This practice seems to afford a very strong analogy for the present purpose. There the defendant affirms, upon his oath, that there is no equitable matter to destroy the legal bar of the release, yet he is nevertheless bound to accompany his plea with an answer and discovery as to every circum-

stance charged as evidence of that equity. Here the defendant affirms upon his oath that there is no partnership; and, by analogy, it seems to follow that he is nevertheless bound to accompany his plea with an answer and discovery as to every circumstance charged as evidence of the partnership." "Adopting, therefore, this analogy for the present purpose, it furnishes this rule, that a plea which negatives the plaintiff's title, though it protects a defendant generally from answer and discovery as to the subject of the suit, does not protect him from answer and discovery as to such matters as are specially charged as evidence of the plaintiff's title." "According to this rule, this plea, not being accompanied by an answer and discovery as to the circumstances specially charged as evidence of the partnership, must be overruled; but, being a new case, the defendant must be at liberty to amend his plea."

108. In *Thring* v. *Edgar* (*o*) (1821), the same learned judge said, "The plea of no debt is a full bar to the whole suit; unless the plaintiff has sought from the defendant a discovery of any circumstances by which the existence of the alleged debt is to be established; and then the defendant, although by his plea he may deny the debt, *must still answer as to the particular discovery* which is thus sought from him."

109. Sixthly—Suppose the plaintiff to anticipate the defence, and to dispute its *truth* as matter of fact.

(*o*) 2 Sim. & St. 280.

This the plaintiff may be supposed to do, either by a general charge alone, or by alleging, in addition to the general charge, specific matters, as evidence that the anticipated defence is untrue. Cases such as these cannot—so far as a plaintiff's right to discovery is concerned—be distinguished, in principle, from those in which discovery is ordinarily given. The reasoning upon the plaintiff's right to discovery must be the same in these as in other cases. A cause is about to be tried: the plaintiff alleges a case in his bill which, if true, would induce a decision in his favour: the onus of proving this case is upon the plaintiff: the case is the *subject of evidence:* and, discovery from the defendant is a species of evidence to which the rules of a Court of Equity entitle the plaintiff. Suppose, for example, the anticipated defence to be a deed, purporting to have been executed and attested at a given time, and at a place in this country, by the plaintiff and by persons named in the plea. Suppose further, that, at the time mentioned, the plaintiff and the attesting witnesses were resident in parts beyond sea — making it impossible that the deed could be other than a forgery—and that the bill contained charges as to these circumstances, which, if admitted, would destroy the deed. Would the plaintiff have a right to compel a defendant (who pleaded this deed in bar) to admit or deny his knowledge of the suggested circumstances? If the defendant were charged to be a party to the forgery of the deed, he would not, upon a *special*

ground of exemption, be bound to answer as to that forgery, or any of the circumstances attending it. But, excluding this specialty, the defendant could not (it is conceived) *by plea or otherwise,* withhold the discovery sought by the bill as to the matters charged as evidence of the *untruth* of the plea. A negation of the plaintiff's right to discovery, in such cases, would involve the proposition that a defendant, by resorting to a defence by plea, might compel a plaintiff to try his cause *without evidence*—a proposition not sustainable in a Court of Equity.

110. The cases of negative pleas already noticed, are in principle, if not in specie, authorities in point. The following authorities, however, appear *in specie* to support the plaintiff's "*right*" to discovery in the cases immediately under consideration.

111. In *Evans* v. *Harris* (*p*), (1814), the bill was filed for the specific performance of an agreement alleged to have been in writing, suggesting that the agreement was either in the defendant's possession, or that he had destroyed it, and charging divers collateral matters "as evidence" *of such written agreement.* The defendant put in a plea of the Statute of Frauds to all the discovery and relief, averring, that there had been no agreement in writing; but he did not answer the collateral matters. The Vice-Chancellor, in giving judgment, said (inter alia)—"The statute has no application,

(*p*) 2 Ves. & B. 361.

if the written agreement charged does exist. The question then comes to this: whether, when the relief rests *on one material fact, as evidence of which several collateral facts are charged, it is sufficient to deny the substantive fact; or whether the defendant must not discover the collateral facts.* To a bill, stating the corruption of arbitrators, is it sufficient to plead the award merely; leaving the charge of corruption untouched? Can a defendant protect himself by a negative plea, *from the discovery of a variety of circumstances charged, which, if discovered, would establish the fact in issue?* Suppose a bill alleging a partnership; and insisting that the existence of such partnership was made out by a certain document, by settlements of accounts and admissions; would it be sufficient to plead to such a bill a mere denial that the partnership ever existed; stopping there? I cannot find it asserted by any authority, that a plea of one solitary fact would enable the defendant to avoid all further discovery. *Such a plea would be no better than an answer* (*q*); *but the defendant, if he had taken that course, must have gone further. Why then should this plea have this effect?* I cannot conceive a principle on which this plea can be good: nor can I distinguish this case from *Jones* v. *Davis* (*r*); which is a clear decision by the Lord Chancellor, that a mere

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(*q*) i. e. could not put the defendant in a better situation, *as to that point*, than if he had answered.

(*r*) Supra, pl. 105.

denial of an agreement, without denying the circumstances charged as making it out, will not do. The plea must, therefore, be overruled."

112. In *Hardman* v. *Ellames* (*s*), (1833), the bill was to recover possession of certain estates, alleging outstanding terms which prevented the plaintiff from proceeding at law. The bill charged, that the defendants had in their possession deeds and other documents relating to the estates, and the title thereto, and the other matters therein mentioned, and shewing the truth of such matters, and particularly *as to the plaintiff's pedigree;* and that many of such documents would shew the particulars of the outstanding terms, *and that the plaintiff was the heir-at-law of the testator.* To this bill the defendant pleaded, that the title (if any) of the plaintiff, or of the party through whom by his bill he claimed the estates in question, accrued on the death of John Hardman, (who died in March, 1759), *and that the possession had been adverse to the plaintiff and the persons through whom by his bill he claimed, ever since the death of the said John Hardman.* The Vice-Chancellor overruled the plea. One ground of his doing so was, that the plea should have been supported by an answer as to the charge relating to the possession of deeds and other documents *evidencing the plaintiff's title.* His Honor said—"I am also of opinion that the plea is defective, because it is not supported by an answer, with respect to the collateral circumstances charged by the

(*s*) 5 Sim. 640.
2. Myl. & K.

bill, that the defendant is in possession of deeds and documents. For I apprehend, that, according to the rule laid down in *Thring* v. *Edgar*, if a person pleads a plea of a negative kind, or, *indeed, any plea inconsistent with the plaintiff's case*, he is bound to support it by answer, so far as the bill has charged any collateral matter. Thus, for example, when a defendant pleads that he is a purchaser for valuable consideration without notice, to a bill which has charged that he has in his possession certain papers and documents whence it will appear that he is not a purchaser without notice, then, by the rules of this Court, the defendant is bound to support his plea by an answer as to that charge (*t*). Now, inasmuch as there is, in this bill, a charge, that the defendants have in their possession, certain deeds, documents, and writings, shewing the truth of the matters stated in the bill, my opinion is, that, where a defendant pleads such a plea as that now before the Court, and gives *no answer* to that charge, his plea is insufficient, and must be overruled.

113. To the above may also be added the case of *Emerson* v. *Harland* (*u*).

114. These cases have been stated at length, on account of the conflict which—if unexplained—they might appear to raise with the terms of the third proposition hereafter to be considered, which asserts the right of a

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(*t*) See infra, pl. 117.

(*u*) 3 Sim. 490 ; S. C. on appeal, 8 Bligh, 62 ; infra, pl. 116. But see the observations upon this case, infra, pl. 117, note.

defendant to withhold from the plaintiff a discovery of the evidences exclusively relating to his own case. There is no such conflict. In the cases just stated, the plaintiff does not call upon the defendant to discover the evidences of *his own case;* but makes a specific case of his own, and asks discovery in opposition, it is true, to the defence—but which being addressed to the proof of a case specifically made in the bill, is clearly distinguishable in principle, as well as fact, from a direct inquiry into the evidences of his opponent's case. The third proposition is not, therefore, touched by the right to discovery which such cases establish.

115. Seventhly—The defendant may plead an affirmative fact which involves a negation of the plaintiff's case. This is not a pure plea; for, *that* would admit the plaintiff's case (*x*). Nor is it a negative plea, (in the common acceptation of the term), for the characteristic of a negative plea is, simply to deny the plaintiff's allegations, whereas, in these cases, the defendant undertakes to prove a fact *ultra* those asserted by the bill.

116. The point to be determined in the last-mentioned cases is — whether they are (for the purpose of discovery) to be *treated* as affirmative or negative pleas? *That* point determined—the consequences will result accordingly; and the discovery to

(*x*) Supra, pl. 98.

which the plaintiff will be entitled will be governed by the cases already stated.

117. In *Emerson* v. *Harland* (*y*), (1831), the plaintiffs, by their bill, claimed, as heirs *ex parte maternâ* of Ann Trigg, to be entitled to one undivided third part of certain estates in Yorkshire, of which the defendants were in possession. The bill stated that Ann Trigg died intestate and without issue, and that, at the time of her death, the male line of her family was extinct, and that she had not any heir or heirs on the side or part of her father; the bill then prayed, that it might be declared that the plaintiffs were entitled to an undivided third part of the estates; that accounts might be taken of the estates, and of the rents received by the defendants since the decease of *Ann Trigg;* and that a partition of the estates might be made between the plaintiffs and the defendants. The bill charged, that the defendants had frequently, by correspondence or otherwise, admitted the plaintiff's title. The bill further charged, that the defendants had then or lately had in their custody, possession, or power, the title-deeds, writings, muniments and evidences of title, letters, and other documents of and relating to the several estates and hereditaments thereinbefore mentioned, or some of them, or some part thereof respectively; or to the part, share, and interest of the

(*y*) 3 Sim. 490; S. C. in appeal, 8 Bligh, 62.

said Ann Trigg therein, and relating to the rents, issues, and profits of the said hereditaments and premises which had accrued due since the decease of the said Ann Trigg, or of or relating to the several matters therein aforesaid, or some of them, or from which the truth thereof, or of some part thereof, if produced, would appear. The defendants put in a plea, in the following words:—"That Lois, the wife of Timothy Morine of Weatherby, in the county of York, gentleman, formerly Lois Harland, was, at the death of Ann Trigg in the said bill named, and now is, heir-at-law of the said Ann Trigg, *ex parte paternâ* of the whole blood, which the defendants aver to be true, and are ready to prove, &c." The plea was set down for argument, and the plaintiffs' counsel argued, that it covered too much; for that, at all events, the plea should have been supported by an answer as to the charge relating to the correspondence. In answer to this argument, the defendants' counsel insisted that the admission, by the defendants, of the plaintiffs' title, was a collateral fact: that the plaintiffs were put out of Court, by the defendants' shewing that the title to the estate was not in them, but in another person; that no admission by the defendants would give the plaintiffs a title; and that, if the defendants had answered the charge in question, they would have overruled their plea. The Vice-Chancellor said—"I think that the defendants should have supported their plea by an answer *denying the correspondence:* and, on the ground that they have not done so, I overrule the plea." From this order of

the Vice-Chancellor, the defendants appealed to the Lord Chancellor (Lord Lyndhurst), who affirmed the order; and, from the order of the Lord Chancellor, the case was carried to the House of Lords, where the orders of the Court below were also affirmed (*z*). The Lord Chancellor (Brougham) said—"In this case the defendants plead, in substance, that the plaintiffs are not heirs, and propose to falsify the title which they set up as heirs *ex parte maternâ*, by proving that there is in existence an heir *ex parte paternâ*. But, is the case made by the bill, in the particulars charged, one which would be capable of proof or illustration by the disclosure of facts, of which a discovery is sought by the bill? It is urged, on general principles, that discovery ought not to be compelled, if, on proof of the matter of the plea, it will appear that the plaintiff has no title. But, *if the title would in part be proved by discovery of the fact charged*, does not that raise a distinct case, and form a ground of exception? Can a defendant to such a bill suppress or evade the discovery by a simple denial of the title generally? That cannot be the office of a negative plea, or of any plea (*a*)."

(*z*) 8 Bligh, 62. This case, it will be observed, determines only that *some* answer must be given to the general charge in the bill, *not* what that answer should be. See, as to this, infra, pl. 284.

(*a*) Adverting to the high authorities by which the decision

118. The case of *Emerson* v. *Harland* upon which some observations will be found in the notes, is scarcely reconcilable with the decision in *Plunket* v. *Cavendish*,—a decision, the soundness of which, the author submits, cannot be impeached. In *Plunket* v. *Cavendish* (*b*), (1824), the plaintiff claimed certain estates, as the right heir of Sir William Lowther, insisting,

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in *Emerson* v. *Harland* is supported, it is with the greatest diffidence that the author presumes to offer any criticism upon it. But he cannot admit its soundness. The *plea* that Lois Morine was heir *ex parte paternâ* absolved the plaintiffs from all obligation to prove their alleged title as heirs *ex parte maternâ*. This latter point could never be the subject of trial in that cause. If the defendant did not prove the truth of his own plea, affirmatively, the plaintiffs would be entitled to a decree whether they were heirs *ex parte maternâ* or not. The "plaintiff's case" in that cause, after plea pleaded, was simply a negation of the defendant's plea. The only ground upon which a discovery of the correspondence mentioned in that cause could be required was, that it might assist the plaintiffs in proving that negation. But the bill was not so framed as to entitle the plaintiffs to discovery upon that ground. It had not anticipated the defence, and contained no charges applicable to it. It is material, however, to observe that *Emerson* v. *Harland* does not decide that the defendant was compellable to produce the correspondence if its existence were admitted. A decision to that effect would be irreconcilable with the principle of the decision in *Plunket* v. *Cavendish*, infra, pl. 118. *Bolton* v. *The Corporation of Liverpool*, 1 Myl. & K. 88, and other analogous cases. The case of *Hardman* v. *Ellames*, supra, pl. 112, is open to some of the observations which have been made upon *Emerson* v. *Harland*.

(*b*) 1 Russ. & Myl. 713.

that the prior limitations in the will of Sir William Lowther, under which Lord John Cavendish was tenant in tail, had expired. The bill alleged, that the defendant pretended that a recovery had been suffered by Lord John Cavendish, and that the uses of such recovery had been limited to him in fee, and that the defendant was entitled to the estates under him. The bill then charged, that no good or valid recovery was ever suffered of those estates, and, if any recovery were suffered, that the estates were so settled, that, in the events which had happened, the plaintiff, as the right heir of Sir William Lowther, was entitled thereto; and that it would so appear, if the defendant would produce the deeds, &c. To this bill the defendant pleaded a recovery duly suffered, and the deed declaring the uses thereof. By the uses (which were set forth in the plea) it appeared, that the defendant was lawfully entitled to the estates. The argument against the plea was, that it should have been supported by an answer meeting the charge in the bill, "that if any recovery were suffered, the estate was so settled, that, in the events which had happened, the title was in the plaintiff, and that it would so appear if the defendant would produce all such deeds as therein mentioned." The Vice-Chancellor (Sir J. Leach) said, that the only question was, whether the case came within the rule, that where there are collateral allegations in the bill sufficient to avoid the effect of the matter relied upon as a defence by way of plea, those allegations must be denied by answer, in

order to make the plea an effectual defence; that here, the charge in the bill was, that, if any recovery were suffered, the estate was so settled that the plaintiff was entitled as the right heir of Sir William Lowther; that the plea was a direct denial of that averment; for, it set forth the uses of the recovery, and under those uses there could be no such title as was alleged in the bill; and, that it was therefore evident, that the matter charged in the bill, to which the plaintiff argued an answer should have been given, was not collateral to the matter pleaded. The plea was allowed.

119. The decision in the case of *Plunket* v. *Cavendish* proceeded (and the author presumes to add correctly) upon the principle, that the plea was to be treated as an affirmative plea (*c*). The defendant took upon himself to prove a fact, and submitted that a decree should go against him if he failed in doing so; and the bill called for no discovery necessary for the trial of that point.

120. Upon the two last cases the reader will find room for speculation. It will be observed with respect to *Emerson* v. *Harland,* that the bill charged that there were *no heirs ex parte paternâ,* and that this fact would appear, if the correspondence were produced. *Some* answer was held necessary to this charge (*d*).

121. The above cases, it is to be understood, are put as examples only.

(*c*) See *Blackett* v. *Langlands,* 4 Gwillym, 1368.

(*d*) But qu.? and see note pl. 117.

122. Lastly—Let it be supposed that the defendant meets the plaintiff's case by *answer*. This mode of defence, as already observed, offers no objection to the cause proceeding to a hearing in its regular course, and *all* objections to the relief which the plaintiff claims, whether apparent upon the bill itself or brought forward by answer, are in this mode of defence reserved for trial at that one hearing(*e*). As *all* objections are thus kept open, the plaintiff may be obliged to sustain his case by evidence applicable to every one of the grounds of objection noticed by Lord Redesdale, and cited in a former page(*f*). And as all the points in the cause will thus come on for trial *simultaneously*, the right of the plaintiff to discovery will of necessity attach upon them all.

123. The preceding observations, as to the "*plaintiff's* case," are intended only to illustrate and explain the *nature* of the case upon which a plaintiff's right to discovery attaches, and the stage or stages in the cause in which, according to the pleadings, that right arises. The *extent* to which the right may be pursued, and the restrictions in favour of defendants, by which it is guarded, remain for consideration.

(*e*) The great advantage of this mode of defence over that by plea, which reduces the cause to a single point, has already been noticed, supra, pl. 44, note.

(*f*) Supra, pl. 32.

124. "*As a general rule.*" The rule of equity which gives the plaintiff a general right to discovery, is not without its exceptions.

125. The state of the authorities requires that these exceptions should be considered with reference to the two classes of cases upon which the Fourth and Fifth Propositions have been constructed, namely:

I.—Where the objection to discovery is founded upon a denial of the plaintiff's right of suit, or of his right to proceed with his suit in its existing state; and,

II.—Where the objection to discovery depends exclusively upon the nature of the discovery sought.

126. Without admitting that there are any exceptions of the first class, the state of the authorities requires that it should be separately noticed (*g*).

127. Taking the *second* class of cases first, it has been already observed (*h*), that it is only in aid of *civil* proceedings, that Courts of Equity compel discovery. But, it *may* happen, that, in proceedings for a merely civil purpose, *material* facts constituting evidence of the "*plaintiff's case*" may be alleged in a bill, and inquiries may be founded upon such alleged facts, the answers to which would subject the party alleging them to criminal proceedings. Will a Court of Equity

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(*g*) Infra, pl. 147, et seq.

(*h*) Supra, pl. 10: and see *Glyn* v. *Houston*, 1 Keen, 329, (1836).

compel a defendant to answer an interrogatory to which such an observation applies?

128. Similar questions apply to numerous other cases.

129. It is foreign to the writer's purpose, to enter into a detailed examination of these cases, with their various qualifications and exceptions. The following brief notice of the principal cases, which constitute the exceptions to the general rule, is here given (*i*), for the purpose of illustration only, and to assist in the examination of a rule of pleading, which will be found in a future page (*k*).

130. If a question involves a criminal charge, *the plaintiff is not entitled* to an answer to such question (*l*), however material it may be to the "*plaintiff's case.*" This was carried to its extent in *Maccallum* v. *Turton* (*m*). In the application of this principle, it has been held, that a married woman will not be compelled to answer a bill which would subject her husband to a charge of felony (*n*).

131. So,—if the answer of the defendant to a given question would subject him to pains or penalties, the

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(*i*) See as to all the exceptions, Redes. Plead. 194.

(*k*) What matters a defendant who defends by *answer* may refuse to discover. Infra, pl. 272, et seq.

(*l*) *Thorpe* v. *Macaulay*, 5 Madd. 229; and see cases collected 5 Madd. 231, n. (*s*).

(*m*) 2 Younge & J. 183; and see *Harrison* v. *Southcote*, 1 Atk. 539.

(*n*) *Cartwright* v. *Green*, 8 Ves. 405.

plaintiff is not entitled to an answer to such question (*o*), however material the answer might be to the "*plaintiff's case.*"

132. So,—if the answer would subject the defendant to ecclesiastical censure (*p*).

133. So,—if the answer would prove the defendant guilty of great moral turpitude, subjecting him to penal consequences (*q*).

134. So,—of a forfeiture of interest (*r*), strictly so called. But, the objection does not apply to the mere determination of an interest by force of a limitation (*s*).

135. So,—formerly if the defendant were a purchaser, without notice of the plaintiff's claim (*t*). But

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(*o*) Redes. Plead. 194, 307; Hare, 181; where the cases are classed. Extent of the privilege, Hare, 149; *Parkhurst* v. *Lowten*, 1 Mer. 391; *Attorney-General* v. *Brown*, 1 Swans. 265, 294; *Billing* v. *Flight*, 1 Madd. 230; *Bullock* v. *Richardson*, 11 Ves. 373; *Neline* v. *Newton*, 4 Madd. 253, n. (*a*); *Curzon* v. *Delazouch*, 1 Swans. 185, 192; *Paxton* v. *Douglas*, 19 Ves. 225; *Lloyd* v. *Passingham*, 16 Ves. 59, 64; *Rowe* v. *Teed*, 15 Ves. 372; *Claridge* v. *Hoare*, 14 Ves. 59; *Thorpe* v. *Macaulay*, 5 Madd. 218; *Drummer* v. *Corporation of Chippenham*, 14 Ves. 245; *Maut* v. *Scott*, 3 Price, 493; *Gibbons* v. *Waterloo Bridge Company*, 5 Price, 491.

(*p*) *Finch* v. *Finch*, 2 Ves. sen. 493.

(*q*) *Brownsword* v. *Edwards*, 2 Ves. sen. 245.

(*r*) *Lord Uxbridge* v. *Staveland*, 1 Ves. sen. 56.

(*s*) *Attorney-General* v. *Duplessis*, 2 Ves. sen. 286; Redes. Plead. 197, 198.

(*t*) *Rowe* v. *Teed*, 15 Ves. 378; *Claridge* v. *Hoare*, 14 Ves. 59; Hare, 89, 104.

later decisions seem to consider a purchaser for value without notice, as not entitled to any greater privilege than a party having any other ground of defence (*u*).

136. So,—if the matter to which the question applies be within the privilege allowed to communications between a client and his attorney (*x*);—a privilege which, it seems, applies to the attorney himself in all cases (*y*). The late case of *Desborough* v. *Rawlins* (*z*) contains much valuable criticism upon the subject of professional privilege.

137. The above privileges extend, it has been said, to the representatives of the party (*a*).

138. With respect to these excepted cases, it must be further observed, that the defendant's privilege

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(*u*) *Ovey* v. *Leighton*, 2 Sim. & St. 234; *Earl of Portarlington* v. *Soulby*, 7 Sim. 28; and see Sugden's Vendors and Purchasers, 304.

(*x*) *Bolton* v. *The Corporation of Liverpool*, 1 Myl. & K. 88; *Garland* v. *Scott*, 3 Sim. 396; *Hughes* v. *Biddulph*, 4 Russ. 190; *Vent* v. *Pacey*, Id. 193; *Preston* v. *Carr*, 1 Y. & J. 175; *Whitbread* v. *Gurney*, 1 Younge, 541; *Newton* v. *Beresford*, Id. 377; Hare, 163, 174, 182. N. B. Some judges have thought, that the judgment in *Bolton* v. *The Corporation of Liverpool* goes too far upon this point; others, that it did not go far enough. *Storey* v. *Lord George Lennox*, 1 Keen, 352; *Nias* v. *The Northern and Eastern Railway Company*, 2 Keen, 76; *Bellwood* v. *Wetherell*, 1 *Younge* v. *Collier*, 219.

(*y*) *Greenough* v. *Gaskell*, 1 Myl. & K. 98. See, however, *Wright* v. *Mayer*, 6 Ves. 280; *Fenwick* v. *Reed*, 1 Mer. 114; Hare, 166, 174.

(*z*) 3 Myl. & Cr. 515, (1838).

(*a*) *Parkhurst* v. *Lowten*, 1 Meriv. 391.

extends, not merely to the particular question to which the objection applies, but to every question in the bill, the answer to which would form a link in a chain of evidence, which, if perfect, would lead to the consequences against which the privilege is intended to guard (*b*).

139. The cases which have just been cited, are, strictly speaking, *exceptions* (*c*) to the general rule. For, the questions to which the privilege applies, are questions, the answers to which would, by the supposition, be material to the plaintiff's case. The questions, therefore, are *within* the scope and principle of the first proposition, but *without* its operation—upon grounds *peculiar to the questions* themselves. In other words, the privilege applies to *particular* discovery, as distinguished from objections founded upon the *merits of the party's case*, a distinction which the reader will find of importance in a later page (*d*).

140. Whenever the *reason* for the exception ceases, the privilege will cease also (*e*). Thus, if a penalty would enure to the benefit of the plaintiff in the cause,

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(*b*) *Claridge* v. *Hoare*, 14 Ves. 59; *Paxton* v. *Douglas*, 19 Ves. 225; *Thorpe* v. *Macaulay*, 5 Madd. 220; *E. India Company* v. *Campbell*, 1 Ves. sen. 246; *Attorney-General* v. *Duplessis*, 2 Ves. sen. 286; Hare, 152. See *Chambers* v. *Thompson*, 4 Bro. C. C. 436, n. (*a*), Lord Henley's edition; *Glyn* v. *Houston*, 1 Keen. 329. And see *Curzon* v. *Delazouch*, 1 Swans. 135.

(*c*) Infra, Prop. III. pl. 342, note.

(*d*) Infra, pl. 153, *Adams* v. *Fisher*.

(*e*) See as to all these cases, Hare, 135 et seq.

and the plaintiff by his bill waives the penalty, the defendant must answer (*f*).

141. So,—of a forfeiture (*g*).

142. So,—if the time for suing for penalties has expired (*h*).

143. So,—if the party has, by contract, bound himself to answer the question, notwithstanding the consequences (*i*).

144. So,—if a bill requires discovery of matter of criminal accusation, and also of innocent matter, the latter must be answered (*k*).

145. Other cases to the effect of the above might be stated (*l*).

146. In *Ewing* v. *Osbaldiston* (*m*), the Vice-Chancellor decided, that where a defendant had made admission sufficient to shew that he had incurred the penalties of an act of Parliament, he could not refuse to produce documents, upon the ground that they afforded evidence of his being subject to penalties. The admission should be very full and distinct upon which a Court of Equity applied a principle like this.

(*f*) Redes. Plead. 193, 307; Hare, 137.

(*g*) Redes. Plead. 197, 286.

(*h*) *Williams* v. *Farrington*, 2 Cox, 202; *Corporation of The Trinity House* v. *Burge*, 2 Sim. 411; *Davis* v. *Reid*, 5 Sim. 443; and see *Green* v. *Weaver*, 1 Sim. 404.

(*i*) Redes. Plead. 195, 287.

(*k*) *Att.-Gen.* v. *Brown*, 1 Swanst. 265, 294.

(*l*) Redes. Plead. 195 et seq.

(*m*) 6 Sim. 608.

147. Such, then, is the *second* class of cases which was noticed above (*n*) under the head of exception to the general rule, which entitles a plaintiff to all discovery material to his own case.

148. The *first* class remains to be examined. It has been shewn (*o*), that where a defendant denies the plaintiff's right of suit, or his right to proceed with his suit in its existing state, he may by demurrer or plea, according to the nature of the case, demand the judgment of the Court whether he should give the discovery sought by the bill or not. Now suppose a defendant, instead of taking these objections or either of them by demurrer or plea, to defend the suit by *answer*, and to insist therein upon the same ground of objection as he might have done by demurrer or plea. That he might by answer insist upon every ground of defence to the relief prayed by the bill, which he might have done by demurrer or plea, is clear; but is it open to a defendant, who defends by *answer*, to withhold the discovery which a demurrer or plea would have covered (*p*)? Does not that form of pleading alone preclude the defendant from objecting to any discovery which may be material to the relief

(*n*) Supra, pl. 36, 37, 40, 43.

(*o*) Supra, pl. 20, 21, 34 et seq.

(*p*) The present argument, it will be observed, does not embrace the cases in which the objection to discovery is founded upon the nature of the discovery only, pl. 20, 21, and pl. 125, 126.

prayed by the bill, whether the plaintiff shall be eventually held entitled or not? The cases which *in practice* usually give rise to the question are those in which the plaintiff prays an account, and the defendant by *answer* denies the plaintiff's right to that account; and the question is,—whether, before the trial of that principal point, the defendant shall give discovery, and produce his books, papers, &c., relating *only* to the question of the account.

149. This question is commonly expressed, both in argument and in judgment, in some of the following forms: "whether a defendant can by answer protect himself against discovery?"—"whether a defendant who answers a bill must not 'answer fully?'"—"whether a defendant who answers a bill must not answer 'throughout (*q*)?'" None of these expressions convey, with accuracy, the precise question they are intended to raise, for, unquestionably, a defendant may by answer refuse to give discovery, falling within the exceptions already noticed, in which the objection is grounded in the nature of discovery itself, (as where it would subject him to penalties), and it is equally clear that a defendant who answers a bill cannot *primâ facie* be compelled to discover the evidences which exclusively relate to his own case. The real question is: whether, when a defendant defends by *answer*, the right of the plaintiff to relief, and the regularity of his suit in point of form, are not conceded to

(*q*) Infra, pl. 268. 11 Ves. 306, 16 Ves. 387.

the plaintiff for the purpose of determining the extent of his right to discovery?—or whether (as Lord Thurlow observed in *Cookson* v. *Ellison* (*r*)) the Court, upon argument of exceptions to an answer, can enter into the question, whether a demurrer or plea to the bill would or would not have been allowed.

150. In the examination of this question, therefore, the reader should begin by excluding from his consideration those cases in which the objection to discovery arises merely out of the nature of the question proposed, and by confining his attention to those cases in which a question, unobjectionable in itself, and material to the plaintiff's case if his right to relief were established, is objected to by the defendant, upon the ground only that the plaintiff has no case for the assistance of a Court of Equity, or that he is not entitled to such assistance in the existing state of his suit,—an objection which it is the proper office of a demurrer or plea to raise (*s*).

(*r*) 2 Bro. C. C. 252.

(*s*) The distinction between the exceptions to the general rule which have been noticed, and the case now under consideration, with reference to a defendant's means of protecting himself against discovery, is very neatly expressed by Mr. Hare: "He (the defendant) is not permitted to say, 'I will not answer because you have no title to relief against me at law or in equity,' for he has passed that stage of the cause in which such an objection is appropriate; but he may say in any stage of the cause, 'I am not bound to make this discovery, even admitting your title were as you have asserted.'" Hare, 270.

151. For the present also, it is to be assumed, that every valid ground of defence may (theoretically at least) be insisted upon by demurrer or plea, according to the nature of the case (*t*); provided in the case of a plea, the defendant is content to rest his defence upon any single question (*u*). Upon this assumption, every defendant who defends by *answer* must be taken either to admit the plaintiff's title to some relief and to the discovery ancillary to it, or voluntarily to have waived a defence by demurrer or plea, in consideration of some contingent advantage to be gained by *answering* (*x*).

152. The cases to which the present observations are confined, involve the consideration of two grounds of objection:—one, relating to the merits of the plaintiff's case,—the other, to the form of his proceeding (*y*). The author is not aware of any case, in which it has

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(*t*) The assumption here made was scarcely necessary; for, as Sir Wm. Grant has observed, "There is no difference whether the court has determined that the bill is such as the defendant must answer, or whether the defendant has by his own conduct precluded himself from raising that question."—11 Ves. 42, in *Taylor* v. *Milner*.

(*u*) Supra, pl. 44, note. Instances of double pleas being allowed are rare: see Beames on Pleas.

(*x*) The advantage of answering instead of pleading to a bill, by enabling the defendant to go into his case at large, has already been noticed, supra, pl. 44, note. The advantage of answering instead of demurring, will be found incidentally noticed hereafter, infra, pl. 158.

(*y*) Supra, pl. 34.

been held that an objection of form only could be effectually insisted upon by *answer* as a ground for resisting discovery, to which the plaintiff would be entitled, if his right to relief were admitted or proved. But in the late case of *Adams* v. *Fisher* (*z*), the Lord Chancellor decided, that a defendant might to some extent, by *answer*, resist discovery, to which the plaintiff would clearly be entitled, if the case made by his bill were founded. This decision has induced the author to enter at large into the examination of the point under consideration (*a*).

153. In *Adams* v. *Fisher* (*b*), the plaintiff (as personal representative of a deceased testator) stated by his bill, that the defendant Fisher had acted as his solicitor, and had, in that character, received various sums

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(*z*) 3 Mylne & Craig, 526.

(*a*) Prior to the decision in *Adams* v. *Fisher*, the author had long been of opinion that the Court was imperatively called upon to adopt one of two courses, namely, either to found a system of practice, of which cases like *Adams* v. *Fisher* would be part, or to explain, and, if necessary, modify the existing rules of pleading applicable to demurrers and pleas. The best consideration, however, which he had been able to give the subject, had led him to the conclusion, that the former of these courses was open to the most serious objections, and that the Court had deliberately rejected it. The effect upon the practice of the Court, by the decision in *Adams* v. *Fisher*, in combination with another case (*Latimer* v. *Neate*) is noticed hereafter, infra, Prop. V.

(*b*) *Adams* v. *Fisher*, 3 Myl. & Cr. 526.

of money on account of the testator's estates, for which he had not accounted; and that he had in his possession books and papers relating to the testator's estate; and called for a schedule, and production of such books and papers, and also prayed an account. The defendant admitted collecting the estate of the testator, and the possession of books and papers relating to the estate, and set out a schedule of them, but insisted that he was not the plaintiff's solicitor, but the solicitor of Fisher, who was the person employed by the plaintiff to collect the estate, and that he was accountable to Fisher only, and not to the plaintiff. Upon a motion for the production of the documents in the schedule, the Lord Chancellor refused the motion. In the course of the argument, the Lord Chancellor said, "Suppose a bill is filed by a person claiming to be a creditor or legatee, or in any other assumed character, and the defendant denies that the plaintiff is what he is alleged to be, but states, on the contrary, that he is a perfect stranger, and denies, in short, every thing on which the plaintiff proceeds, but, not having protected himself by plea, he is obliged to answer; is the plaintiff, as a matter of course, to ask for all the documents in the possession of the defendant which relate to any of the matters introduced in the bill? I only want to know how far you carry the principle; whether, as a mere matter of course, documents which, if the defendant's allegation is true, have nothing to do with proving the case made by the bill,

are to be produced for the plaintiff's inspection? If a bill is filed by a person as a creditor, and he asks for all the title deeds of the real estate, is the plaintiff entitled to see the title deeds of a person's estate because he calls himself a creditor, which the defendant denies that he is?" In giving judgment his Lordship said, "Here the defendant *has denied the plaintiff's interest;* he has on the record stated, that which, as it stands, in my opinion, excludes the plaintiff from instituting this suit against him. As long as that stands, I think the plaintiff is not entitled to see the documents.

154. In deciding whether a defendant shall be permitted by *answer* to protect himself against discovery, in cases like *Adams* v. *Fisher,* the Court has four courses of practice open to it:—1, that of giving to the answer, to all intents and purposes, the force and effect of a demurrer or plea;—2, that of giving to the plaintiff the same full right of discovery before the hearing, as he would be entitled to, if his right to relief were admitted or proved, and the only question between the parties was the amount of his demand;—3, that of laying down some definite intermediate rule, by which the extent of a plaintiff's right to discovery, where by answer the defendant denies his right, may be determined;—and 4, that of leaving the question undefined by any rule, except that which may be described as the "discretion of the Court."

155. With respect to the *first* of these courses, the author is not aware that it has ever been held in judgment, or suggested in argument, that a defendant can have the same full benefit of a defence by answer, as by demurrer or plea, in withholding discovery. In the case before suggested, of a bill for an account, if the defendant should plead the statute of limitations, or any plea in bar, he could not be obliged to give *any* answer to so much of the bill as related only to the plaintiff's original title to an account, for the plea would admit that. But, if he relied upon the same defence by answer, he would clearly (it is conceived) be bound to give a full answer to so much of the bill as related to the plaintiff's original title; for a defence by answer does not, even for the purposes of argument, admit any of the bill to be true, to which the admissions in the answer do not in terms apply. Again; in the case before suggested, of a bill for an account, the amount of the plaintiff's demand would be part of the "*plaintiff's case.*" If a release were pleaded, the plea would shut out all actual discovery, even an answer to the most simple and direct questions relevant to that amount. Now, it admits not of controversy, that if in the same case the defence be made by answer, the plaintiff may, by apt charges in his bill, compel the defendant to answer *specific* charges, stating or shewing the amount of the plaintiff's demand; and it is equally clear that a defendant, who, by means of such specific charges, has got an admission with which he is satisfied, may

take a decree at the hearing of the cause for the amount appearing by the answer to be due to him, instead of going to an account before the Master (*q*). This example alone is sufficient to prove, that the plaintiff's right to discovery, where the defence is by answer, attaches, to some extent at least, upon parts of the bill which a demurrer or plea might wholly cover. The state of the record in *Adams* v. *Fisher* did not raise this question, and the language of the judgment appears to exclude the supposition that the Lord Chancellor considered that an *answer* could have, to all intents and purposes, the effect of a demurrer or plea. "Now I took leave (said the Lord Chancellor (*r*)) to ask Mr. Anderdon how far he carried the principle; and he very properly limits it within its true bounds: that is, he admits (*s*), as to every document not necessary to make out the plaintiff's equity, that the plaintiff is not entitled to see it. *Whatever may make out the plaintiff's title he may have a right to see.* The documents in question, however, are not to make out Adams' title to have the bill taxed, and the production of them could not possibly aid the asser-

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(*q*) Per Lord Eldon, in *Rowe* v. *Teed*, 15 Ves. 375; and see infra, pl. 159.

(*r*) 3 Myl. & Cr. 546.

(*s*) If the judgment is to be referred in any degree to this admission, the operation of the decision upon future cases may be very limited.

tion of the equity which Adams has asserted by his bill."

156. The *second* course above suggested, is that which the author had considered the rule of the Court prior to the case of *Adams* v. *Fisher* (*t*), but which that decision has undoubtedly displaced.

157. The two extreme courses of practice above suggested, appear, therefore, to be excluded. Before adverting to those which remain, the author ventures to suggest some difficulties in principle, convenience, and authority, which may be experienced in upholding the decision in *Adams* v. *Fisher*, and by reference to which (if the decision itself be not affected by them) the future practice of the Court must in a great degree be regulated.

158. First, as to principle. If a defendant who denies a plaintiff's right of suit may, as in *Adams* v. *Fisher*, insist by *answer* that he is not bound to give discovery upon points subordinate to the question of the plaintiff's title, (as the amount of his demand), some difficulty may reasonably be experienced in understanding how demurrers or pleas barring a plaintiff's right of suit should in practice have obtained a place among pleadings in equity. A defendant, who demurs, indeed, may have the benefit of every ob-

(*t*) 3 Myl. & Cr. 526.

jection which is apparent upon the face of the bill, and a decision in favour of a demurrer, if submitted to by the plaintiff, will put a more speedy termination to a suit than a defence by answer. But this possible advantage is purchased at the price of a premature discussion of the case, of which, if the demurrer should be unsuccessful upon argument, or the plaintiff be permitted to amend his bill, or if he should file a new bill, he will not fail to take advantage. The injurious consequences of such discussions have, almost universally (*u*), induced counsel of the greatest experience to advise against the practice of demurring, except where it was of paramount importance to the defendant to avoid some of the discovery sought by the bill. The necessity for demurring could never have existed, if a defendant could by answer be protected against the discovery which the demurrer would cover. A plea which raises a question of law only, is in the same predicament as a demurrer. A plea, however, which raises a question of fact, is open to observations of a graver character, which would necessarily supersede its use, if a defendant might by answer protect himself against discovery, save that which may be necessary to try the plea itself. If the defendant has several grounds of defence, he will by plea lose the benefit of all, except that which his plea may raise,—whereas by answer he may have

(*u*) A case depending exclusively upon the construction of a written instrument, and some few other cases, may be free from the objection.

the benefit of them all. If circumstances exist, as in the case put by Lord Redesdale (*x*), by which the plaintiff's right to relief may be qualified, the defendant by pleading, may lose the benefit of those qualifying circumstances which an answer would save. And, if the ground of defence be single, the defendant will obtain no advantage by a plea which an answer will not equally afford him, but will subject himself to the disadvantage of a premature discussion of his case, which has already been adverted to. Negative pleas were (although reluctantly) admitted in equity pleadings, *because*, without such a mode of meeting a case, the defendant was without the means of protecting himself against discovery, although he should deny the plaintiff's right of suit,—a reason which negatives the supposition that an answer could have performed the same office.

159. In the cases which have most frequently, if not exclusively, given rise to discussions upon the point decided in *Adams* v. *Fisher*, the discovery against which the defendant has sought protection, has been discovery relevant only to the *amount* or *extent* of the plaintiff's demand (*y*), the validity of the demand itself being denied by the answer. It is certainly difficult to understand the principle, which, where the defence is by answer, denies the plaintiff's right to discovery material to the proof of the *amount* or extent of his

(*x*) Supra, pl. 44, note.

(*y*) Supra, pl. 36, 37 ; Hare, 251.

demand. If the plaintiff may ask a decree at the hearing of the cause for payment of the amount admitted by the answer to be due to him (*z*), (which unquestionably he may do), and if, for the purpose of getting that admission, he may compel the defendant to answer specific questions applicable only to the amount of his demand, (a power respecting which no doubt can exist), upon what principle shall he be denied discovery which may be necessary to enable him to suggest those questions to the defendant, by means of which alone he can obtain the admission upon which a decree for immediate payment of his demand may be founded? The amount of the plaintiff's demand is a point in the "*plaintiff's case*," upon which a decree may be made at the hearing. The admission of the defendant is evidence upon which that decree may be founded. Discovery from the defendant as to the account sought by the bill, and documents in his possession relevant to it, are material evidence by which the requisite admission may be obtained. Upon what principle can a plaintiff, who is permitted to make the immediate payment of his demand the subject of decree at the hearing of the cause, be deprived of any legitimate evidence by means of which the amount of that demand may be established? The effect of denying the plaintiff a right to such discovery, is either to deprive him of his right to a decree for payment at the

(*z*) *Rowe* v. *Teed*, 15 Ves. 375.

hearing, or to compel him to take that decree upon imperfect evidence. In the case of a bill of discovery in aid of a trial at law, where the judgment upon the right and upon the amount of it, are contemporaneous, it would be difficult, if not impossible, to apply the rule.

160. Nor is this the only difficulty in the case. The question, whether a defendant who defends by answer, must not answer "throughout," is capable of being raised in one way only, namely, by exceptions to his answer. In the Court of Chancery, this question always goes before a Master in the first instance. Now, the Court never has allowed the Master to decide how far a point suggested by the answer is good as a defence to the whole or part of a bill, nor could it with propriety do so. And, accordingly, as Lord Eldon has pointedly observed, the Master is under a necessity of allowing the exceptions, and the Court is afterwards required to reverse the Master's judgment without being in a position to say, or meaning to say, that the Master was wrong (*a*).

161. The practice in the Court of Exchequer differs from that of the Court of Chancery upon the point last adverted to. In the Exchequer, exceptions to an answer come before the Court in the first instance, but even in that Court, authority has by no means recognised, to the full extent, the practice which the case of *Adams* v. *Fisher*, if followed up, must establish.

(*a*) Per Lord Eldon, 11 Vesey, 305; 15 Ves. 378; 16 Ves. 387.

162. The Court itself, also, is placed in a singular position in deciding that a defendant, who defends by *answer*, may refuse to answer the bill "throughout." The defendant who defends by answer is taken to submit to answer the bill throughout (*b*), and to this submission the Court to some extent actually holds him (*c*). When the case comes before the Court, the only question properly raised by the exceptions is that which was referred to the Master, and to which the Court confines him, namely, whether the defendant had in fact answered all such material interrogatories in the bill as could not be objected to upon grounds peculiar to the interrogatories themselves. The Court, however, instead of deciding that question, entertains another wholly distinct from it, namely, whether the defendant ought not to be excused from answering them. Lord Thurlow in *Cookson* v. *Ellison*, before referred to (*d*), expressly held that the court could not, upon the argument of exceptions, entertain the distinct question whether a demurrer or plea to the bill would have been allowed. Where the ground upon which the defendant seeks to be excused from answering questions material to some part of the relief sought, is apparent upon the face of the bill, a decision of the Court in his favour is frequently open to this further observation. The practice of the Court obliges a defendant to demur in eight days. The practice, of

(*b*) 15 Ves. 378; 16 Ves. 387. (*c*) Supra, pl. 155.
(*d*) Supra, pl. 149; 2 Bro. C. C. 252.

which *Adams* v. *Fisher* is an example, would often enable a defendant, who had lost his opportunity of demurring, to gain by an irregular course a benefit which regular practice denied him (*e*).

163. If the subject is looked at with reference to "convenience, that is justice (*f*)," considerations of weight present themselves in favour of the proposition, that a defendant who defends by *answer* ought to be compelled in all cases to give *the same full discovery as the plaintiff would be entitled to if* the amount of his demand were the only question in dispute. In law, right, and the evidence of right, mean the same thing. It may be true, that in allowing a defendant by answer to refuse discovery of matters of account only, where the plaintiff's right to that account is in dispute, the Court professes only to suspend the discovery until the plaintiff's right shall have been adjudicated upon. But it is obvious, that this suspension may eventually work a loss of all benefit to the plaintiff. In cases of account, the discovery from the defendant is frequently the best, if not the only evidence, upon which the plaintiff is compelled to rely. The death of the defendant (*g*), the loss, suppression, alteration, or destruction of documents (*h*), may render a just suit wholly fruitless. The

(*e*) 11 Ves. 295.

(*f*) 15 Ves. 378.

(*g*) 11 Ves. 76, in *Baker* v. *Mellish;* 11 Ves. 306, in *Shaw* v. *Ching.*

(*h*) Spoliation may be out of the question in the case of one party—but not of his successor in right.

discovery, if obtained in an early stage of the suit, may satisfy the plaintiff that his suit is not worth prosecution, or enable him (as before observed) to limit his demand to that which the defendant's admission may entitle him to ask at the hearing of the cause. And even if at the hearing of the cause he should elect to take a decree for an account, instead of a decree for immediate payment, his position will be widely different where he has had full discovery before the decree, from that in which he will be placed where discovery has been withheld from him. In the latter case he will, without any exaggeration of terms, have to commence a new suit after the decree, and if the death of his opponent, or other circumstance leading to a loss of evidence, shall not have deprived him of the discovery which has been withheld from him, he will still have lost the advantage of having previously sifted the account, and of being at once prepared to carry in his charge before the Master. It may be objected, indeed, that this reasoning proves too much,—for that it would to some extent apply to the privilege allowed to a demurrer or plea. Practically, however, this objection is not well founded. A demurrer is generally disposed of within a few days from the time of its being filed, and so is a plea, unless it be supported upon argument and issue joined upon it. Where issue is joined upon the truth of a plea, the cause is undoubtedly much protracted, but not to the same extent as where the defence is by answer, unless, in the latter case, the

defence be confined to a single point, and, theoretically speaking, there is no reason in such a case why the defence should not be made by plea. The only cases which in principle can give rise to the present question, are those in which the defendant gives up his defence by plea, and resorts to an answer, in order that he may thereby have the advantage of going into his case at large (*i*).

164. Nor is it easy to understand the principle upon which Courts of equity in practice discourage demurrers and pleas, unless it be that it is safer to enforce discovery in favour of a plaintiff, than to risk the loss of it in a stage of the cause in which the Court is compelled to decide between the parties, without any guide for its judgment except the oath of an interested party, who is often swearing to a mixed question of law and fact.

165. It cannot be successfully objected to these observations, that, if followed out, they might, in a given case, oblige a defendant to produce his title deeds at the suit of a party who had no interest in them. If such deeds would assist the plaintiff in making out his title, he would be entitled to a production of them before the hearing, according to all the authorities. And if the object of the suit were to obtain possession of the deeds, and the deeds were collateral to the plaintiff's

(*i*) Supra, pl. 44, note.

case, a description of them in the answer would be sufficient for the purposes of the decree, without the production of them before the hearing.

166. Between the conflicting interests of the parties, it would be extremely difficult to shew a balance of convenience in favour of either, which should induce a Court to adopt any arbitrary rule of practice at the expense of principle.

167. The effect of allowing a defendant by *answer* to protect himself against discovery to which the plaintiff would be entitled if his right to relief were proved, is, that it enables the defendant by answer to get the benefit of a demurrer or plea, in addition to the other advantages an answer may afford him,—at the cost to the plaintiff of delay—expense—and possibly the loss of right.

168. The inconvenience attending a departure from principle is strongly marked by the difficulty which the Court has experienced in dealing with cases analogous to *Adams* v. *Fisher*. Lord Kenyon (sitting for Lord Thurlow) *first*, it is believed, allowed a defendant, who denied the plaintiff's title, to refuse by *answer* to set out accounts to which the plaintiff's right was clear, provided his title to the relief he prayed were established. The case in which Lord Kenyon did this, was the same (*k*) in which Lord Thurlow had overruled a plea negativing the plaintiff's title, upon

(*k*) *Gunn* v. *Prior*, 2 Dick, 657, Forest Exch. 88.

the ground that negative pleas were inadmissible in equity. Lord Kenyon, therefore, had to deal with a case in which, if the defendant were not permitted by answer to withhold discovery as to the account, he would have been without any means of defence. So strongly, however, was Lord Kenyon impressed with the hardship to which, by overruling the exceptions, he might subject the plaintiff, that he directed an issue to try the question upon which the plaintiff's title depended(*m*). Now, an order directing the trial of an issue upon the argument of exceptions, cannot be defended as matter of regular practice. The Court could only get at that result by the power which the matter in judgment conferred upon it over either party who should decline the issue. It is a course which, in many cases, would involve a cause in the greatest confusion. Suppose several defendants, and the answer of one only to be insufficient. The other defendants would not be parties to the issue, and would not be bound by the finding on the trial of it. The issue, therefore, would decide no final question in the cause; and the evidence in the cause, or a second issue, might lead to a conclusion different from the first. In the case of married women, or infants, being parties, the expedient would be scarcely practicable. Lord Eldon has observed upon this practice, "that if the parties had gone to issue upon the cause in equity, and the

(*m*) *Gunn* v. *Prior*, 2 Dick. 657; and see *Randal* v. *Head*, Hardres, 188.

cause had come to a hearing, it might have turned out that no issue would be directed (*n*)." A practice which requires an expedient, like that resorted to by Lord Kenyon, cannot be sound.

169. Lord Redesdale appears to have thought, that the relaxation of practice, to which the present observations apply, might be confined to cases in which the defendant set up a title in himself, apparently good, *and which the plaintiff must remove to found his own title*, as distinguished from cases in which the defendant merely denied the plaintiff's title (*o*). He refers, however, to cases in which a defendant denying the plaintiff's title, has been permitted by answer to withhold accounts, the right to which depended upon that title. The observation which occurs upon Lord Redesdale's suggestion is, that it leaves a large class of cases unprovided for, which are clearly within the same mischief as those which his suggestion would protect. The suggestion, however, is strong evidence of the difficulties which the learned writer felt in defending the practice to which it applies. Lord Redesdale, in another place, after referring to the authorities, appears to have concluded, that the Court had "declined laying down any general rule, deciding ordinarily upon the circumstances of the case" (*p*). The Court, however, certainly has not professed so to deal with this important question, but has

(*n*) 11 Ves. 304, in *Shaw* v. *Ching*.
(*o*) Redes. Plead. 310, 311, 312.
(*p*) Redes. Plead. 312.

apparently acknowledged its obligation to act upon some definite rule. In *Gethin* v. *Gale* (*q*), Lord Hardwicke is represented to have said, that, if the right is clear, the defendant shall set forth the account; if not clear, he shall not. This (says Lord Eldon) "cannot be (*r*)." In *Sweet* v. *Young* (*s*), Lord Chief Baron Parker is made to say, that as it is sworn positively, *and was in the knowledge of the party*, the fact was disproved, which would give the right to discovery; but he proceeds to say, that if it was not in the knowledge of the party, they would compel the discovery (*t*).

170. Mr. Hare refers to cases in which a distinction has been attempted between bills which were demurrable, and bills which could be met only upon something *dehors* the bill, or by a denial of the plaintiff's equity, but justly concludes that there is nothing to warrant such a distinction (*u*). It is remarkable, that all the authorities, in discussing the question under consideration, appear to affirm the proposition, that an executor cannot by answer refuse to give an account of assets, although he may deny the plaintiff's title as creditor or legatee (*x*). The only rule which the Court appears clearly to have decided is, that a defendant cannot have the benefit of a plea by answer,

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(*q*) Cited, Ambler, 354.

(*r*) 11 Ves. 304, in *Shaw* v. *Ching*.

(*s*) Amb. 353.

(*t*) 11 Ves. 304-5.

(*u*) Hare, 260.

(*x*) Redes. Plead. 311; 11 Ves. 304, in *Shaw* v. *Ching*.

without stating his case with the same precision as if he had pleaded (*y*). Mr. Hare, indeed, appears to think, that a defendant who by answer claims the benefit of a plea, is subject to a technical rule, preventing him from giving any part of the discovery to which the defence, if pleaded, *might* have extended; and he refers to *Somerville* v. *Mackay* (*z*). The author does not so understand that case. He understands Lord Eldon to have decided only, that there was not in that case "averment positive enough" of the ground upon which the defendant could refuse to answer. A decision to the effect attributed by Mr. Hare to *Somerville* v. *Mackay*, would bring the defendant back again into the original difficulties from which it has been the object of the Court to relieve him, in the cases under examination, namely, the practical difficulty of pleading or demurring with effect. The case of *Adams* v. *Fisher*, seems inconsistent with Mr. Hare's suggestion; for, in that case, the defendant might by plea have protected himself against much of the discovery which he gave.

171. But it may be asked, is the assumption upon which the preceding observations have been made, well founded? Is it true that every valid defence may be insisted upon either by demurrer or plea, according to the nature of the case? May not cases be suggested,

(*y*) Infra pl. 171, n. (d).

(*z*) Hare, 254: *Somerville* v. *Mackay*, 16 Ves. 387.

in which upon mixed grounds, arising partly out of the law of the case, and partly out of the conduct of parties, a Court of equity would give no relief, although it might decline to decide the case upon demurrer or plea? And passages may be cited from Lord Redesdale, in which he appears to say, that where a case consists of a variety of facts, it may not be proper to be offered by way of plea, or it may be doubtful, whether, as a plea, it would hold (*a*). It may also be reasonably urged, that a system of pleading must be eminently defective, which obliges a defendant either to give discovery, the right to which he disputes, or to waive the benefit of circumstances by which the plaintiff's right, if established, would be materially qualified (*b*). Upon the first of these points, the author ventures to suggest that the conduct of parties, or other circumstances which are not of weight or precision enough to induce a legal conclusion capable of being supported upon demurrer, or of being reduced to a plea, cannot, in sound legal reasoning, be of any greater avail if insisted upon in an answer. The difficulty of framing a plea does not bear upon the question. But whether that be so or not, is immaterial to the present purpose; for all the authorities clearly affirm, that unless the case alleged in a bill would not *certainly* entitle the plaintiff to relief at the hearing,

(*a*) Redes. Plead. 308.

(*b*) Supra, pl. 44, note

the bill is demurrable (*c*); and that, if the case set up by answer is not so precise, that, if alleged by way of plea, it would afford the protection claimed by the defendant, he cannot have that protection by answer (*d*). With respect to the second point above noticed, it is undoubtedly of great weight, but it resolves itself into the question which has already been adverted to,—the balance of convenience operating in favour of one party or the other, in deciding the main question at issue.

172. It may be said, the power of a defendant to demur or plead to a bill is theoretical only, and that the rules of pleading are of so strict and technical a character, that in practice the power is merely nugatory. The author ventures to think that the practical difficulty (which cannot be denied) of demurring or pleading, with effect, is mainly attributable to a perversion of some of the rules of pleading (*e*), and to the strong leaning of the courts against those modes of defence. But if the truth of the suggestion were admitted, it is obvious that the proper mode of meeting the difficulty should be sought for in a correction of the rules of pleading which occasion the difficulty, and

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(*c*) *Kemp* v. *Pryor*, 7 Ves. 237; *Attorney-General* v. *The Corporation of Norwich*, 2 Myl. & Craig, 406.

(*d*) See the cases of *Dolder* v. *Lord Huntingfield*, 11 Ves. 283; *Faulder* v. *Stuart*, 11 Ves. 296; *Shaw* v. *Ching*, 11 Ves. 303; *Rowe* v. *Teed*, 15 Ves. 372; *Somerville* v. *Mackay*, 16 Ves. 387.

(*e*) Some observations upon this point will be found in a later page, pl. 219.

not in the violation of sounder and better rules of practice. To this consideration, (the proper mode of correcting an admitted imperfection in the present practice of the Court), the author's observations upon *Adams* v. *Fisher* are exclusively directed.

173. Next, as to authority. "The old rule," (says Lord Eldon), "before the time of Lord Thurlow, was either to demur, to plead upon something *dehors* the bill, or that sort of negative plea of which we know more in equity than at law (*f*)."

174. Lord Thurlow decided that a negative plea was not good in equity (*g*). He afterwards, however, changed his opinion, when pressed with the necessary consequences of this decision, namely, "that any person falsely alleging a title in himself, might compel any other person to make any discovery which that title, if true, would enable him to require, however injurious to the person thus brought into Court; so that any person might, by alleging a title, however false, sustain a bill against any person for any thing so far as to compel an answer; and thus the title to every estate, the transactions of every commercial house, and even the private transactions of every private family, might be exposed; and this might be done in the name of a pauper, at the instigation of others, and for the worst of purposes (*h*)." The validity of negative pleas has since

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(*f*) 16 Ves. 387, in *Somerville* v. *Mackay*.

(*g*) *Gunn* v. *Prior*, Forest. Exchq. Reports, 88; S. C., 2 Dick. 657, and 1 Cox, 197.

(*h*) Redes. Plead. 231. *Newman* v. *Wallis*, 2 Bro. C. C. 143.

become firmly settled in equity practice. Of Lord Thurlow's opinion upon the point in question there can be no doubt. He admitted a species of plea, to which, in principle, he objected, in order to avoid a consequence which would have had no existence if, in his opinion, a decision in accordance with *Adams* v. *Fisher* could have been sustained. Indeed, his observation in *Cookson* v. *Ellison*, already quoted (*i*), is conclusive evidence of his opinion upon the subject.

175. Lord Kenyon afterwards, sitting for Lord Thurlow, decided that a defendant, who by *answer* disputed the plaintiff's title, might refuse to set out accounts, the right to which depended upon that disputed title. The case in which Lord Kenyon first decided this point, (as already stated), was the same (*k*) in which Lord Thurlow had decided that a negative plea was not a legitimate mode of pleading. Lord Kenyon, therefore, had to contend with a case in which two conclusions only were open to him. 1st, That to which he came; and 2ndly, the alternative of holding that a Court of equity did not provide a defendant with *any* means of availing himself of a just defence. Lord Kenyon's decision is no evidence of his opinion, under that state of practice which Lord Thurlow's subsequent decision as to the validity of negative pleas established. Indeed, Lord Thurlow's subsequent opinion was a reversal of Lord Kenyon's judgment. For, if

(*i*) Supra, pl. 149. (*k*) See 11 Vesey, 291.

that judgment were right, there was no necessity for Lord Thurlow's reluctant change of opinion. Lord Kenyon, it is true, came to a similar conclusion in a later case, *Neuman* v. *Godfrey* (*l*); but this decision preceded the case in which Lord Thurlow altered his opinion about negative pleas. And, in the specific question involved in *Neuman* v. *Godfrey*, it has been decided that a defendant, who answers a bill, must answer throughout (*m*).

176. Chief Baron Eyre, in *Selby* v. *Selby* (*n*), said, "He should be glad to take advantage of the rule that Lord Thurlow had laid down in particular cases, and to apply it to all, that wherever the party is not obliged to answer the interrogatories put, he must take advantage of it by demurrer." This decision is of the greater weight because it came from an Exchequer Judge (*o*).

177. Lord Rosslyn undoubtedly expressed a strong opinion, that a defendant should be allowed upon ground of merits to resist by answer discovery subordinate to the question of the plaintiff's right of suit. The cases in which that opinion is expressed, are *Jerrard* v. *Saunders* (*p*), *Lord Donegal* v. *Stewart* (*q*), and *Phelips* v. *Caney* (*r*). The first of these cases has little bearing upon the general question, for, in that case,

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(*l*) 2 Bro. C. C. 332.
(*m*) *Taylor* v. *Milner*, 11 Ves. 41.
(*n*) 4 Bro. C.C. 11.
(*o*) Supra, pl. 161.
(*p*) 2 Ves. jun. 187.
(*q*) 3 Ves. 446.
(*r*) 4 Ves. 107.

the defendant insisted that he was a purchaser for value without notice; and a party who is so circumstanced, was formerly considered as so far *lege solutus*, that no rules of form merely should be allowed to bind or affect him (*s*). This privilege has been displaced in modern cases, in which it has been held, that a purchaser for value without notice must make his defence by demurrer or plea, or answer the bill "throughout" (*t*). The case of *Stewart* v. *Lord Donegal* has nothing of a special character in it. The case of *Phelips* v. *Caney*, is opposed by cases of high authority (*u*), and is certainly at variance with the practice of the profession in cases ejusdem generis.

178. Lord Redesdale's opinion is scarcely to be collected from his treatise on pleading. He shews the conflicting state of the authorities, but does not appear to have intended to express any opinion of his own, except so far as that opinion may be inferred from the language in which he explains the grounds upon which Lord Thurlow changed his original opinion respecting negative pleas, namely, "when pressed by the ne-

(*s*) In *Rowe* v. *Teed*, 15 Ves. 378, Lord Eldon apparently considers a purchaser for value without notice in the same privileged situation as a party to whom questions are addressed, the answers to which would criminate him. He classes the two together as parties not subject to the ordinary rules which oblige a defendant, who answers a bill, to answer "throughout."

(*t*) Supra, pl. 135.

(*u*) Supra, pl. 170, n. (*x*).

cessary consequence that any person fasely alleging," &c. (*x*).

179. Of Lord Eldon's opinion no doubt can be entertained. In all the cases, indeed, which came before him, he found the means of avoiding a direct decision upon the point, by deciding that the defendant was bound to answer. But his opinion is clearly marked in his judgments. The principal cases before Lord Eldon are *Dolder* v. *Lord Huntingfield* (*y*), *Faulder* v. *Stuart* (*z*), *Shaw* v. *Ching* (*a*), *Rowe* v. *Teed* (*b*), and *Somerville* v. *Mackay* (*c*). In *Shaw* v. *Ching*, Lord Eldon says, " A case of partnership is stated; praying a great variety of accounts; and stating several circumstances of fact. The defendant does not put in a short answer; or try the effect of a plea of no partnership; but puts in an answer, stating, that there is no partnership; refusing to answer what is inconvenient to him to answer; but answering all that is convenient. Where a party demurs, judgment is bad in the first instance: so upon a plea: but if this sort of illegitimate pleading can be substituted, the suitor is thus involved: 1st, he is put to the expense of the judgment of the Master; and the Master is called upon to give judgment in a matter, which, with the exception of the case of pain, penalty, and forfeiture, it is not the habit of the Court

(*x*) Supra, pl. 174.
(*y*) 11 Ves. 283.
(*z*) 11 Ves. 296.
(*a*) 11 Ves. 303.
(*b*) 15 Ves. 372.
(*c*) 16 Ves. 382.

to intrust to him; 2ndly, if the defendant, by plea puts into a single fact, or several facts, constituting one defence, the parties go to issue upon that: if it is found for the defendant, the plaintiff is dismissed; if for the plaintiff, further inquiry is directed. But, in this way, the defendant answering just what he chooses, issue cannot be joined upon the single fact supposed to be the bar: but the plaintiff, if he replies, must reply to the answer, as he finds it; and must go to long, expensive proof upon a great variety of facts; which is an unnecessary, vexatious burthen thrown upon him. Lord Thurlow seems to have thought, that, if a defendant answers, he shall answer throughout. Whether that is right or not, I am convinced the forms of pleading cannot stand as they now are upon the reported cases (*d*)." In *Rowe* v. *Teed,* Lord Eldon says (*e*), "There is no difference between law and equity; that here for the sake of convenience, that is, of justice, the denial of some fact alleged by the bill in some instances, with certain averments, has been considered sufficient to constitute a good plea; though not, perhaps, precisely within the definition of good pleading at law. If each case is to be considered upon its own circumstances, it is desirable that this point should be brought before the Court by plea rather than by answer, as an answer *primâ facie* admits, that the defendant cannot

(*d*) 11 Ves. 305, 306. (*e*) 15 Ves. 377, 378.

plead; and with the exception of the cases in which it is settled as general law that the party is not to answer a particular circumstance, as, that he is not to criminate himself, the case of a purchaser for valuable consideration, &c., this Court does not trust the Master generally with the determination how much of the answer, considered as a plea, would be a good defence. The Master is, therefore, almost under the necessity of admitting an exception; and when the propriety of his judgment comes to be argued here, it would be most incongruous that the Court, admitting his judgment not to be wrong, should yet give a different judgment, considering the answer as a plea. Another circumstance deserving attention is, the great difference of expense in bringing forward the objection by plea rather than by answer. There is but one more material general observation to be added to those which are to be found in the cases reported; that generally, admitting there are exceptions, the practice of the Court requires that the bill and the answer should form a record, upon which a complete decree may be made at the hearing. If, for instance, this plaintiff is a part owner of the ship, he has a right to an answer that will enable him, if a certain sum is admitted to be due, to obtain a decree for that sum, if he is satisfied with that, and does not desire an account (*f*)." And in a prior passage in the same judgment, Lord Eldon says, "The question is,

(*f*) 15 Ves. 377, 378.

whether this is an answer, bringing forward such one short fact, or such a series of circumstances establishing in the result one fact, that would be an answer to the prayer of discovery and relief; and therefore, whether this is a case in which the Court should decide that point which has been long the subject of litigation, to what extent a defendant is bound to answer, who has averred a circumstance, which, if truly averred in another form, and sufficiently proved, would be an answer to the whole prayer for discovery and relief." "*Whenever this question comes to a decision, it will be infinitely better to decide that in this Court the objection should be made by plea rather than by answer.*" The judgment of Lord Eldon, in *Somerville* v. *Mackay* (*g*), is equally pointed and decisive with the last.

180. Sir William Grant, in *Taylor* v. *Milner* (*h*), decided that a mere witness who answered a bill, was bound to answer "throughout."

181. Sir John Leach's opinion upon the point is well known. In *Mazzaredo* v. *Maitland* (*i*), he said, "I remember, during the argument," (referring to *Somerville* v. *Mackay*) "the Lord Chancellor strongly expressed his opinion, that a defendant could not answer as to part of a bill, and refuse to answer the rest; and I think that is so useful a rule, that I shall always adhere to it." In ——— v. *Harrison* (*j*), a bill was filed, stating a partnership, and praying an account. The defendants, by

(*g*) 16 Ves. 382.
(*h*) 11 Ves. 41.
(*i*) 3 Madd. 66.
(*j*) 4 Mad. 252.

their answer, denied the partnership, and refused to set forth any account. Exceptions were taken to the answer for insufficiency, in not having set forth the account. The Vice-Chancellor, Sir John Leach.—"That point is settled. If a defendant answers, he must answer fully. *They should have pleaded.* Exceptions allowed."

182. With respect to the *third* and *fourth* courses of practice, which were suggested in a former page, the author conceives, that, until the views of the Lord Chancellor shall have been more fully developed, it is impossible to state with certainty what the practice of the Court now is. In *Adams* v. *Fisher,* the Lord Chancellor, in the passage of his judgment quoted in a former page (*k*), clearly intimates that the defendant who answers must give full discovery as to so much of the bill as relates to the plaintiff's title. But is the right to discovery limited to this, under the principle upon which *Adams* v. *Fisher* proceeded? The defendant, in that case, gave a schedule of the documents, the production of which he resisted. A plea to the bill would have protected him against giving that schedule. The facts of the case in *Adams* v. *Fisher* did not raise the question, whether the defendant could by answer have refused to give it. It is difficult, however, to understand how the reasoning of the Lord Chancellor could stop short of the conclusion that the

(*k*) Pl. 155, p. 93.

defendant might have refused to give the schedule, unless he proceeded upon the principle, that convenience required that a production of the documents should be refused, but that a mere list and description of them was not within the same mischief. A decision that the defendant might, in such a case, refuse to give a schedule of the documents, would be attended with serious consequences in practice. The author is not aware of any case in which an executor, denying *by answer* that a plaintiff, suing as legatee, had the title which he asserted, has been excused from answering, as to the assets of his testator or as to the documents he had relating to the estate. Indeed the contrary had been expressly decided (*l*). But the decision in *Adams* v. *Fisher* would, apparently, excuse him from doing this.

183. The Lord Chancellor in *Adams* v. *Fisher* said—"What the bill requires is not the contents of the documents, but a list of the documents; and you cannot except to the answer because the contents are not set out (*m*)." Now, nothing, it is conceived, is better settled in practice than this, that the admission by a defendant of the possession of documents which relate to the "plaintiff's case," is sufficient to entitle the plaintiff to an order for the production of them, upon motion, without his calling upon the defendants to set out their contents in the answer (*n*). If documents

(*l*) Supra, pl. 170. (*m*) 3 Myl. & Cr. 542.
(*n*) Infra, pl. 301, 306, 325.

are in the possession of the defendant which relate to the plaintiff's case, the plaintiff has a right to see them, unless the defendant can bring them within some special ground of exemption (*o*). Unless, therefore, it can be said that the amount or extent of the plaintiff's demand in a suit is not part of his case, the observation just quoted may introduce a very special practice in cases of the most ordinary occurrence.

184. The present state of the authorities has the effect of converting an answer into an informal demurrer or plea—allowing the defendant to refuse by answer what is inconvenient, but at the same time to answer all that is convenient (*p*)—and *that* after the time (where the bill is demurrable) when he could do so by pleadings of a regular character—deciding that the answer shall not have the full effect of either a demurrer or plea, but not deciding *à priori* to what precise extent it shall have the effect of those other forms of defence—introducing a "species of plea which is neither a plea, answer, or demurrer, but a little of each (*q*)." In the case of *Bentinck* v. *Willinck* (*r*), in which an account was prayed, a motion was made for the production of documents contained in a schedule to the defendant's answer relating to the items of the account;

(*o*) Infra, pl. 286, 306.

(*p*) 11 Ves. 295, 305.

(*q*) 11 Ves. 293.

(*r*) Not reported. The suit was compromised after the argument, and before judgment was given upon the motion.

and the motion was resisted upon the ground that the answer set up a defence, which, if true, would have excluded the plaintiff's right to the account. The Lord Chancellor, during the argument, intimated an opinion against the motion; and—in answer to the argument for the plaintiff, that the defence being by *answer* instead of by *plea*, the defendant could not resist the motion merely upon the ground that the plaintiff's equity was denied—observed, that that argument would deprive the court of all *discretion* in that and similar cases. The author has referred to this case because his impression is, that the Lord Chancellor considers that the Court is not fettered by any fixed rules in cases falling within the class which has been observed upon at so much length. Upon this view of the case (which is the *fourth* course suggested above) the author with diffidence presumes to make any observation, not only because he is uncertain whether his impression is correct, but because his private opinion upon such a point can be but worthless when opposed to that of the eminent judge whose judgment he has presumed to observe upon. He is not, however, aware that an unfettered discretion has ever been assumed by the Court in cases of this nature. The observations of Lord Thurlow, Lord Eldon, Lord Redesdale, and Sir John Leach, appear anxiously to exclude it. Their observations all admit an obligation upon the Court to observe some definite rule, and point only at a doubt *what* that rule should be. The discretion of a Court is properly exercised in establish-

ing and defining rules, and in applying them to specific cases, and within those limits, the discretion of the Court has ample range for its exercise. The practice which leaves to a judge the decision of a cause, according to a discretion not reduced to rule, is in principle a denial of the suitor's right. The reader will not have failed to observe, that the third and fourth courses of practice which have been observed upon are open to the objection noticed in a former page,—that the Master can decide only one way upon a case expressly referred to his judgment, and that the Court afterwards reviews, and perhaps reverses, his judgment, without being in a condition to say he was wrong.

185. It can scarcely be necessary to observe, that the case of *Adams* v. *Fisher* clearly introduces some exception to the general rule which entitles a plaintiff to discovery, in support of his own case.

186. "*The Plaintiff in Equity.*" In the view which the writer takes of the subject, the right of a plaintiff to discovery will be regulated by the same principle, and governed by the same rules, whether he seeks relief in equity as well as discovery, or is plaintiff in equity seeking discovery only in aid of his own case as plaintiff or defendant in some other Court of law or equity(*p*). The reader, however, must con-

(*p*) Supra, pl. 11.

sider how far the generality of this observation requires qualification with reference to the cases of *Hindman* v. *Taylor*(*q*), *Leigh* v. *Leigh, Jeremy* v. *Best*(*r*), already noticed, and the decision of the Vice-Chancellor in *Lowndes* v. *Davies,* which will be found in a later page(*s*).

187. "*Matters of fact.*" A defendant need not answer as to conclusions of law, although alleged in the bill, and material to the "*plaintiff's case.*" For, these are not properly the subject of admission.

188. "*About to come on for trial.*" That the right to discovery is confined to the question or questions in the cause which are about to come on for trial, has been shewn under the first proposition.

189. "*Well pleaded.*" The right of a plaintiff to discovery being *limited* to such discovery as is material to the proof of "*his case*"—it follows that he is bound so to frame his pleadings, as to enable the defendant to know, and the Court (in a disputed case) to decide(*t*), whether he is entitled to an answer on a specific point or not.

(*q*) *Hindman* v. *Taylor*, supra, pl. 67, et seq.
(*r*) Supra, pl. 78.
(*s*) Infra, pl. 377, et seq.
(*t*) *Cardale* v. *Watkins*, 5 Madd. 18; Redes. Plead. 191.

190. The rules of pleading in equity, as already observed, require that the bill should contain a specific allegation or charge upon which each interrogatory is grounded; for, without such allegation or charge, there is no test by which the right to discovery can be tried (*u*). This involves the proposition that such allegation or charge must be "*certain*," and this rule, which is one of general application (*x*), is no qualification of the plaintiff's *right* to discovery. Uncertainty in pleading is a vice, by which a party may lose a benefit to which otherwise he may be strictly entitled. And all that is here contended for is, that a suitor for discovery is not exempt from an obligation to which suitors for all other purposes are liable.

191. At common law there are degrees of *certainty* in pleading,—certainty to a common intent; and certainty to all intents and purposes (*y*). Certainty to a common intent is, perhaps, all which the rules of pleading in equity require for any purpose. The author, at least, is not aware of any authority to the contrary.

192. *Uncertainty* in a bill may, for the purposes of the present question, exhibit itself under different forms. 1. The *case* intended to be made by the bill may be

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(*u*) Supra pl. 94. *Duncalf* v. *Blake*, 1 Atk. 52: *Attorney-General* v. *Whorwood*, 1 Ves. sen. 534: *Bullock* v. *Richardson*, 11 Ves. 373: and see *Gordon* v. *Gordon*, 3 Swans. 472.

(*x*) See *Edwards* v. *Edwards*, 1 Jac. 335: *Hardman* v. *Ellames*, 5 Sim. 640; S. C., 2 Myl. & K. 732.

(*y*) 1 Chitty on Plead. 257. Stephen, 348, 77, 380.

vague and uncertain. 2. The case intended to be made may be certain, but the *allegations* in the bill may be so vague as to draw with them the consequences and mischiefs of uncertainty in pleading. In both cases the plaintiff's right to discovery will be affected by the *uncertainty* of the pleadings.

193. In *The East India Company* v. *Henchman* (*z*), (1791), the plaintiffs filed their bill against Henchman, alleging that he had been a writer and covenanted servant of the plaintiffs from 1765 to 1780; and again (in another capacity) from 1785 to 1790. The bill charged the defendant, in a very vague manner, with making profits in fraud of his engagements with his employers, and prayed an account of such profits. The defendant demurred, and the Lord Chancellor allowed the demurrer, upon the ground of the vagueness and uncertainty of the charges in the bill.

194. In *Cresset* v. *Mitton* (*a*) (1792), a demurrer was allowed to a bill, on the ground that the case alleged by the plaintiff was so general, that the defendant could scarcely know the point to be examined to.

195. In *Ryves* v. *Ryves* (*b*), (1797), the plaintiff alleged himself to be the eldest son and heir-at-law, and heir of the body of Thomas Ryves the elder, deceased, by Elizabeth his first wife, deceased; and also only son and heir-at-law, and customary heir of the said Eliza-

(*z*) 1 Ves. jun. 287. (*a*) 1 Ves. jun. 449.
(*b*) 3 Ves. jun. 343.

beth Ryves, who with her sister were the only two children and co-heiresses at law of Sir William Abdy, deceased. The bill then stated, that, at the time of the marriage of the plaintiff's father and mother, his mother was seised and possessed of freehold, copyhold, and leasehold lands, as one of the co-heiresses of her father, *or* under his marriage settlement, *or* his will or codicil, *or* by some such or other means; and that, *upon or before or after* the marriage, the said estates and other estates of Elizabeth and of Thomas Ryves, were settled to uses *in some manner,* so as that the plaintiff, upon the deaths of his father and mother, or the death of the said Thomas Ryves the elder, became seised of *all or most* of the estates in settlement, *either* in fee *or* as tenant for life, or in tail in possession, or *in some other* manner; as in and by the said settlements or settlement, or some counterparts or some counterpart, duplicates, copies, drafts, abstracts, extracts, counterpart, duplicate, &c., then in the custody or power of the defendants, or one of them, would appear. The bill then stated the deaths of parties, and that the plaintiff had become entitled to the settled property, and that Anna Maria Ryves, and Henry Pleydle Ryves, had wrongfully taken possession of the property, and of all the muniments of title and writings relating thereto, and still had such possession. The bill then suggested a pretence by the defendants, that the plaintiff had made an exchange of some of the lands comprised in the settlements, and had made or concurred with his father in exchanging

some of the settled lands situate in Lincolnshire, for other estates in Dorsetshire, which were afterwards sold, and part of the money received by the plaintiff. The bill then charged, that no such exchange had ever been made, and that, if any had been made, he had been induced to make the same by misrepresentation or concealment as to the value of the estate; for that the estates in Lincolnshire were worth 1,100*l.* per annum, and were actually let for 1,000*l.* per annum; and that the Dorsetshire estates (alleged to have been exchanged) were not worth more than 400*l.* or 500*l.* per annum. The bill denied that the estate in Dorsetshire had been sold, and insisted that if any sale had been made, the plaintiff had not concurred in such sale, or received any part of the money; and that the alleged exchange (if any) *had been effected by fraud.* The bill then charged that Henry Pleydle Ryves had, on a specified occasion, *admitted* that an estate called Barnardiston was comprised in the above-mentioned marriage settlement. The bill prayed a production of documents which might in any manner tend to prove or shew the title of the plaintiff thereto, so that the plaintiff might have an opportunity of procuring the same to be inspected on his behalf; and that the defendants might deliver, or procure to be delivered up to the plaintiff, the possession of the estates then in the possession of them, or either of them, which the plaintiff should be found entitled to, together with all title deeds and writings in the custody or power of the said defendants, or any persons claiming under them, in

anywise relating or belonging thereto; and for an account of the rents and profits, and for further relief. The usual affidavit was annexed to the bill. To this bill a general demurrer was put in. In support of the demurrer it was argued, that the bill was one of those vexatious fishing bills, which had always received the disapprobation of the Court. It was so vague and uncertain, that the defendants could not plead to it; and must discover all deeds relating to their estates. Applicable to every thing, it applied in certain to nothing. The bill ought to state what the property was to which it applied; and from what was said of the exchange, it appeared the plaintiff could do so. There must be what Lord Hardwicke calls *convenient certainty*. The Master of the Rolls allowed the demurrer.

197. In *The Mayor and Commonalty and Citizens of London* v. *Levy* (*c*), a bill was filed for discovery in aid of an action at law, and a general demurrer was put in. Lord Eldon allowed the demurrer. He said, "that, where the bill avers, that an action is brought, or, where the necessary effect in law of the case stated by the bill appears to be, that the plaintiff has a right to bring an action, he has a right to discovery, to aid that action so alleged to be brought, or which he appears to have a right and an intention to bring, cannot be disputed. But, it has never yet been, nor can it be, laid down, that you can file a bill, not venturing to state who are the persons against whom the action is

(*c*) 8 Ves. 398.

to be brought; *not stating such circumstances as may enable the Court, which must be taken to know the law, and therefore the liabilities of the defendants, to judge; but stating circumstances; and averring that you have a right to an action against the defendants or some of them.*"

198. In *Jones* v. *Jones* (*d*), (1817), upon demurrer, the Master of the Rolls said, "When the plaintiff comes to ask that the defendant may be restrained from setting up any outstanding terms, the language is varied; for it is,—so as to defeat the plaintiff's claim in any issue or action directed by the Court, or which the plaintiff may be advised to bring, for recovery of the real estates or the rents and profits thereof. This, undoubtedly, would be proper relief to ask, if it had been averred that there were any outstanding terms. But the case of *Barber* v. *Hunter* is a direct authority that the Court *will not proceed on a mere vague allegation that the action may be defeated by setting up outstanding terms.*" Demurrer allowed.

199. In *The Princess of Wales* v. *The Earl of Liverpool* (*e*), Lord Eldon ultimately came to the conclusion, that the case was one in which the plaintiff ought to produce certain documents before she called on the defendant to answer the bill. Before he made the order, however, he required an affidavit specifying the

(*d*) 3 Mer. 172. (*e*) 1 Swans. 126.

grounds upon which the application by the defendant was founded; and his observations apply forcibly to the point now under consideration. "The affidavit (said Lord Eldon) amounts only to this: it is a statement that Count Munster is advised that an inspection of the instrument may afford to the defendants material information for their defence; that is, it may, or may not, afford it. How can it be said that this expression "may afford," points out the necessity alluded to in the passage which I have quoted? It appears to me impossible. This motion requires an affidavit stating more strongly the necessity, *and in some measure the grounds on which the necessity arises. Unless those grounds are to a certain extent stated, it is impossible to be sure that the Court is not compelling a production which the circumstances do not require. It seems to me, that the right mode of disposing of this case is to dismiss the motion, unless the defendants produce an affidavit of special circumstances.*"

200. In *Frietas* v. *Dos Santos* (*f*), (1827), the insufficiency of a merely general charge was the subject of express decision. The Court, it would seem, in this case, arrived at its conclusion by construing the general charge with reference to particular charges in the bill. The bill stated certain dealings and transactions between the parties, and charged that there was an open account between them. The Court, being of opinion that the

(*f*) 1 Younge & J. 574.

dealings and transactions stated did not make a case for account in equity, refused to give effect to the general charge, beyond what the specific case stated in the bill warranted.

292 201. In *Walburn* v. *Ingilby* (*g*), (1832), the plaintiff claimed to be a shareholder in an unincorporated joint stock company, alleging a case of fraud against the defendants, who were the directors of the concern. A general demurrer to the bill was allowed, because it did not specifically state the mode in which the plaintiff became a shareholder, and the manner of his holding, or whether, as to some of his shares which were derivative, he had complied with the conditions upon which alone (as appeared by the bill) the transfer of shares was permitted.

202. In the judgment in *Hardman* v. *Ellames* before the Lord Chancellor (*h*), the reader will find much valuable information upon the degree of certainty required in pleadings in equity. The cases of *Metcalf* v. *Hervey* (*i*), *Mendizabel* v. *Machado* (*j*), *M'Gregor* v. *The East India Company* (*k*), and *Stansbury* v. *Arkwright* (*l*), may also be referred to.

203. In the cases which have been cited, the objection of uncertainty applied for the most part to the

(*g*) 1 Myl. & K. 61.
(*h*) 5 Sim. 640: on appeal, 2 Myl. & K. 732.
(*i*) 1 Ves. sen. 247.
(*j*) 2 Sim. 452.
(*k*) 1 Sim. 63.
(*l*) 6 Sim. 481.

case for relief made by the party to whose pleading it was imputed (*m*). And it may, perhaps, be thought doubtful, whether these cases do more than illustrate the general proposition—that a plaintiff who does not in his bill state a case which entitles him to relief, is not entitled to discovery. It may be proper, therefore, to add a few observations as to the effect of *uncertainty* upon a plaintiff's right to *particular discovery*. If a *particular allegation* be open to the charge of "*uncertainty*," in the sense of being of uncertain meaning, it is obvious that no discovery can be exacted, for there is in truth no question to which it can be applied. There is a sense, however, in which a *particular allegation* may be *certain* for the general purposes of pleading, and *certain* for *some*, but not (it is conceived) for *all* the purposes of *discovery*. Thus, suppose a plaintiff by his bill to claim an estate, his right to which was represented in the bill to be intercepted by conveyances to which the plaintiff had not been party; and suppose the bill to charge *generally*, that the conveyances had been obtained by fraud,—without any such specification of the particulars constituting the alleged fraud as would enable the Court to know what the case was upon which the plaintiff relied. Now, this allegation would (in general) be sufficient to let in evidence in support of the charge

(*m*) As to the answer to be given to *general* and to *special* allegations respectively, see Hare, 279.

of fraud(*n*), subject to a question at the hearing of the cause, whether if, by reason of the generality of the charge, the evidence were a surprise upon the defendant, the Court, *in the exercise of its discretion*, would direct inquiries before a Master. The allegation would also be sufficient for the purpose of *discovery*, so far as to oblige the defendant to answer generally the charge of fraud. For a demurrer to the whole bill would leave that charge in admission(*o*). It may, indeed, be laid down, (as a general rule), that a *particular* charge, however general, (supposing the case made by the bill in other respects well pleaded), must receive *some* answer(*p*), whenever the admission of its truth would give title to the plaintiff. Even a charge that a defendant *claims* an interest, without suggesting any explanation of the nature of such claim, requires *some* answer(*q*). Now, suppose the plaintiff (in the case suggested) to charge that the defendant had in his possession documents, papers, and letters, *rele-*

(*n*) 1 Chitty Plead. 570; 9 Co. 110; *Watkyns* v. *Watkyns*, 2 Atk. 96; *Clark* v. *Periam*, 2 Atk. 337; *Wheeler* v. *Trotter*, 3 Swans. 174, note; *Gordon* v. *Gordon*, 3 Swans. 471, 474; *Attwood* v. ——, 1 Russ. 353.

(*o*) Redes. Plead. 212, 213.

(*p*) *Stroud* v. *Deacon*, 1 Ves. sen. 37; *Buden* v. *Dore*, 2 Ves. sen. 444; *Shaftesbury* v. *Arrowsmith*, 4 Ves. 66; infra, pl. 228; *Emerson* v. *Harland*, 3 Sim. 490, S. C. 8 Bligh, 62; supra, pl. 117; and see *Whyman* v. *Legh*, 6 Price, 83.

(*q*) Redes. Plead. 188.

vant to the matter of the conveyances impeached by the bill, and the circumstances attending the execution thereof, and that if the same were produced, the imputed fraud would thereby appear—it is clear (as already observed) that to this charge *some* answer must be given. But, suppose an answer were given, fully and unequivocally denying the charge of fraud, would a Court of Equity, in such a case, compel a defendant to subject his documents, papers, and writings, to the inspection of an adversary, solely upon the ground of their admitted relevancy to the general matter in hand? The answer to this question must, it is conceived, be given in the *negative*. A bill so framed is purely a *fishing* bill. The object of a bill so framed can scarcely be intended by a Court to be legitimate, unless some reason be assigned for the generality of the plaintiff's statement. Discovery is given in Courts of Equity, to assist a plaintiff in proving a known case, and not to assist him in a mere roving speculation, the object of which is to see whether he can *fish out a case*. The only postulate necessary to prove that a defendant denying (to the satisfaction of the Court) a general charge of fraud, may successfully object to the production of his documents, in a case like that suggested, is this,—that a party cannot, in a court of justice, be without an opportunity of defence, if in truth he has one. *The mode of taking the objection to the particular discovery is another point.* But, if a defendant be not provided with *some* means

of doing this, it will follow that a plaintiff, merely by suggesting a *fictitious* case, may secure to himself an inspection of another man's private documents, to which in truth he is not entitled. That this consequence is inevitable, will be manifest from the consideration, that a bill may always be so framed as to make the answer to which the objection of uncertainty applies necessary, even where the defence is by plea. Unless, therefore, the *generality* of the charge *per se* be admitted as a *possible* ground of objection to the interrogatory founded upon it, none can be sustained. This point is resumed in another place to which it more properly belongs, namely, that place in which the power of a defendant to insist by *answer* that he is not bound to give *particular* discovery is insisted upon.

204. The observations in the last paragraph may, upon a first impression, appear inconsistent with the previous observations on the effect of uncertainty in pleading. They are to be reconciled, however, by adverting to the distinction between a charge which is vague and uncertain, and one which, though general in terms, is definite in meaning; and by adverting also to the principle of construction noticed in the observation upon *Frietas* v. *Dos Santos* (*r*).

205. It may be proper to observe in conclusion, that a less degree of certainty in pleading may sometimes satisfy the Court, where the plaintiff assigns a

(*r*) Supra, pl. 200, and 1 Younge & Collyer, 574.

sufficient reason for the apparent want of certainty in his pleading(*p*).

206. Such, generally, are the requisitions of a Court of equity with respect to its pleadings. There are some points, however, of a more particular character, the great importance of which, although they belong more properly to the science of pleading, will, it is hoped, recommend the following observations to the attention of the reader.

207. A class of cases was particularly noticed in a former place(*q*), in which the frame of the bill was supposed to be such as to preclude the defendant from meeting it by a *pure* plea; and in which a valid plea to *all* the *relief* did not exclude the plaintiff's right to *part* of the discovery sought by the bill. By the rule which they establish, a defendant, who pleads to a bill, must not by his plea cover any discovery which is material to the trial of the truth or validity of the plea itself(*r*). By another rule of pleading, a defendant, who pleads to the discovery called for by the bill, must not give any of the discovery which his plea covers(*s*)—a rule of such strictness, that in one case Lord Hardwicke said, that, in a plea of purchase for valuable considera-

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(*p*) *Wright* v. *Plumptre*, 3 Madd. 481.

(*q*) Supra pl. 99 & 103.

(*r*) Assuming that the plaintiff's *pleadings* are properly framed in point of form, infra, pl. 212 et seq.

(*s*) Redes. Plead. 299; Beames, 33 et seq.

tion without notice, to a bill seeking a discovery of deeds and writings, *the purchase deed must be excepted*(*t*). The precise effect to be given to these *two* rules in all their bearings is not, so far as the writer is aware, fixed by any positive authorities. Their obvious tendency and their necessary effect in *some* cases is, to impose upon the pleader the task of separating, by a line of the nicest demarcation, the different allegations in the bill from each other—according as they are necessary or unnecessary, material or immaterial, to the trial of the plea itself—so that the plea and answer, when complete, may meet each other upon the very line by which the different parts of the *whole* bill are thus divided. The difficulty of doing this with effect will not be disputed by any one who, in a case of the least complexity, has attempted to frame a plea which required an answer to support it. To investigate these rules of pleading with that accuracy and research, which alone could render the investigation valuable, is a task which the writer is compelled to decline. The observations which immediately follow, occurred to the writer upon his having occasion to examine certain modern decisions, the correctness of which, in some respects, he presumes to controvert.

208. The decisions here referred to are *Sanders*

(*t*) *Salkeld* v. *Science*, 2 Ves. sen. 107; Redes. Plead. 279.

v. *King* (*u*), *Thring* v. *Edgar* (*x*). and *Pennington* v. *Beechey* (*y*).

209. The case of *Sanders* v. *King* has been stated at length in a former page (*z*), and to that statement of the case the reader is here referred.

210. In *Thring* v. *Edgar* (*a*), the plaintiff claimed to be a creditor of Martha Butt deceased, and filed his bill against her heir-at-law, devisees, and executors, for an account, or payment of the plaintiff's debt. The bill alleged that the testatrix Martha Butt was, in her lifetime, and at the time of her death, indebted to the plaintiff in the sum of 215*l.*, for goods sold and money lent, paid, laid out, and advanced by him to the testatrix, or for her use and by her order; and that the same debt, with an arrear of interest thereon, was due to the plaintiff; and that the truth thereof would appear from the books, papers, and writings in the defendant's possession. The defendant pleaded to all the discovery and relief sought by the bill, *other than and except* so much of the bill as sought a discovery of the matters above mentioned as to the plaintiff's alleged debt. And to these *excepted* parts of the bill the defendant answered. The Vice-Chancellor, after stating at length

(*u*) 2 Sim. & Stu. 277; and 6 Madd. 61.
(*x*) 2 Sim. & Stu. 274.
(*y*) 2 Sim. & Stu. 282.
(*z*) Supra, pl. 107.
(*a*) 2 Sim. & Stu. 274.

his judgment in *Sanders* v. *King*, proceeded as follows: —"To apply these principles to the present case. If the testatrix were not at her death indebted to the plaintiff in any sum of money, then the plaintiff's title to any relief or any discovery upon this bill wholly fails, and the plea of no debt is a full bar to the whole suit, unless the plaintiff has sought from the defendant a discovery of any circumstances by which the existence of the alleged debt is to be established; and then the defendant, although by his plea he may deny the debt, must still answer as to the particular discovery which is thus sought from him. But, in order that a defendant may in such a case know what is the particular discovery which the plaintiff requires from him, it is incumbent upon the plaintiff distinctly to state it in the bill; and the common form of doing this is, by the plaintiff's charging, *as evidence of his title*, the particular matters as to which he seeks a discovery from the defendant. Unless the defendant is distinctly informed by the plaintiff what are the particular matters affecting his title, as to which he seeks such discovery, the defendant, not knowing what he is expected to answer, is not to answer at all." "The plaintiff in the present bill gives no distinct information to the defendant that he seeks any discovery from him, for the purpose of establishing the existence of the debt. The defendant's plea, therefore, of no debt, was a full bar to the whole discovery, as well as to the relief; and the defendant as much overruled his plea by answering to the debt, as he would have overruled it by answering to

any other part of the bill." "If, upon the filing of this plea, the plaintiff had desired a particular discovery from the defendant as to any circumstances by which the debt was to be established, he would have amended his bill, and would have charged, *as evidence of his title*, the special matters which he required to be answered."

211. In *Pennington* v. *Beechey* (*b*), the bill was filed for a discovery in aid of an ejectment brought by the plaintiff against the defendant, to recover possession of an estate. It alleged that the plaintiff was entitled to an estate under a settlement, made upon the marriage of his great grandfather in 1717; and that the defendant had frequently admitted to the plaintiff's father that he held the estate during the life only of the plaintiff's father, and that at his death the plaintiff would succeed to it. The defendant pleaded a conveyance of the estate made to him in 1795, by a person then in the actual possession of it, and who alleged himself to be seised in fee, for 600*l.*; and averred that he had not, at or before the time of the execution of the conveyance or the payment of the 600*l.*, any notice whatsoever of any right, title, or interest of the complainant in or to the premises, or any part thereof." The Vice-Chancellor gave judgment as follows:—"The plaintiff insists that notice of the settlement of 1717 would have been constructive notice of the plaintiff's title;

(*b*) 2 Sim. & Stu. 282.

but it does not follow that the plea therefore ought specially to have denied notice of that settlement. The general denial by the plea of all notice whatsoever includes constructive as well as actual notice, and is therefore a denial of notice of the settlement. It is not the office of a plea to deny particular facts of notice, even if such particular facts are charged. Here the plaintiff, not anticipating by the bill the defence of the defendant as a purchaser for a valuable consideration, has not charged that the defendant had notice of this settlement, or any notice of his title." "If the plaintiff had meant to have affected the defendant with notice of this settlement, he should have charged generally, in his bill, that the defendant had notice of his title; and then, as evidence thereof, should have specially charged notice of the settlement. In such case the defendant, notwithstanding the general denial of notice in the plea, would have been bound to answer as to the special notice of the settlement." "With respect to the objection, that the plea ought to have been accompanied with an answer to the admission of the plaintiff's title, alleged to have been made by the defendant, because such admission would have been evidence that the defendant has notice of the plaintiff's title—the answer is, that the plaintiff has not made that case in his bill. For such a purpose also the plaintiff, after generally charging that the defendant had notice of his title, should, as evidence thereof, have specially charged these admissions, which the defendant would have been bound to answer,

notwithstanding the general denial of notice in the plea."

212. To the propriety of the judgment in *Sanders* v. *King*, so far as it overruled the plea, the writer entirely subscribes—for, the plea undoubtedly covered matter to a discovery of which the plaintiff's right extended. By this case, however, and the cases of *Thring* v. *Edgar* and *Pennington* v. *Beechy*, *taken together*, three propositions of law are laid down, to which the author's objections, already adverted to, apply (*c*).

213. The three propositions objected to are these:

I. That a defendant *is not bound*—in support of his plea—to answer any allegation in the bill which is not *expressly* charged "*as evidence*" of the plaintiff's case, or in words of equivalent import (*d*);

II. That the defendant *is bound* to support his plea by an answer to every allegation in the bill which is so charged; and,

III. That the defendant is *not at liberty*—under pain of overruling his plea—to answer any allegation in the

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(*c*) Mr. Daniel, in his valuable work on the Present Practice of the Court of Chancery, expresses a strong opinion in favour of the judgment in *Thring* v. *Edgar*. He thinks that Sir J. Leach intended to confine his observations to charges directly connected with the plaintiff's title, as distinguished from charges collateral to it. The writer of this volume cannot detect that distinction in the report of the case; and if the distinction exists in fact, the writer must submit, that it is founded upon a misconception of the proper meaning of discovery being *covered* by a plea. Infra, pl. 219.

(*d*) Hare, 36, 40.

bill which is not expressly charged "*as evidence,*" or in words of equivalent import.

214. The *first* of these propositions (if sustainable) must be rested upon authority,—upon principle,—or upon convenience.

215. Now, the point is not to be found in any case preceding that of *Sanders* v. *King*. The cases of *Roche* v. *Morgell* (*e*) (1809), *Jones* v. *Davis* (*f*) (1809), *Chamberlain* v. *Agar* (*g*) (1813), *Crow* v. *Tyrell* (*h*) (1817), respectively decided before *Sanders* v. *King;* and the cases of *Arnold* v. *Heaford* (*i*) (1825), and *Hardman* v. *Ellames* (*k*) (1834), decided *since* that case, are authorities the other way. The judgment of the Lord Chancellor (Brougham) in the last case supports the proposition for which the writer here contends, namely, that it is not *necessary*—in order to entitle a plaintiff to particular discovery—that a fact should be charged in any particular form of words, where the fact is in its *nature* such as to make it proper that an answer should be given. "The cases (says Lord Brougham) of *Sanders* v. *King* and *Thring* v. *Edgar*, decided by the Master of the Rolls upon similar principles, do not appear to me in the least inconsistent with the present determination. In the former, it was held that when, besides setting forth his title, the plain-

(*e*) 2 Scho. & Lef. 721.
(*f*) 16 Ves. 262.
(*g*) 2 Ves. & Bea. 259.
(*h*) 2 Madd. 397.
(*i*) 1 M'Cl. & You. 330.
(*k*) 2 Myl. & K. 732.

tiff alleges circumstances *as evidence* of that title, a plea negativing the title does not protect the party from answering as to those circumstances; being nearly the doctrine laid down in two of the cases which I have cited before; and in *Thring* v. *Edgar* it was held, that when the defendant, in the answer accompanying a negative plea, goes beyond denying the facts specially charged *as evidence* of the plaintiff's title, he overrules his plea. But it is not at all inconsistent with this (*l*), to hold that where facts have been charged *inconsistent with the plea itself,* negativing that negative plea by anticipation as it were, and thus supporting the plaintiff's title, the traversing those averments, *and thereby supporting the plea, is safe, and does not overrule the plea.* This would be sufficient to shew that *Thring* v. *Edgar* is consistent with the present decision; *but the other cases which I have referred to shew not only that so answering does not overrule the plea, but that without such denials the plea itself is bad. Indeed, strictly speaking, the one proposition* is involved in the other (*m*)." The late case of *Denys* v. *Locock* (*n*) supports the same conclusion. The first of the three propositions above mentioned cannot, then, it is conceived, be sustained by *authority* alone.

216. Upon *principle* it seems equally difficult to sustain it. Upon principle—a plaintiff has a right to a discovery of all such material facts as, upon the *ar-*

(*l*) Query.

(*m*) 2 Myl. & K. 744.

(*n*) 3 Myl. & Cr. 205.

gument or *hearing of the plea* would be material for the purposes of such argument or hearing. The cases referred to under the second proposition (*o*) determine this as a general rule; and the cases of *Jones* v. *Davis*, *Chamberlain* v. *Agar*, *Crow* v. *Tyrrell*, and *Hardman* v. *Ellames*, are merely *examples* of the application of that general rule to specific cases. The language of the judgment in *Jones* v. *Davis* appears to be decisive upon the point. "In this case my opinion is, (says Lord Eldon), that the plea is bad, since, it does not contain a negation of the alleged accounts having been kept by the company. If the accounts had been kept by the company, that would have been evidence before a jury of such an agreement as that stated in the bill; and *therefore* it was not sufficient for the defendant merely to deny the agreement having been entered into" (*p*).

217. As a rule of *convenience* merely—the writer with confidence submits that the point under consideration cannot be defended. The argument of *convenience* must be, that, by imposing upon the plaintiff an obligation to point out the parts of the bill he desires to have answered, the defendant is relieved from the difficulty of determining what discovery he *must*, and what discovery he *may*, give without injury to his plea. It is obvious, however, that this end would not be gained by compelling a plaintiff thus to mark (as

(*o*) Supra, pl. 99, 103, 104, 109.

(*p*) Supra, pl. 105.

with a badge) the questions he required the defendant to answer. The object of the plaintiff always is to get discovery *at all events,* and the technicalities of equity pleadings are among his available means of exacting this discovery. The consequence of a rule which denied to the plaintiff a right to discovery of any allegation upon which he had not put *the regulation mark,* would be,—that he would put the required mark upon *every* allegation in the bill. This (which the writer *knows* to have been a course adopted in practice) would at once reduce the defendant to his original difficulty —an observation which destroys the rule as one of convenience.

218. The *second* of the three points ruled by the Vice-Chancellor, if carried to its literal extent, would amount to this—that a plaintiff might acquire a right to discovery merely by using a particular form of words, whether the fact were one which he was entitled to have answered or not—a meaning which perhaps ought not to be attributed to the expressions of the learned judge. If his words are to be understood of allegations *material* to the issue in the cause, the proposition they involve cannot be objected to; but they *express* a great deal more (*p*).

219. The *third* point remaining to be noticed is one of difficulty and importance. The Vice-Chancellor,

(*p*) Hare, 36, 40.

in ruling this point, proceeded upon the admitted rule, that an answer overrules a plea where both cover the same thing. Now, what is the true scope and meaning of this rule? The rule is thus laid down in *Clanrickard* v. *Burk* (*q*) (1717): "It is a rule in equity that the answer overrules the plea where defendant answers the same things he insists upon in his plea that he ought not to answer to." The same rule is thus laid down by Lord Redesdale (*r*): "An answer can only overrule a plea, where it applies to matter which the defendant by his plea declines to answer; demanding the judgment of the Court, whether by reason of the matter stated in the plea he ought to be compelled to answer so much of the bill." In the Forum Romanum (*s*) the rule is thus expressed: "If (says Chief Baron Gilbert) you answer to any thing to which you *may* plead, you overrule your plea; for your plea is only why you should not contest and answer; so that, if you answer, your plea is waived." And again, in the same page: "But all these pleas with us are to be put in *ante litem contestatam*, because they are pleas only why you should not answer; and therefore, if you answer to any thing to which you may plead, you overrule your plea; for your plea is only why you should not contest and answer, so that, if you answer, your plea is waived; but you may answer any thing which is not charged in the bill, *in subsidium* of

(*q*) 4 Vin. Abr. 442. W. a. 1. (*r*) Redes. Plead. 240, n.
(*s*) For. Rom. 58.

your plea, *as you may deny notice in your answer, which you deny also in your plea, because that is not putting any thing in issue which you would cover by your plea from being put in issue; but it is adding by way of answer that which will support your plea, and not an answer to a charge in the bill which by your plea you would decline.*" Mr. Beames, in his valuable book upon pleas in equity, refers to numerous cases (*t*), affirming the proposition in support of which he cites them, — that, "if an answer extend to any part of the bill covered by the plea, it will be fatal to the plea, on argument." The rule, then, in its strictest sense, cannot be carried beyond this—that a defendant must not answer that which his plea covers, for *that* by the rules of pleading he is understood to decline answering (*u*). The rule of pleading thus defined raises a distinct question of law, namely, what is meant by the expression "discovery *covered* by a plea?" The meaning of this, in one sense, must have reference to a case in which the defendant, having insisted that he was not bound to give specified discovery, has *de facto* given the very discovery which he had in terms insisted he was not bound to give,—as, where a defendant, having pleaded to all the discovery sought by the bill, has answered part of it, — and this, it is conceived, is the true meaning and limit of the expression, "discovery *covered*

(*t*) Beames on Pleas, 37, n. (4). (*u*) Hare, 30, 36.

by a plea." In the late case of *Denys* v. *Locock* (*x*), the plaintiff sought to establish a trust against one of the defendants, upon the ground of a promise alleged to have been made by that defendant to the plaintiff's mother, provided she would execute a codicil under which the defendant took large benefits. The defendant pleaded no promise, and accompanied the plea with an answer to parts of the bill relating to the alleged promise. The plea was, in form, precisely similar to that in *Thring* v. *Edgar* (*y*), and did not purport to cover those parts of the bill which the defendant answered. The Lord Chancellor overruled the plea upon a ground which is inapplicable to the present subject, but in observing upon that part of the judgment in *Thring* v. *Edgar*, in which Sir J. Leach considered the plea as overruled by the answer, his Lordship said: "Now, the answer cannot, properly speaking, be said to overrule the plea, *when the plea and answer are to distinct and several matters* (*z*)." This observation is directly in point, and was applied to an argument of counsel by which the judgment of Sir J. Leach, in *Thring* v. *Edgar*, was impeached. This, however, was not the sense in which Sir John Leach must have understood the expression, "discovery covered by a plea;" for, in *Thring* v. *Edgar*, as in *Denys* v. *Locock*, the answer by which the

(*x*) 3 Myl. & Cr. 205, (July, 1837).
(*y*) Supra, pl. 210. (*z*) 3 Myl. & Cr. 235.

plea was held to be vitiated, applied to matter *expressly excepted* out of the operation of the plea; and, therefore, not in terms covered by it. The sense in which Sir John Leach must have understood the expression,—and which the passage cited from the Forum Romanum may possibly be supposed to point at,—may thus be stated (*a*):—rules of law, unconnected with rules of pleading, determine *a priori* what discovery a plaintiff is entitled to (*b*):—if a plaintiff seeks to obtain discovery to which, *by those rules*, he is not entitled, the defendant may submit to the Court the reasons upon which he founds his right to be protected against the discovery sought:—a plea is one of the appointed modes of making this submission; and the question which every plea to discovery in substance raises is—whether the matter of the plea is or is

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(*a*) These observations suggest a distinction as to a plea being a cover *in fact*—or a cover *in law*. In deference to the opinion of the Vice-Chancellor, the author has conceded and reasoned upon the supposition that this distinction is founded. He is not, however, prepared to admit that there is any authority to support the *latter* species of cover, except *Thring* v. *Edgar* and *James* v. *Sadgrove*, which are directly opposed by the opinion of the Lord Chancellor in the case of *Denys* v. *Locock*, and other authorities cited in the text. In a late case, not reported, *Costa* v. *Albertazzi*, it was said, in argument of a demurrer, that a defendant was bound to refuse an answer to all which his demurrer *might* have covered; for that, if a different practice were admitted, the answer would tender a number of immaterial issues. The answer to this is, that it proves too much, for the defendant may give *all* the discovery which the bill seeks, and yet demur with effect to the relief.

(*b*) Prop. 1.

not a reason in law why the plaintiff should not have that discovery which he seeks. Whatever discovery the plea would, on the part of the defendants, be a reason in law for not giving—*that* discovery the plea may be said in law to *cover*. Confining the observations which follow to those parts of the bill which the plea *thus* covers, the strictest interpretation of which the rule in question is susceptible is this—that, whatever the defendant (who pleads) *may*,—he *must*,—abstain from answering, or waive the benefit of his plea to discovery altogether; and this appears to have been the opinion of Sir J. Leach, as well in *Thring* v. *Edgar* as in *James* v. *Sadgrove* (*c*). Further than this the rule of pleading referred to cannot possibly be extended. There is no authority—so far as the author has been able to discover—for holding that a plea is vitiated by an answer merely, irrespective of the matter to which such answer may apply. The rule is not that *any* answer overrules a plea, but that an answer to *that* which the plea covers, overrules it. The admissibility of an answer *in subsidium* of a plea (*d*), excludes the argument which would carry the rule beyond this. It must, therefore, in a given case, be determined *what* the plea covers, before the effect of the answer upon it can be tried. If the bill contains allegations, which, if uncontroverted, would invalidate the plea, these (as already shewn) the defendant *must* answer; and, in the absence of authority to the contrary, it seems irresistibly to follow, that a

(*c*) 1 S. & S. 4. (*d*) Infra, pl. 221.

plea can never be hurt by discovery which relates exclusively to *the matter of the plea itself*. *That* discovery the plea can never cover—unless, indeed, the plea *in terms* purports to cover it; which, however, is not the case here supposed.

220. Now, to apply this to the cases under consideration. What was the issue which the plea raised in *Thring* v. *Edgar?* Debt or no debt. What was the discovery which this plea (if true) was a *reason in law* for not giving? The accounts of the testator's estate. But not the question whether the debt was due or not. *That* was the very question to be tried. How, then, could an answer *to a part of the bill not sought to be covered by the plea, and confined to the question which the plea itself raised,* be an answer to that which the defendant by his plea declined to answer? Suppose the bill in *Thring* v. *Edgar* had alleged special circumstances as evidence of the truth of the plaintiff's allegation of debt. These special circumstances *must* have been answered. Can it be argued that the defendant would, in that case, have overruled his plea, because, in addition to the *requisite* answer to the special circumstances, he answered the general allegation of debt also? If not—and the answer must, it is conceived, be in the negative—why should an answer to the general allegation have invalidated the plea, because it stood alone, i. e. without special allegations to support it? What makes the decision in *Thring* v. *Edgar* the more remarkable, is, that the answer which was held to over-

rule the plea—so far from giving discovery which the plea covered, either in fact or in law,—was, in effect, a mere repetition of the plea itself. The answer gave not a particle of discovery beyond what was given by the plea itself (*e*). It might, indeed, admit of a question, whether, according to the opinion of Lord Hardwicke in the case of *Salkeld* v. *Science*, before referred to (*f*), it was not (in strictness) *necessary* to except the matter in question out of the plea (*g*).

221. The author presumes to think that the point under immediate consideration would not have been so ruled by the Vice-Chancellor, even according to his own interpretation of the expression, "discovery covered by a plea" (*h*), had his attention at the moment been fully alive to the essential distinction between negative pleas and pleas which require the support of an answer, (which in principle are the same as negative pleas), on the one hand, and pure affirmative pleas, on the other. These last being founded entirely upon new matter *dehors* the bill, the plea contradicts nothing in the bill, but admits the whole bill to be true, and, therefore, covers all the discovery. But, where the bill is so framed that the defence must involve

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(*e*) This, in effect, is making the plea cover itself. See in confirmation of the text an important extract from the For. Rom. Supra, pages 147, 148.

(*f*) Supra, pl. 207.

(*g*) What the pleader must disclose.—Hare, 94.

(*h*) But see supra, pl. 219, n. (*a*).

a *negation*, instead of an *admission*, of the whole, or part of the bill, there the test to be applied in determining whether an answer overrules a plea or not, must be derived wholly from the *nature* of the allegation answered. The rule *so* understood and *so* applied to negative pleas, and to pleas which require the support of an answer, is assimilated to the rule which in the case of pure affirmative pleas permits an answer *in subsidium* (*i*), without prejudice to its validity. Lord Redesdale (in speaking of an answer *in subsidium*) says: "By such an answer, nothing is put in issue *covered by the plea from being put in issue*, and the answer can only be used to support or disprove the plea. But, if a plea is coupled with an answer to any part of the bill covered by the plea, and which, consequently, the defendant by the plea declines to answer, the plea will, upon argument, be overruled (*k*)." These observations are applied by Lord Redesdale to a pure plea bringing forward new matter not contradicting any thing in the bill. But, *mutatis mutandis*, the observations apply in principle, though inapplicable in terms, to the point now contended for.

222. If the preceding observations should militate against the reader's preconceived notions of the strictness and technicality of pleas in equity, he is reminded, that it is not by rules of pleading merely that

(*i*) Redes. Plead. 299; For. Rom. 58.
(*k*) Redes. Plead. 299.

the question,—What a plea covers?—is to be determined. These rules are inapplicable to that question. The law or the fact *a priori* determines *that;* and the rules of pleading observe and give effect to what the law has so determined.

223. How, then, it may be asked, is a plea to be framed in a case in which the plea does not exclude all right to discovery? A full answer to this question would involve an investigation of the general rules of pleading which the writer is compelled to decline. The following suggestions are all that he ventures now to offer upon the subject. The defendant must begin by *integrating* (as into a separate record) those parts of the bill the answers to which are *material* to the trial of the plea—for these must not at all events be covered by the plea. If a given charge in the bill—being relevant and material to the trial of the plea—be also relevant and material to those parts of the bill which the plea should cover, such charge must, for the purposes of the plea, be itself divided, viz. *so far as* it relates to the matter of the plea, &c. (*l*)—and to that extent the charge must *not* be covered by the plea. If a given charge, relating exclusively to the matter of the plea, be *not material*

(*l*) e. g. a bill for an account running over a period of ten years, and a plea of a stated account covering the first five of those years—and charges in the bill applicable in terms to the *whole* period.

for the trial of the plea, the defendant may (it is conceived) safely exercise an option about answering it or not. By answering it, he will not, it is conceived, overrule his plea, because he will not thereby give any discovery of matter which by his plea he declines to answer. And, by refusing to answer such a charge, he will not (it is conceived) affect the validity of his plea, because, by the supposition, the discovery is not *material*. This last suggestion is consistent with the principles contended for in this proposition, and appears to be sanctioned by the opinion of Sir Thomas Plumer in *Drew* v. *Drew* (*m*). If it be doubtful whether a given charge *must* be answered or *may* be covered by the plea, and the answer to such charge be one which the defendant do not object to give, the safer course is to leave it both *unanswered and uncovered* until the argument of the plea. The Court can, without difficulty, allow a defendant to amend his plea; but there is great difficulty in allowing him to *withdraw an answer*. This, indeed, was done by Lord Lyndhurst, C. B., in the late case of *Tarlton* v. *Hornby*, in the Exchequer, upon the (supposed) authority of the case of *Stone* v. *Yea* (*n*), but the authority of this latter case, *for that purpose*, was denied by the Lords Commissioners in the late case of *Angell* v. *Westcombe* (*o*). If the question be one which it is an object with the defendant *not* to

(*m*) 2 Ves. & B. 159.

(*n*) 1 Jacob, 426.

(*o*) At Westminster, Trin. Term, 1835.

answer, he must of course, at all hazards, cover it by his plea. Having thus determined what the plea shall leave uncovered, and (as a consequence of this) what it shall purport to cover—the defendant must actually accompany the plea with an answer as to all those uncovered parts of the bill, the answer to which is material to the argument of the plea. Whether he need further, before the argument, answer charges in the bill which affect only the truth of the plea (such parts being uncovered by the plea) is considered hereafter (*p*).

224. "*Material* (*q*)." The word "*material*" is relative,—material with reference to the purpose for which discovery is given, i. e. material to the "*plaintiff's case.*" Now, the "*plaintiff's case*" (in the sense in which the words are here used) is that case upon which the parties are about to go to trial. It follows, then, that discovery, which is not material to the proof of that case, is not within the scope of this proposition, however it may otherwise be *connected* with the subject of the suit. This, (it may be observed), if established, will go a long way towards

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(*p*) Infra, *Foley* v. *Hill*, pl. 251.

(*q*) Hare, 8. Mr. Hare, in one part of his work, appears to consider *relevancy* and *materiality* as identical—157, 188. But see Id. 196.

proving that the *right* of a plaintiff to discovery is *restricted* to cases falling within the terms of this proposition; subject only to such (if any) qualification as the reader may consider to be introduced by a point noticed in the observations upon the third proposition (*r*).

225. Lord Redesdale (*s*), in speaking of the grounds of objection to discovery, says, "As the object of the Court, in compelling a discovery, is either to enable itself or some other Court to decide on matters in dispute between the parties, the discovery sought must be *material* either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted (*t*).

226. Again, Lord Redesdale, in stating the general right of a plaintiff to a discovery of the matters alleged in the bill, says,—"provided they are necessary to ascertain facts *material* to the merits *of his case, and to enable him to obtain a decree* (*u*)." Obvious and necessary as this condition may appear, it was at one time a matter of doubt and controversy *in Chancery* (*x*),

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(*r*) Infra, pl. 345.

(*s*) Redes. Plead. 191.

(*t*) Hare, 110; discovery after verdict, Id. 112; after judgment in aid of execution, Id. 114.

(*u*) Redes. Plead. 306. And see *Francis* v. *Wigzell*, 1 Madd. 258.

(*x*) In the Court of Exchequer, where exceptions come before the Court in the first instance, without an intermediate reference

whether a Master, in deciding upon the sufficiency of an answer, could enter into the question of materiality. This point is now set at rest by Lord Lyndhurst's orders of 1828 (*y*).

227. The same learned writer, in speaking of bills having for their object the possession of title deeds (*z*), says—"If the evidence of his (the plaintiff's) title to it (the property to which the possession of the deeds is incident) is in his own power, *or does not depend on the production* of the deeds or writings of which he prays the delivery, he must establish his title to the property at law, before he can come into a Court of equity for delivery of the deeds or writings (*a*)."

228. In *Shaftesbury* v. *Arrowsmith* (*b*), (1798), the plaintiff claimed as heir-at-law and customary heir, and also as heir of the body, of Sir John Webb, who had devised his estates to the defendant and another in trust. The bill stated that the plaintiff was ignorant whether she was or was not entitled to any and which of the estates devised; that the defendants were in possession of the estates; that there were several

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to the Master, the materiality of a question was always open upon the argument of exceptions to the answer.

(*y*) Order 74.

(*z*) Redes. Plead. p. 54.

(*a*) The assertion contained in this passage, that a plaintiff's title must be first established *at law*, is foreign to the purpose for which the passage is cited. The accuracy of the assertion, with reference to the present practice of the Courts, may be doubted.

(*b*) 4 Ves. 66.

settlements, and that it was impossible for the heir to know her title without an inspection of the deeds. The bill prayed a discovery of such deeds and writings, relating to the estates, as were in the possession of the defendants, and that such of the same deeds and writings as related to such of the estates to which the plaintiff should appear entitled, either as heir-at-law, customary heir, or heir of the body, might be decreed to be delivered up to the plaintiff. The defendants, by way of schedule to the answer, set forth an abstract of several settlements *in their possession,* and a motion for the production of these documents was made. The Lord Chancellor, so far as the plaintiff's claim for production was founded upon his title as heir-at-law or customary heir, refused the motion. "The title of the plaintiff (said the Lord Chancellor) is a plain one, and is a legal title. *All the family deeds together would not make his title better or worse. If he cannot set aside the will, he has nothing to do with the deeds.*" "A will is no answer to an heir in tail: a will established is an answer to an heir-at-law. *An heir in tail has,* beyond the general right, *such an interest in the deed creating the entail, that the Court, as against the person holding back that deed, would compel the production of it.*" "Permitting *a general sweeping survey* into all the deeds of the family *would be attended with very great danger and mischief;* and where the person claims as heir of the body, it has been very properly stated, that it may shew a title in another person, if the entail is not well barred. It may set up

a title, not for the benefit of Lady Shaftesbury, but to the injury of the devisees: *indulging a speculation to the prejudice of parties, whose interest this Court has no right to invade.*" "The defendant Arrowsmith must give himself the trouble of inspecting the deeds, and *answering upon oath whether they create an entail or not.*" "*The plaintiff has a right to an answer to this question,—are there any deeds that contain a limitation in tail general*(*c*)*?*"

229. In *Cardale* v. *Watkins* (*d*), (1820), the Vice-Chancellor said, "The purpose for which discovery is given, is the aid of some proceeding pending or intended, and not to satisfy curiosity; and, *if such purpose be not stated in the bill*, a demurrer will lie." This case clearly establishes, that the plaintiff is bound to inform the Court, what the purpose is for which the discovery is sought, in order that the Court may judge of its materiality.

230. In *Lingen* v. *Simpson* (*e*), (1821), the bill was filed, for the purpose of having it determined that the plaintiff was entitled to a copy of a certain reference book for the purposes of his trade. This was the

(*c*) Note.—It appears from the judgment in this case, that the production of deeds creating estates tail was not opposed. The case, therefore, only decided that the plaintiff *as heir general* or *customary heir* was not entitled to see the deeds.

(*d*) 5 Madd. 18.

(*e*) 6 Madd. 290. And see *Shaw* v. *Shaw*, 12 Price, 163, and the cases there collected.

whole scope and object of the bill. The answer admitted the book to be in the defendant's custody, and the plaintiff moved that the defendant might be ordered to leave the book with his clerk in court, with liberty for the plaintiff, his clerks or agents, to inspect or refer to the same, for the purposes of his trade. The Vice-Chancellor refused the motion, stating, that the Court made *interlocutory orders* for production of documents only upon two principles: security pending litigation; and discovery *for the purposes of suit;* and that the application in the cause sought an anticipated decree.

231. In *Guppy* v. *Few* (*f*), Few, who was the assignee of a certain patent for refining sugar, brought an action against Guppy, for infringing his patent. Guppy filed a bill of discovery against Few, in which the history of the patent was stated from the beginning, suggesting that Few was assignee of the patent upon trust for persons *exceeding five in number*, and that licenses (in the nature of assignments) to use the patent had been granted, whereby the patent had become vested in *more than five persons;* and that, by those means, the patent had become void. The bill then contained the usual charge about books, &c. The defendant by his answer offered to produce

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(*f*) MS. Linc. Inn Hall, 18 March, 1835. Approved by the Lord Chancellor, S. C., 1 Myl. & Cr. 504.

all licenses and assignments. Upon a motion to produce, &c., the Lord Chancellor held, that the defendant was bound to produce all documents which related to the assignments and licenses, but refused to make a more extensive order, as the alleged grounds of invalidity were confined to that, and the rest of the documents were therefore irrelevant.

232. In *Stewart* v. *Lord Nugent* (*g*) the defendant had brought his action against the plaintiff for a libel. Stewart pleaded two pleas: 1st, not guilty; and 2ndly, a plea of justification. Lord Nugent filed a replication to the first plea and a special demurrer to the second. After the pleas at law were filed, Stewart filed his bill for discovery, and a commission to prove his second plea at law. To this bill Lord Nugent pleaded matter to shew that the discovery could not be material, because the truth of the second plea at law could never be tried, or inquired into. The Master of the Rolls allowed the plea.

233. The cases of *Wallis* v. *The Duke of Portland* (*h*); *Barber* v. *Hunter* (*i*); *Jones* v. *Jones* (*k*); *Francis* v. *Wigzell* (*l*); *Barron* v. *Grillard* (*m*); *Law* v. *Hunter* (*n*); *M'Gregor* v. *The East India Company* (*o*); and the judgments in *Tomlinson* v. *Lymer* (*p*), and in *Mant* v. *Scott* (*q*),

(*g*) 1 Keen, 201.
(*h*) 3 Ves. jun. 494.
(*i*) Cited 3 Mer. 173.
(*k*) 3 Mer. 161.
(*l*) 1 Madd. 258.
(*m*) 3 Ves. & B. 165.
(*n*) 1 Russell, 100.
(*o*) 2 Sim. 452.
(*p*) 2 Sim. 489.
(*q*) 3 Price, 493.

may also be referred to upon the point of materiality.

234. The principle of the decisions which have just been cited, appears to be opposed by the recent decision in *The Attorney-General* v. *Ellison* (*r*). That case, with the grounds upon which the decision is objected to, will be found in a later page (*s*).

235. A trustee or other party interested in part only, cannot (it is conceived) be compelled to answer more of the bill than relates to the case made against himself (*t*). The frame of a bill in equity, combining numerous parties against whom separate relief is prayed, does not affect the proposition, that the suit is several and distinct against each. Each party, therefore, is in strictness a *defendant*—so far as the suit is a suit against him, —and a *witness* (*u*), as to the residue of the bill. So far as the bill prays relief against him, it must be met by a *defence* and *examination*, applicable to that part of the case. But, so far as it applies to *other* parties only, the allegations in the bill are *immaterial*.

236. The point under consideration is further illus-

(*r*) 4 Sim. 238.

(*s*) Infra, pl. 303.

(*t*) *Agar* v. *The Regent's Canal Co.*, Cooper, 212, 215.

(*u*) That a mere witness need not answer, see Hare 65, 68; S. P. *Irving* v. *Thompson*, Vice-Chancellor's Court, 25th July, 1839; where witness incompetent, Id. 70; where the examination at law would be imperfect or ineffectual, Id. 73; interested party withholding evidence, though otherwise a mere witness, Id. 76; defendant a bankrupt, Id. 79; officer or member of a corporation, Id. 83.

trated by the cases, in which a plaintiff, having, by reading the defendant's answer, entitled himself to an order for the production of documents appearing to be *in part* material to his case,—the defendant is held entitled to have the order for production qualified, by giving him liberty to seal up, or otherwise conceal such parts of the documents in question, as he can upon oath declare to be irrelevant to the matters in question (*v*). A privilege which (as will hereafter be seen) extends to other cases also (*w*).

237. Further authorities might be cited, but the above may for the present be considered sufficient to illustrate the bearings of a point, which—as a general proposition—does not admit of controversy.

238. In determining whether *particular* discovery is material or not, the Court will exercise a discretion in refusing to enforce it, where it is *remote in its bearings* upon the real point in issue, and would be an oppressive inquisition. Thus— 1895. 1 Ch. 340.

239. In *Dos Santos* v. *Frietas* (*x*), a creditor's bill was filed against an executor. The bill charged the defendant with mixing the testator's money with his own, and thereby increasing the floating balance at his bankers', and that he had, by these means, made con-

(*v*) *Gerard* v. *Penswick*, 1 Swans. 533.

(*w*) *Jones* v. *Powell*, 1 Swans. 535, n. (*b*).

(*x*) MS. (R. T. K.) In the Exchequer, 5th Feb. 1829. Before Ch. B. Alexander.

siderable profits, for which the bill charged he ought to account to the testator's estate. The bill (after other charges upon which the interrogatories were founded) charged, that the truth of the above would appear, if the defendant were to set forth (among other things) the matters included in the demurrer after mentioned. The demurrer was as follows: "This defendant by protestation, &c., as to so much of the said bill as requires defendant to set forth the balance either for or against him at the end of every month since the death of the said L. G. Da Costa, on defendant's accounts with his bankers,—and also requires defendant to set forth, whether defendant had on the 19th May, 1828, and whether or not on the 7th July, 1828, and whether or not on the 25th July, 1828, and whether or not on any and which of such days respectively, a balance in his favour at his bankers' amounting to £2,000, and, if yea, how does the defendant make the same appear—And also, as requires defendant to set forth the amount of the balance at his bankers' on each and every of the said last-mentioned dates respectively—And also, as requires defendant to set forth, whether defendant does not owe large and what, or some and what, sums of money—And whether he is not under acceptances or in some and what manner liable for the payment of sums to a very great or some and what amount, or how otherwise—And whether it is not true, that the defendant's property is not great, and what in particular is the amount of the defendant's property in value—And also, as requires defendant to set forth, whether defendant hath now or had not lately and

when last in his possession, custody, or power, or in the possession or power of his agents or agent, divers or some and what books of account or book of account, bankers' books or book, cash books or book, memorandum books or book, letter books or book, diaries or diary, and other and what books or book, accounts or account, documents or document, vouchers or voucher, letters or letter, copies or copy, bills of exchange or bill of exchange, receipts or receipt, memoranda or memorandum, and other papers and writings concerning, referring to, connected with, mentioning, or in some and what manner relating to, or shewing, the truth of all or some of the matters in the said bill mentioned (so far as such particulars relate to the matter hereby demurred to or any of them)—And also, as requires defendant to set forth a full and true list or schedule of all such books, accounts, documents, letters, vouchers, copies, memoranda, bills, receipts, papers, and writings (so far as the same relate to the matters hereby demurred to or any of them): Defendant doth demur, and for cause of demurrer sheweth, that the said complainant has not, in or by his said bill, shewn any right or title to a discovery of the matters hereinbefore demurred to or any of them. Wherefore, &c." The answer stated who were the defendant's bankers. Mr. Kindersley appeared in support of the demurrer; Mr. Russell, for the bill, insisted that a defendant cannot demur to part of the discovery only, and that the answer overruled the demurrer, and that the questions were such as ought to be answered. Alexander, C. B.,

allowed the demurrer; observing that if the Court were to enforce this sort of inquisition into a man's private affairs and business, the sooner its doors were closed the better, for it would be a scourge to the country.

240. The judgment in *Francis* v. *Wigzell* (*y*) is in principle to the same effect.

241. Again, in *Small* v. *Attwood* (*z*), the bill sought to rescind a contract for the sale to the plaintiffs of an estate belonging to the defendant Attwood, upon the ground of fraud. Part of the purchase money had been paid, including a sum of £200,000, which was paid in notes of the Bank of England. These identical notes were invested by Attwood in the purchase of a sum of Consols unmixed with any other funds. By the decree of the Court, the contract was rescinded. After this decree, the plaintiffs discovered the fact of the above-mentioned investment, and succeeded in tracing the notes into it. Upon this, a supplemental bill was filed, claiming the stock as the plaintiffs' property, and praying an injunction to restrain the transfer of it, in the meantime. The injunction was granted (*a*) upon the general principle, that by reason of the fraud the property in the notes was not altered, and that the plaintiffs might follow them into the investment in question. The plaintiffs, independently of this general ground, had sought to strengthen their case *for the injunction*, by charging to the effect, that Attwood was

(*y*) 1 Madd. 260. (*z*) Younge, 407.
(*a*) Younge, 507.

insolvent, and had no available property, or property (if any) to a small amount only, exclusive of the stock in question, and that, if the stock should be transferred, the plaintiffs would lose their remedy. The interrogatories founded upon this charge required Attwood to set forth what property he had, together with its particulars and other details. Attwood referred this part of the bill for impertinence. The Master was of opinion, that it was not impertinent; but, Lord Lyndhurst, on appeal from the Master's judgment, held it to be impertinent (*b*).

242. The late case of *Janson* v. *Solarte* (*c*) may also be referred to as evidencing an unwillingness in the Court to sanction an inquisitorial discovery.

243. The following practical suggestion—connected with the point immediately under consideration—may, perhaps, be considered not undeserving the attention of the reader. The word "*material*," as before observed, is relative—*exclusively* relative—to the *case* made, and the *relief prayed* by the bill. Now, the argument upon the materiality of a given question arises, for the most part, upon exceptions to the answer in the ordinary way; or, upon motion for the production of documents which (as will hereafter be observed) is a proceeding analogous to exceptions. In the stage of the cause in which these questions arise, the *case made*, and the *relief prayed* by the bill, are the *only*

(*b*) Not reported. (*c*) 2 Younge & Coll. 127. (1837).

tests by reference to which the question of materiality can be tried by the Court (*c*). The necessity of stating with accuracy the *case* upon which the plaintiff founds his title to relief, need not be enforced. But, the reader may, perhaps, consider, *with reference to the point now under consideration*, that a careful attention to the prayer for *specific* relief (*c*), may—upon the argument of exceptions, or upon a motion for the production of documents,—be of considerable importance to the suitor, notwithstanding the encomiums bestowed, by high authority, upon the prayer *for general relief* alone.

244. "*The plaintiff's case.*" This expression has been already observed upon (*d*). It may be sufficient to observe, without attempting a precise definition of the cases to be comprehended under it, that the expression must, 1. *in one sense*, be considered as describing a case relevant to the point or points in the cause, which, by the general rules of pleading, is or are *about to go to trial*—as distinguished from the other (if any) point or points in the cause, the trial of which may, by those rules, be (at least) suspended; and, 2. *in another sense*, as describing a case (positive or negative) made by the bill (*e*),—either founding the plaintiff's title—or, in opposition to that of the defendant—*as distinguished*

(*c*) *Saxton* v. *Davis*, 18 Ves. 80. "The prayer which is material in construing charges not direct, &c."

(*d*) Supra, pl. 91, et seq.

(*e*) Supra, pl. 94.

from a direct inquiry into the defendant's case. Upon the former term in the definition, a few observations may usefully be made in support of the general proposition that a plaintiff's right to discovery is confined to the question in the cause which is about to come on for trial.

245. Referring (*f*), with this view, to that class of cases, in which a plea to all the relief sought by a bill cannot be made a bar to *all* the discovery—a subdivision of the cases themselves ought, perhaps, to be made, with a view to a right understanding of some of the rules which apply to *pleas* in equity. This subdivision—though necessary *here*—was purposely avoided in the place in which the cases are stated at length—because *there* the object of the writer was to establish the general and indefeasible right of a plaintiff to discovery—a right which is unaffected by the distinction here adverted to.

246. Lord Redesdale, in speaking of a plea which requires an answer—as it is technically expressed—*to support it*, puts the following example:—"If a bill is brought to impeach a decree on the ground of fraud used in obtaining it, the decree may be pleaded in bar of the suit, with *averments* negativing the charges of fraud, *supported by an answer* fully denying them (*g*):"

(*f*) What follows is governed by the observation made in a former page,—that it belongs more properly to the science of pleading than to the subject of discovery.

(*g*) Redes. Plead. 239.

and, again, "If there is *any* charge in the bill which is an *equitable circumstance* in favour of the plaintiff's case against the matter pleaded; as, fraud, or notice of title; that charge must be denied *by way of answer* as well as by *averment* in the plea (*h*)."

247. Taking the case cited from Lord Redesdale as an illustration of that class of cases in which (technically speaking) an answer is requisite *to support* a plea, the characteristic of the class appears to be this—that the plaintiff *makes a case* by his bill, by which—admitting the defence to be *true in fact*—its validity in law is impeached (*i*). These cases are included *in*, but not co-extensive *with*, the aggregate of the cases in which a plea to *all* the relief sought by the bill cannot be made a bar to *all* the discovery. The distinction here contemplated is this:—in all the cases put by Lord Redesdale, the bill — anticipating the defence—is supposed to admit it to be true *in fact*, but to impeach its validity as an equitable defence, on account of some attendant circumstance—fraud, for example—which is charged in the bill; and the purpose of the discovery required, is, to enable the plaintiff to sustain this charge. Now, included in the general class under consideration, are cases of a class distinguishable from these, namely, cases in which the bill — anticipating the defence, as before — disputes its *truth;* and the object of the required dis-

(*h*) Redes. Plead. 298. (*i*) Hare, 30, 36.

covery is, to enable the plaintiff to try the *truth* of the plea.

248. And what, it may be asked, is the *practical* difference which this distinction leads to? The answer to this question depends upon the answer to these other preliminary questions, namely,—upon what occasion, and in what sense, is an answer said to *support* a plea?

249. The answer to the latter questions may, it is conceived, be correctly stated thus: To the validity of every plea three things are essential: 1. That it be good in form; 2. That it be good in substance; 3. That it be true in fact. The two first of these requisites are merely questions of law. The last is a question of fact. In the two first cases, therefore, there is an obvious and short mode of disposing of, or at least trying, the validity of a plea, — namely, by *assuming facts* for the purpose of trying the law to which the facts give rise. This, in practice, is effected by setting down the plea for argument; and, accordingly, when a plea is so set down, the Court (as the terms imply) is confined to a consideration *of the law* of the case only, as it arises upon a state of facts which, *for the purposes of the argument*, are assumed to be true. Lord Redesdale, in explaining the nature and use of averments in and of an answer in support of a plea, says: "Upon argument of a plea, every fact stated in the bill and not denied by answer in support of the plea, must be taken to be true (*k*)." Then, after explaining what averments and

(*k*) 2 Sch. & Lef. 727; Redes. Plead. 256, 271, 298.

what answers are necessary, he adds: "Without those averments and that answer, it (the plea) could not be good to any extent, because, without them, the bill must be taken for true." Now, in the case of an anomalous plea, like that under consideration, a general averment denying fraud, or notice, or other similar general charge, *might* be true in every sense; but it *might* be evasive, and is *necessarily equivocal.* It *might* be meant as a denial of all the special circumstances which constitute the fraud, notice, or other similar charge, or some of such circumstances; or it might be a denial only of the *conclusion of law* (fraud, notice, &c.) which the plaintiff relies upon *as a legal conclusion* from those circumstances (*l*). If the latter be the meaning of the averment, then—assuming the fraud, notice, &c., charged in the bill to be a legitimate conclusion from the special circumstances charged—the Court would be bound, if the facts were before it, to draw its own conclusion from them, and to decide that the defendant had the worst of the argument. The answer, then, to the questions proposed (upon what occasion, and in what sense, an answer is said to support a plea?) is this:—a Court of equity will not trust a party to draw his own conclusions *in law,* without knowing what the facts are upon which such conclusions are founded. The *argument* of the plea is, then, the *occasion* upon which the answer is necessary

(*l*) See *Jerrard* v. *Saunders*, supra, pl. 100.

to support the plea; and the answer supports it (if valid) by shewing, *upon that occasion,* that the premises are such as to warrant the conclusion which the plea insists upon.

250. In the example, then, put by Lord Redesdale, of a plea requiring an answer to support it, and in all analogous cases, it is obvious that the answer which supports the plea must *accompany* it, so as to be upon the file *at the time of the argument*—that being the occasion upon which it is to perform its office. This, however, is inapplicable to that class of cases in which the *truth,* and not the legal validity of the defence, is in issue. For, the *truth* of a plea cannot possibly come in question upon *argument* of the plea. If the answer were to *prove* the plea untrue, no decree could then be made, nor could the Court do more than tell the plaintiff to do that, which (as far as this point is concerned) must be his proper course in the first instance, namely, to set the plea down for *hearing,* and not for *argument.* In *such* cases then, the *argument* of the plea would (it is conceived) be unaffected by the *absence of an answer* to facts which related merely to the *truth* of the plea; provided the plea did not affect to cover the discovery as to those facts. This accords with the rule, that discovery is necessary only for the purposes of the case *first about to be tried,* for, the argument is the first trial to which a plea is subject. The distinction just pointed out has been thought worthy of suggestion, because cases may be put, in which a defendant would find his advantage in withholding particular discovery until the

validity of the plaintiff's case had been determined upon argument of the plea; although an order allowing the plea would not prevent the plaintiff from successfully excepting to the answer afterwards (*m*).

251. Since the first edition of this work was published, the case of *Foley* v. *Hill* (*n*) has been decided, and the author has been referred to that case as overruling his opinion expressed in the above passage. But (with deference) that case directly affirms and supports the author's conclusion in one of its branches, and leaves the other untouched. In that case, the plaintiff filed his bill, in the month of January 1838, against the defendants, his bankers, for an account. The bill alleged that the plaintiff had applied to the defendants for a statement of their receipts and payments, with a view to close the account, but that they had refused to come to an account with the plaintiff, upon the ground that no entries had been made to or on account of the plaintiff's account, within six years last past: and that no written acknowledgment of the existence of any such account, and no written promise to pay the balance thereof, had been signed by the defendants, or any member of their firm, since an accountable receipt therein mentioned to bear date in the month of April 1829, and that the claim was barred by the Statute of Limitations. The bill then contained a

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(*m*) See *Evans* v. *Richard*, 1 Swans. 7: *Walburn* v. *Ingilby*, 1 Myl. & K. 61.

(*n*) 3 Myl. & C. 475.

variety of special charges, which, if admitted to be true, shewed that the defendants had admitted a balance to be due from them to the plaintiff within six years. The defendants pleaded the Statute of Limitations to all the relief and discovery sought by the bill, except the special charges before mentioned. Some of these special charges (which it will be observed the plea did not cover) were answered, and some were not. The plea came on for argument before the Vice-Chancellor on the 5th of August, 1838, when his Honor overruled the plea upon the ground that the defendants had not fully answered the above special charges, which by the form of the plea they submitted or purported to answer. The defendants appealed from this judgment, and the Lord Chancellor affirmed it.

252. Of the soundness of this decision the author presumes to say, he entertains not the slightest doubt. His argument in the passages supposed to be affected by the decision is,—(as to one branch) that if a legal bar is sought to be displaced by a new and independent case made by the bill, the answer which is necessary to support the plea "*must accompany it* so as to be upon the file at the time of argument, that being the occasion upon which the answer is to perform its office;" and—(with respect to the other branch) that where the bill merely disputes the *truth* of the plea without raising any case to destroy its legal operation, there the plea should not be held bad *upon argument*, merely because charges affecting the *truth* only of the plea are not answered, provided the plea does not affect to cover them.

The reason suggested is, "For the *truth* of a plea cannot possibly come in question upon *argument* of the plea." It would be foreign to the question to inquire whether, in strict legal reasoning, it is correct to consider the Statute of Limitations as a legal bar, and to consider the acknowledgment of the debt within six years as a new and independent case, by which the effect of that legal bar is removed. It is sufficient for the purposes of the present argument to say, that the form of a plea in equity does so treat it, and the Lord Chancellor discusses the subject upon the assumption that he was trying the question, whether a legal bar was or was not destroyed by some new and independent case made by the bill. "Now (said his Lordship) the defendant cannot plead to the whole of such a bill as that; for the legal bar is not the only question to be tried. There are two questions: first, whether the legal bar would apply; and secondly, if it would, whether it is not defeated by the circumstances charged in the bill for the purpose of meeting it. Then the defendant puts in the plea, pleading his legal bar; and takes issue on that matter which is to deprive the legal bar of its effect."

253. That the answer which is to support a plea must accompany it at the argument of the plea, cannot admit of serious controversy. Upon the argument of a plea its sufficiency in *form* and *substance* are both in issue. Now the Statute of Limitations was no bar in the case of *Foley* v. *Hill*, if there had been any acknowledgment of the debt within six years. The

bill charged that there had been such acknowledgment, and this charge, if admitted, would shew the plea to be bad in substance. Upon argument of this plea, whatsoever the answer did not deny the plea admitted; the answer in *Foley* v. *Hill*, therefore, left in admission charges which destroyed the substance of the defence. The observation of the Lord Chancellor upon the point is unanswerable: "If facts, which, if true, would destroy the plea, are left untouched by the answer, I certainly never have supposed they could be safely so left. What you neither plead to nor answer, you admit. So that what the Court would be doing would be to say,—here is a very good defence, and here, at the same time, is a fact admitted which destroys it as a defence (*o*)." This accords precisely with the argument of the writer in one of the passages said to be contradicted by *Foley* v. *Hill*. "The argument of the plea is, then, the occasion upon which the answer is necessary to support the plea; and the answer supports it (if valid) by shewing *upon that occasion* that the premises are such as to warrant the conclusion which the plea insists upon (*p*)." "In the example, then, put by Lord Redesdale of a plea requiring an answer to support it, and in all analogous cases, it is obvious that the answer which supports the plea must *accompany* it, so as to be upon the file *at the time of the argument*, that being the occasion upon which it is to perform its office (*q*)."

(*o*) 3 Myl. & Cr. 479. (*p*) Supra, pl. 249.
(*q*) Supra, pl. 250.

254. The only question in a case like *Foley* v. *Hill* appears to be, whether it is correct to treat the acknowledgment of the debt within six years as a new and independent case destroying the legal operation of the Statute, or whether correct legal reasoning does not require that the acknowledgment should be considered as *falsifying* the plea—"non assumpsit infra sex annos." This, however, is not the aspect which a plea of the Statute assumes in equity.

255. With respect to allegations in a bill affecting the truth of the plea, the case suggested by the author in a former page was that of a defence, the *truth* of which was in dispute, *e. g.* a release executed. And his suggestion was, that as the truth or falsehood of a plea is not a point upon which the Court can act upon argument of the plea, the proper course for the plaintiff is to set the plea down for hearing and not for argument. It may be said, indeed, that a defence which is not true in fact cannot be good in substance. This cannot be denied, but the observation of the writer was not, that the Court would upon argument hold a plea good in form or substance, which then appeared to be untrue in fact, but would decline trying the plea at all, so soon as it appeared that the truth of the plea was the only point to be determined. The author's observation was: "If the answer were to prove the plea untrue, no decree could then be made; nor could the Court do more than tell the plaintiff to do that which (as far as this point is concerned) must be his proper course in the first instance, namely, to set the plea down for hearing

and not for argument (*r*)." The importance of the principle involved in this question must be the author's apology for so elaborate a defence of a position of his own.

256. Admitting the decision in *Foley* v. *Hill* to be correct, some observations arise upon the language of the judgment, as reported. The grounds of the Vice-Chancellor's judgment would apparently decide that the defendant, in order to support his plea, must put in an answer technically sufficient and full, and that the plea was technically bad, because the defendants had not in fact answered those charges which their record *purported to answer*. The practice of the Court does not, it is conceived, require that the answer should be technically sufficient. Lord Redesdale, in speaking of the answer necessary to support a plea, says: "In this case the answer must be full and clear, or it will not be effectual to support the plea; for the Court will intend the matters so charged against the pleader, unless they are fully and clearly denied. But if they are in substance fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered (*s*)." This is the correct exposition of the law,—the office of the answer being only to exclude intendments against the pleader. The technical sufficiency of an answer can only be tried

(*r*) Supra, pl. 250. (*s*) Redes. Plead. 298-9.

upon exceptions; and, accordingly, Lord Redesdale adds: "Though the Court, upon argument of the plea, may hold these charges sufficiently denied by the answer to exclude intendments against the pleader, yet if the plaintiff thinks the answer to any of them is evasive, he may except to the sufficiency of the answer in those points (*t*)." Nor would the plea (it is conceived) be bad upon the ground apparently implied in the Vice-Chancellor's judgment. In *Foley* v. *Hill*, the want of an answer vitiated the plea, because it left in admission that which, if uncontradicted, destroyed the plea, and not because the defendant had not answered that which he *purported to answer*. This is obviously the view taken of the subject by the Lord Chancellor.

257. In the judgment of the Lord Chancellor it is said, "It was argued that if the charge introduced for the purpose of meeting the plea had not been sufficiently answered, the proper course is to take exceptions to the answer. That, however, is not so. The plaintiff cannot except to the answer until after argument on the validity of the plea; for, by excepting to the answer, he would admit the validity of the plea (*u*)." The bearing of this observation upon the point before the Lord Chancellor is not altogether obvious. It can scarcely be possible to suggest a case, in which, for the purposes of the argument of a plea, the plaintiff can want an answer to that which the plea properly leaves

(*t*) Redes. Plead. 299. (*u*) 3 Myl. & Cr. 481.

uncovered. The absence of an answer gives to the plaintiff the full benefit of having his own statement of the case taken for true. The answer which is required to support a plea upon *argument* is not for the plaintiff's use, but for the defendant's protection.

258. The Lord Chancellor further observes: "The whole machinery of pleading in equity is somewhat cumbrous and not quite well reduced to principle (*v*)." This is undoubtedly true, and it is much to be lamented that, with a mind and information so admirably qualified for the office, the Lord Chancellor should ever omit an opportunity of reducing to principle that which, upon the decisions, is obscure. The observation of the Lord Chancellor quoted above, that the plaintiff "by excepting to the answer would admit the validity of the plea," requires a judicial exposition of its meaning. The original and proper explanation of the expression cannot, it is conceived, be carried further than this:—that the plaintiff, by excepting to the answer, would admit the validity of the plea *for the purpose of arguing the exceptions;* but not so as to preclude him from afterwards having the plea argued upon the question of its formal or legal sufficiency or truth. That the validity of the plea should be admitted for the purpose of the exceptions is of necessity; for the Master cannot try the plea, and must assume that it properly covers all which it purports to cover. "Where

(*v*) 3 Myl. & Cr. 482.

a defendant," says Lord Redesdale, "pleads or demurs to any *part* of the discovery sought by a bill and *answers likewise*, if the plaintiff takes exceptions to the answer before the plea or demurrer has been argued, he admits the plea or demurrer to be good; *for unless he admits it to be good, it is impossible to determine whether the answer is sufficient or not* (*r*)." Lord Redesdale immediately adds: "But if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the plea or demurrer is argued (*r*)." These two passages clearly shew, that it is only *for the purpose of arguing the exceptions*, that the validity of the plea is admitted by excepting to the answer. Why then, after the exceptions are disposed of, should not a plea to all the relief and to part only of the discovery be argued, as it clearly may be, where the plea does not cover any discovery? It must be admitted, however, that the authorities upon the subject require a judicial explanation, if the true interpretation of the rule referred to (*s*), is correctly stated above.

259. If the preceding observations upon the case of *Foley* v. *Hill* were admitted to be well founded, and if the

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(*r*) Redes. Plead. 317.

(*s*) 1st. As to pleas, see *Darnell* v. *Reyny*, 1 Vern. 344: *Baker* v. *Prichard*, 2 Atk. 390. But see note (*s*) 3 P. Williams, 326-7: *Pigot* v. *Stace*, 2 Dick. 496: *Sidney* v. *Perry*, 2 Dick. 602. 2nd. As to demurrers, see *Boyd* v. *Mills*, 13 Ves. 85: *London Assurance Company* v. *The East India Company*, 3 P. Williams, 326.

meaning of the expression, "discovery covered by a plea," insisted upon in a former page, were also admitted,—pleas in equity would, it is believed, be stripped of nearly all that cumbrous matter to which the Lord Chancellor alluded in *Foley* v. *Hill*.

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260. Assuming the sense in which an answer is said to support a plea, to have been correctly explained, the principle upon which the practice obtained of requiring an answer to support a plea has, apparently, been a subject of doubt amongst the most learned, particularly with reference to the consideration, that the answer—without the support of which the plea would be bad—is *ex concessis* no part of the *defence* (*t*). The origin of this practice is referred by Lord Redesdale to the departure from the ancient mode of pleading before adverted to. The use of *averments* in a plea is sufficiently clear. Suppose a bill for an account, suggesting that the defendant relied upon a release, (the execution of which the plaintiff admitted), and charging that the release was obtained by fraud: if, in this case, the bill had simply prayed an account without suggesting the release, or charging fraud, the plea of the release alone would be good. But, if, in the case supposed, the defendant were to plead the

(*t*) Infra, pl. 261.

release, and *nothing more,* the charge of fraud would be uncontradicted, and, according to the rule above quoted, would be taken for true (*x*), which would of course invalidate the defence. The proper use, then, of the averment, denying the charge of fraud, is, to exclude the intendment which, in the absence of such denial, would be made against the pleader (*y*). Indeed, without such averment, nothing would be put in issue by the plea; for, by the supposition, the bill admits the release, and the only question raised is,—not whether the release was executed,—but whether it was honestly obtained (*z*). There are cases also in which, without any express charge in the bill, intendments might be made against the pleader, if not excluded by suitable averments in the plea (*a*). The averments, therefore, are of the very substance of the plea. Such being the object and purpose of averments, it has not been held necessary that they should follow the language of the bill. They may be expressed in the most general terms, provided they are sufficient to put fully in issue the charges or intendments to which they are opposed (*b*).

261. But why—if such be the office of an averment

(*x*) Redes. Plead. 240, 300: *Roche* v. *Morgell*, 2 Sch. & Lef. 727.

(*y*) Redes. Plead. 268.

(*z*) Redes. Plead. 240.

(*a*) Redes. Plead. 293, 299.

(*b*) Redes. Plead. 244. And see *Jerrard* v. *Saunders*, 2 Ves. jun. 187: *Cork* v. *Wilcock*, 5 Madd. 328.

—require an answer also? If the plea be not a defence perfect in itself, how can any thing extrinsic (which the answer is) support it? If there were no averment in the plea, but the plea were accompanied by an answer, which, in the form of an averment, would render it valid, the plea would be bad, for the answer is *not* part of the defence (*c*). How, then, can the answer be conducive to the validity of the plea? This point is observed upon by Lord Eldon, in the case of *Bayley* v. *Adams* (*d*). In that case Lord Eldon remarks (*e*): "The first difficulty upon that, is, how to consider that record filed by the defendant, consisting partly of what is called plea, partly of what is called answer, as, in a correct sense, either a plea or an answer. The office of a plea in bar at law is to confess the right to sue, avoiding that by matter *dehors*, and giving the plaintiff an acknowledgment of his right independent of the matter alleged by the plea;" and again (*f*), "Such a record is neither plea nor answer, but something like a mixture of both, and very inaccurate;" and again (*g*), "Where the defendant, not stating merely matters *dehors*, but admitting part of the charge, gets rid of it by circumstances, I do not know that it might not be called a plea and answer; but that is a record of a character very distinct from that which is usually

(*c*) Infra, page 188. (*d*) 6 Ves. 586. (*e*) 6 Ves. 594.
(*f*) 6 Ves. 595. (*g*) 6 Ves. 597.

called a plea." Upon the passages just cited from Lord Eldon's judgment in *Bayley* v. *Adams*, Lord Redesdale (*h*) makes the following comment: "It seems to have been imagined that there was something incongruous in a plea and an answer in support of the plea; but this objection seems to have arisen from a supposition that the answer formed part of the defence. *It is no part of the defence;* but that evidence which the plaintiff has a right to require and to use to *invalidate the defence* made by the plea *upon argument of the plea, before other* evidence can be given." Lord Redesdale therefore appears, in this passage, not to approve of Lord Eldon's observations as to the principle upon which an answer in support of a plea is required. If the *not* accordant opinions of Lord Eldon and Lord Redesdale may be considered (like estoppels in law) as setting the matter at large, the author would humbly suggest that the reasonable explanation of the rule which requires an answer—though not part of the defence—to support a plea, is, that it is an *arbitrary* rule introduced by the Courts, not upon the principle that the plea is insufficient in law without the answer, but as a rule of convenience only; in order that the expense and delay of going on to a hearing of the plea may be avoided, if (according to the observations above suggested) the defendant should have founded his plea upon a conclusion of law *not* warranted by the facts

(*h*) Redes. Plead. 244, n. (1), ed. 4.

from which it was drawn, and which the defendant was prepared to admit.

262. The question—why an answer should be required in addition to the averments—may still be pressed, upon the ground that the averments must in substance, and may even in words, agree with the answer. The answer is, that the averments are not subject to exception; and that if an answer (to which exceptions may be taken) were not required, the purpose for which that answer is required might be defeated (*i*). This is an additional example of a plaintiff's *right* to all discovery material to the proof of his own case.

263. "*Which the defendant does not by his form of pleading admit.*" In the absence of admission by the form of pleading, the right to actual discovery arises. This is all that the proposition advances.

264. But suppose the converse case. Will an *actual* admission of that which the pleadings by their form admit be in any case required? This question has been fully observed upon in the course of the observations upon the first proposition. Independently of those observations, the question might be considered as sufficiently answered by the single remark, that, as discovery is given only in aid or for the pur-

(*i*) Redes. Plead. 317.

poses of proof, it would (independently of other considerations) be merely surplusage and impertinence to exact or give discovery of that which the pleadings by their very form admit.

265. The preceding cases will, it is hoped, have sufficiently established the second proposition, so far (at least) as it affirms the *right* of a plaintiff to discovery for the purposes of the case upon which the parties *are about to go to trial;* and that no mode of defence to which the defendant can resort, will have the effect of depriving the plaintiff of the benefit of *such* discovery. The general effect of the cases, when considered, will be found to be, that it is the right of a plaintiff in equity, *in all cases*—whatever the form of the defence may be — to have each question in the cause, *as it comes on for trial,* tried upon a *full answer—express* or *implied*—to every part of the bill.

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266. It was observed in a former place (*l*), that the extent of a plaintiff's right to discovery was commonly expressed by saying that he was entitled to a "full answer." The intermediate pages have been occupied in an endeavour to ascertain the principles upon which the sufficiency of an answer depends. Assuming that these principles have been ascertained, it remains to consider

(*l*) Supra, pl. 85.

them in their application to certain specific cases, and particularly those important cases, in which the question of a plaintiff's right to a production of documents before the hearing is involved. In doing this it has been thought convenient briefly to recapitulate the leading requisites of a "full answer." The expression, however indefinite in itself, is important with reference to the language in which the sufficiency of an answer is commonly discussed, both in argument and reported judgments (*m*). The following will, perhaps, be found as concise a summary of the points involved in the term "full answer," as could safely be attempted.

267. *First.*—An answer will in one sense be "full," where it is so with reference to so much of the bill as, according to the pleadings, (see Prop. I.) the defendant is bound to answer.

268. *Secondly.*—An answer will be "full," notwithstanding the defendant may refuse to answer questions falling within the admitted exceptions to the general rule, which entitles a plaintiff to discovery upon all points material to his own case (*n*). For, admitting a plaintiff's right to all the relief he prays, he has no right to ask questions falling within those exceptions. "In many cases," says Lord Eldon (*o*), "practice gives a construction to the term answer. If, of the interro-

(*m*) See infra, pl. 276, note (*b*). (*n*) Supra, pl. 124.
(*o*) In *Curzon* v. *De la Zouch*, 1 Swanst. 192.

gatories in the bill some require an answer, while others tend to criminate the defendant, is it not clear that he might by *answer* insist on not answering the latter interrogatories? Suppose the case of a bill in which there was not one question that the defendant could answer without subjecting himself to a penalty." An answer therefore may be "full," although the defendant may decline answering many questions which the plaintiff may propose to him.

269. Thus—a plaintiff—whatever the merits of his case may be (*p*),—is not entitled to a discovery from the defendant of any matter which would criminate him or tend to do so (*q*). If, then, a plaintiff—admitting the *merits* of the case to be with him—ask such a question, the defendant may *by answer* refuse to give the discovery sought (*r*), and his answer will still be "full," notwithstanding such refusal.

270. So—if, in the like case, the question be one, the answer to which would subject the defendant to pains or penalties (*s*), the defendant may *by answer* refuse to give the discovery sought, and his answer will still be "full."

(*p*) Hare, 128, 270.

(*q*) *Paxton* v. *Douglas*, 19 Ves. 227; *Mant* v. *Scott*, 3 Price, 477.

(*r*) Redes. Plead. 307: *Curzon* v. *De La Zouch*, 1 Swans. 192: *Attorney-General* v. *Brown*, 1 Swans. 305: and see *Mant* v. *Scott*, 3 Price, 493.

(*s*) Redes. Plead. 307; Hare, 262; *Johnston* v. *Johnston*, 2 Scott, 414.

271. So—of questions involving an admission of gross moral turpitude subjecting the party to penal consequences (*t*).

272. So—of forfeiture (*u*).

273. So—of privileged communications (*x*).

274. So—of *immaterial* questions (*y*).

275. So—of *particular* questions to which the vice of *uncertainty* applies—in the sense in which the term "uncertainty" is explained above (*z*). If the objection of uncertainty applies to the general scope of the bill, and not to *particular* discovery, the defendant would, probably, be held bound (as in other cases) to make his election, whether to demur, or plead to the bill, or answer the bill "throughout." But where the objection applies to *particular* discovery (*a*), the objection may be taken by *answer*. Indeed, where such an objection is raised, there is no distinction, *except in words*, between a demurrer, a plea, and an answer. The office of a demurrer or plea, upon grounds of merits or form, is to rely upon *one* point in a cause as a reason for withholding discovery as to *other* distinct matters—an

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(*t*) *Brownsword* v. *Edwards*, 2 Ves. sen. 245: *Claridge* v. *Hoare*, 14 Ves. 65.

(*u*) Redes. Plead. 307; *Harrison* v. *Southcote*, 2 Ves. sen. 390.

(*x*) *Greenough* v. *Gaskell*, 1 Myl. & K. 98; Redes Plead. 288. 2 Story 873.

(*y*) *Agar* v. *The Regent's Canal Company*, Cooper, 212, 215; Hare, 264.

(*z*) Supra, pl. 203, et seq.

(*a*) Supra, pl. 34, 35.

office which is inapplicable to a case, in which the whole objection begins and ends with *particular* discovery only.

276. The last observations upon the meaning of the term "full answer" are particularly deserving the attention of the reader. The expressions that a defendant who *answers* a bill, must "answer fully,"—that he must answer "throughout," &c. (*b*), are often strained in argument to mean—that, if a defendant submits to answer a bill, he thereby submits to answer every question the bill contains. This certainly is not a sound exposition of the rule. It is manifest that the rule does not even touch, still less decide, *what* a defendant must answer. *A rule which decides only that the defendant must give a full answer cannot decide what a full answer is. That* must be determined *aliunde.* The proper explanation of the rule is, that if a defendant who *might,* upon grounds of merits or form, have defended himself by demurrer or plea, — has waived those modes of defence, and *elected* to make his defence by answer,—he cannot urge the demurrable character of the bill *only,* or that a plea might have been

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(*b*) *Mazarredo* v. *Maitland,* 3 Madd. 70 : *Unsworth* v. *Woodcock,* 3 Madd. 432 ; ——— v. *Harrison,* 4 Madd. 252: *Taylor* v. *Milner,* 11 Ves. 41 : note (*c*) upon *Cartwright* v. *Hately,* 3 Bro. C. C. 239, Lord Henley's edition, see n. (*b*) : *Corbett* v. *Hawkins,* 1 You. & Jervis, 425 ; Hare 247 ; "mere witness." Id. 256: et vide supra, pl. 149.

successfully pleaded to it *only*, as a reason for not answering any part of the bill, to which no objections of a *particular* character exist. The submission to answer concludes him as to that,—but no further.

277. Upon the same principle, if the plaintiff seeks improperly to inquire into the "defendant's case," or the evidence by which he proposes to establish it, the defendant may, by *answer*, refuse to give the discovery sought by the bill (*c*).

278. And as a general proposition, a defendant may regularly, by *answer*, refuse to give *particular* discovery; that is, discovery, the objection to which is confined to the nature of the discovery sought, as distinguished from objections depending for their validity upon the merits of the cause or the form of the proceedings,—that is, as distinguished from objections which deny the plaintiff's right of suit, or his right to proceed with his suit in its existing state (*d*).

279. In support of this general proposition, Lord Redesdale may be referred to. "If (says Lord Redesdale) the grounds on which a defendant might demur to a *particular* discovery appear clearly on the face of the bill, and the defendant does not demur to the bill, but, answering the rest of the bill, declines to answer to so much, the Court will not compel him to make the discovery (*e*)."

(*c*) See Prop. III.

(*d*) Supra, pl. 34, 35 : and infra, Prop. IV. & V.

(*e*) Redes. Plead. 200. See Hare, 128.

280. In further support of the same conclusion, an observation made in a former page (*f*) may be repeated here, namely, that there is no difference, except in words, between an answer and any other mode of defence, when applied to *particular* discovery. Indeed, the whole reasoning upon which the rule—*that a defendant who submits to answer a bill, shall answer it fully*—is founded, is inapplicable to an objection to answer a particular question only.

281. Whether, in *Adams* v. *Fisher*, the limited answer which the defendant was permitted to give is to be considered "full," or whether the defendant is to be considered as excused from giving a full answer, is matter rather of words than substance. The author, however, submits that the answer to which the defendant in that case was permitted to confine himself cannot be deemed sufficient.

282. *Thirdly.*—Suppose a case in which the plaintiff is entitled to require an answer to the whole or some specific part of a bill, and in which none of the interrogatories fall within any of the exceptions to the general rule which entitles a plaintiff to discovery,—what answer in such a case will be sufficient? Lord Redesdale says:—"Every plaintiff is entitled to a discovery from the defendant, of the matters charged in the bill, provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree" (*g*). "He is also entitled

(*f*) Supra. pl. 275. (*g*) Redes. Plead. 306.

to a discovery of matters necessary to substantiate the proceedings, and make them regular and effectual in a Court of equity" (*h*). "Whenever there are particular and precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charge" (*i*). And every charge which, if admitted, would assist the case made by the bill, must receive a direct answer, however general that charge may be, even a charge that the defendant *claims* an interest (*k*). And a substantive charge of a specific fact—payment of money for example—is sufficient to entitle the plaintiff to ground upon it all questions as to the circumstances, when, where, &c., it was paid, which may be material to establish the substantive charge (*l*).

283. *Fourthly.*—But the last observation must be limited in its application in practice. It is no uncommon thing for a plaintiff, in the exercise of his right to an account from the defendant, to require him to give discovery in a *specific form*, e. g. by giving balances from quarter to quarter throughout a given period, by setting out prices and wages during such period, &c., — and the question sometimes arises—

(*h*) Redes. Plead. 307. (*i*) Id. 307.

(*k*) *Stroud* v. *Deacon*, 1 Ves. Sen. 37 : *Buden* v. *Dore*, 2 Ves. Sen. 444 : *Harland* v. *Emerson*, 3 Bligh, 62 ; S. C., 3 Sim. 490 : *Culverhouse* v. *Alexander*, 2 You. & Coll. 213.

(*l*) 11 Ves. 301, in *Faulder* v. *Stuart ;* Redes. Plead. 44, 45.

to what extent the defendant is bound *specifically* to comply with this requisition? The Vice-Chancellor has repeatedly — and the author presumes to add, correctly (*m*)—decided, that it is not sufficient in such a case for the defendant to say (without more) that he is unable to answer the questions in the bill, except from his books, and to tender those books for the plaintiff's inspection. On the other hand, it may (it is conceived) be safely stated, that a plaintiff has no right in the abstract to impose upon the defendant the labour of stating an account in a merely *arbitrary* form. If a defendant, in answer to a bill requiring him to set out accounts in a specific form, should say, that, during the period stated in the bill, he had kept accounts of the matters in question — that such accounts were contained in books which he described and tendered for the plaintiff's inspection—that the entries in such books were full and true—that the books themselves were kept in the manner usual with persons concerned in matters of the like nature — that any persons acquainted with such matters could from the books ascertain the true result of the account to which the plaintiff was entitled—and that the defendant was unable to answer the questions in the bill, or any of them, except by recasting the form of his books into that required by the bill:—this, in the absence of

(*m*) *White* v. *Williams*, 8 Vesey, 193. And see *Seeley* v. *Boehm*, 2 Madd. 176; Hare, 278.

special circumstances, would, it is submitted, be a *sufficient* answer. For this, however, the author can cite no authority, unless the concluding part of the judgment in *White* v. *Williams*, just referred to, be considered in point (*n*).

284. *Fifthly.* — The right of a plaintiff to discovery is not (as already observed (*o*)) confined to a discovery of facts resting merely in the knowledge of the defendant, but extends primâ facie to a discovery of *deeds, papers, and writings* of every description in his possession or power, the contents of which may be material to the proof of the plaintiff's case (*p*).

285. And first, as to the mode in which a plaintiff must proceed to obtain, before the hearing of the cause, a production of documents in the defendant's possession or power, and the *principle* upon which orders for that purpose are made. Assuming that the defendant has in his possession or power, documents of which the plaintiff has a right to require the production, and that the answer contains a sufficient admission of that fact, the plaintiff has the *right* to require the defendant to set out the contents of such documents in his answer, according to their purport and effect; or, if

(*n*) *Farquharson* v. *Balfour*, Turn. & Russell, 190 : *Martineau* v. *Cox*, 2 You. & Coll. 638; Hare, 273.

(*o*) Supra, pl. 3.

(*p*) Redes. Plead. 53.

he pleases, in the very words and figures thereof; and such appears to have been anciently the practice in pleading (*q*). The great and unnecessary expense of this mode of giving discovery, has led to a cheaper and more simple mode of accomplishing the same object in practice. The way is this:—the plaintiff alleges in his bill (in effect), that the defendant has in his possession or power, deeds, papers, and writings *relating* to the matters mentioned in the bill; and that, by the contents of such deeds, papers, and writings, if the same were produced, the truth of the plaintiff's case would appear. The defendant is then required by the bill to admit or deny the truth of these allegations; if he admits having *possession or power* over any such deeds, documents, or writings, he is required by the bill, and is primâ facie bound, to *describe* them, either in the body of his answer or in a schedule to it. The plaintiff then moves the Court that the defendant may be ordered to produce and leave in the hands of his clerk in court the deeds, papers, and writings *so described*, with liberty for the plaintiff to inspect them and take copies thereof. This mode of getting at the defendant's documents is, then, merely a *substitution* of one form of practice for another—a substitution which cannot affect the *principle* upon which the order is made. This principle (founded upon the more ancient practice before explained) is, that the documents

(*q*) *Atkyns* v. *Wright*, 14 Ves. 211.

are part of the defendant's *examination* (*r*). The motion for the production of the documents is in the nature of an *exception* (*s*) to the answer, and the judgment of the Court upon the motion will be regulated accordingly. If the plaintiff, under the old practice, would have succeeded upon exceptions to the answer for not setting out the documents, he will now be entitled upon his motion to an order for their production; otherwise, he will not be so entitled (*t*).

(*r*) The principle does not in general (if ever) apply, where the documents belong to the *defence* and not to the *examination*. Infra, Proposition III.; Hare, 222, 223.

(*s*) *Somerville* v. *Mackay*, 16 Ves. 387; Hare, 212.

(*t*) Upon the preceding paragraph, Mr. Bosanquet, in the letter referred to in a later page, observes: "The preceding discourse appears to me to be wholly a work of the imagination," p. 19. The proposition in the text is so familiar to the author, that he is unable to say when he first learnt it. In *Wright* v. *Atkyns*, 14 Ves. 213, Lord Eldon says: "*formerly* bills were framed, calling upon the party to produce or to set forth their short contents, &c. If that sort of practice is to be *restored*," &c. And in *Somerville* v. *Mackay*, 16 Ves. 386, Lord Eldon (*upon a motion for the production of documents*), observes upon the inconvenience of allowing a defendant to put in an insufficient answer, and says: "It goes, first, to the Master upon *exceptions to the answer;* then to the Court upon exceptions to the report: assuming, in this instance, a different shape, a motion for the production of books and papers: *in substance the same, as that production can only be required upon that principle.*" And see Hare, 222, and pl. 236, 237, 238, infra. See *Unsworth* v. *Woodcock*, 3 Mad. 432, S. C. infra, pl. 289, the Vice-Chancellor says: "The plaintiff might compel the defendant to set out the contents of the books in his answer." And in *Hardman* v. *Ellames*, the Lords Commissioners lay down the same proposition *totidem verbis*.

286. That this is the principle upon which orders for the production of documents scheduled to or described in an answer are made upon motion, is clear upon authority.

287. Thus—in *Marsh* v. *Sibbald* (*u*), (1814), a motion was made for the production, at the trial of an action against one of the defendants, of books and papers referred to by his answer,—extending also to a book referred to by the answer of another defendant. The Lord Chancellor said—"The rule as to producing papers upon a trial at law is this: If this Court, on motion or by decree, directs a trial, that trial is directed in such a way, that all production, which the Court conceives to be useful upon that trial, the creature of its own direction, shall be made: but, if upon a bill, filed for an injunction against an action, and praying relief, the injunction being refused, they go on at law to trial, the plaintiff can only read by the direction of this Court what he may read without that direction, *the answer; and then he may read every book, letter, memorandum, or paper, referred to by that answer; as every such book, letter, &c., is a part of the answer. It is read as being part of the answer; and the plaintiff must shew, that what he prays may be produced is in effect and substance part of that answer* (*v*); unless the trial is directed by the Court itself on motion, or by decree: but there is no instance

(*u*) 2 Ves. & B. 375.

(*v*) See the Lord Chancellor's important criticism upon this language, 3 Myl. & Cr. 542-549.

of directing the answer of any other person except of the defendant in that cause, or any part of it, to be read upon a trial, not directed by the Court itself. *If, therefore, this book is not referred to by the answer of the defendant, I cannot order it to be produced; and you must get at it by amending your bill.* You are entitled to the general production, in the usual form, of all the papers referred to by the several classes of defendants respectively, *as part of their answers*, for the general purposes; but that will not answer your object, without proceeding to order a production at the trial; and that is limited in the manner I have stated."

288. In *Evans* v. *Richards* (*x*), (1818), the plaintiff filed his bill for an account arising out of a trading contract undertaken with an alien enemy, and for an injunction to stay an action brought by the defendant against the plaintiff for a balance alleged to be due upon this contract. The common injunction was obtained, but afterwards dissolved, upon the ground that the trading was a fraud upon the laws of the country, and, therefore, not entitled to the aid of the Court. Upon a motion to discharge an order of the Vice-Chancellor for the production of documents referred to in the answer, the defendant argued, that the Court *having declared the contract illegal and not entitled to relief in equity*, no advantage could be derived from the inspection of the papers. The Lord Chancellor said:— "The event of this motion must depend on the fact,

(*x*) 1 Swans. 7.

whether the answer contains an admission that the documents in question are in the custody of the defendant (*y*). When the Court orders letters and papers to be produced, *it proceeds on the principle, that those documents are, by reference, incorporated in the answer, and become part of it. Being in the office, the effect is the same as if they were stated in hæc verba in the answer.* This motion, therefore, in effect, *seeks to strike out a part of the answer.* The plaintiff may amend his bill, by omitting the allegation from which the illegality of the contract appears; *and the admission remaining in the answer entitles him to the production of the papers.*"

289. So, in *Unsworth* v. *Woodcock* (*z*), (1818), the Vice-Chancellor said,—"The plaintiff might compel the defendant to set out the contents of the books in his answer, and the production of the books is a part of the discovery, which the defendant, submitting to answer, submits to make."

290. A word of caution is necessary here, with reference to the language in which the judgments of the Court are expressed in the three cases which have just been referred to. From that language it might be inferred, that if a defendant admits the possession of documents, and gives a list and description of them in the body of his answer, or in a schedule to it, the *contents* of the documents are thereby ex-

(*y*) See as to this, infra, pl. 293.
(*z*) 3 Madd. 432.

clusively made part of the answer, so as to entitle the plaintiff to have them produced upon motion, notwithstanding any case the defendant may make by his answer for resisting such production. This, certainly, would be an incorrect interpretation of the judgments referred to. Those judgments must be understood as assuming, that the admissions in the answer respecting the documents, are sufficient to entitle the plaintiff to have them produced before the hearing, and as intending only to enforce the proposition, that where the documents appear by the admissions in the answer to be of that character, the legal consequences which the cases point at flow from those admissions. This, in truth, is involved in the very principle upon which the order for *production* is made. The plaintiff is entitled to the production of such documents only as he might, by *exceptions* under the old practice, have *compelled* the defendant to set forth in *hæc verba* in his answer (*a*). Now, a plaintiff never had the right *à priori* (*i. e.* independently of what the defendant might by his pleadings *concede* to him) to exact from the defendant a discovery of anything which would subject him to pain, penalty, or forfeiture, or to see or know the evidences of the defendant's case (*b*); from which it follows, that the plaintiff could not by exceptions under the old practice have *compelled*—and, if not,

(*a*) See supra, pl. 285. (*b*) See Prop. III.

he cannot now by motion, under the modern practice, compel — the defendant to disclose documents, the disclosure of which would subject him to pain, penalty or forfeiture, or to disclose the evidence relating to his own case exclusively. The same point is, perhaps, sufficiently demonstrated by the fact, that, in order to ground an application by a plaintiff for a production of documents mentioned in or scheduled to a defendant's answer—*as being for that reason part of his answer*—it is *not* necessary that the defendant should by his answer *in any way refer, or reserve to himself liberty to refer, to the documents.* The documents are part of his answer for the purpose of production without any such reference (*c*), *provided they are, in other respects, within the principle which entitles a plaintiff to an order for their production.* If, on the other hand, the documents appertain to the *defence alone,* the plaintiff will *not* be entitled to inspect them *without* some reference to them by the answer. What the effect of such reference is, will be considered hereafter (*d*); but—as this reference may be inserted in the answer or omitted, at the *pleasure or caprice* of the defendant—it is obvious that the *right* of a plaintiff to consider and treat documents mentioned or scheduled to an answer as part of the answer, only *because* they are so mentioned or scheduled, is confined to

(*c*) Common practice. And see the cases just referred to.

(*d*) See the observations on *Hardman* v. *Ellames,* Prop. III. infra.

such documents as appertain to the defendant's *examination, i. e.* to the *discovery* he is compellable to give in support of the "plaintiff's case" (*e*).

291. The same reasoning may apply where the production of documents would not subject the defendant to any penal consequences, and where they are unconnected with the defendant's case, and directly connected with the object of the suit. Thus, if a plaintiff files a bill to obtain the possession of deeds, the plaintiff may compel the defendant to *describe* them in his answer, and say, whether they are in his possession, or in whose possession they are,—for, without such discovery, the plaintiff might not be able at the hearing of the cause to obtain a complete decree. It will not, however, *follow* from this, that, because the defendant describes the deeds, and admits having them in his possession, the plaintiff will have a right to inspect them before the hearing. The judgment of the Vice-Chancellor in *Lingen* v. *Simpson* is conclusive upon this point (*f*). Similar observations, *mutatis mutandis*, will apply to other cases.

292. The general principles, in short, upon which the right of a plaintiff to the production of documents in the defendant's possession depends, and by which it is bounded, are those that resolve themselves into

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(*e*) Infra, pl. 293.

(*f*) 6 Madd. 290; S. C., supra, pl. 230; and see *Storey* v. *Lord George Lennox*, 1 Myl. & Cr. 534: and *Adams* v. *Fisher*, 3 Myl. & Cr. 526.

the two rules which, in a former page (*g*), were described as the two cardinal rules in the Law of Discovery: first, the right, saving just exceptions (*h*), of every plaintiff to a discovery of the evidences which relate to *his* case; and, secondly, the privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own. And the questions, upon motions for the production of documents before the hearing, are,—by what tests the Court is to determine under which of the two heads, of plaintiff's or defendant's evidences, any given documents fall.

293. In determining these questions—the first thing to be observed is, that the *onus* is upon the plaintiff to prove his right to see the documents, the production of which he calls for, and that the only evidence upon which the Court can act in his favour, is the *admission* of the defendant. "When the motion was argued before me," said the Lord Chancellor, in *Storey* v. *Lord G. Lennox* (*j*), "it occurred to me that there might be some doubt, whether the answer contained a sufficient admission to entitle the plaintiffs to move for the production of the documents in question. To entitle the plaintiffs to an order for that purpose, they must shew *an admission* that the documents which they seek

(*g*) Supra, pl. 23.

(*h*) Supra, pl. 130, et seq.

(*j*) *Storey* v. *Lord George Lennox*, 1 Myl. & Cr. 534. See also *Adams* v. *Fisher*, 3 Myl. & Cr. 526.

to inspect, are in the possession of the defendant; and that they are of a nature to entitle the plaintiffs to an inspection of them." In general, the answer will be the only place where the requisite admission can be found. But if the defendant should, by affidavit, as he sometimes may (*k*), seek to protect a document from the plaintiff's inspection, an admission by affidavit filed for that purpose would doubtless be as effectual as an admission by answer.

294. What admissions, then, will be sufficient to entitle a plaintiff to an order for the production of documents in the answer before the hearing? First, in order that the Court may be able to apply the principle before explained, two things are necessary:— 1. The defendant must, in his answer, admit his *possession of*, or *power over* the documents, the production of which is sought;—and 2. He must *describe them* in his answer, or in some schedule to it (*l*). Unless the documents are in the possession or power of the defendant, he cannot obey an order for production (*m*); and, unless the defendant *describes* the documents, the Court cannot know whe-

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(*k*) That this additional matter may be introduced by affidavit, see *Tyler* v. *Drayton*, 2 Sim. & Stu. 309: *Hughes* v. *Biddulph*, 4 Russ. 190: and *Parsons* v. *Robertson*, 2 Keen, 605.

(*l*) *Princess of Wales* v. *Earl of Liverpool*, 1 Swans. 114: Hare, 276; books abroad, Hare, 274.

(*m*) *Hardman* v. *Ellames*, 2 Myl. & K. 732: *Barnett* v. *Noble*, 1 Jac. & W. 227: *Erskine* v. *Bize*, 2 Cox, 226: *Darwin* v. *Clarke*, 8 Ves. 158: and see *Heeman* v. *Midland*, 4 Madd. 391.

ther its order is complied with or not (*n*). In the absence then of a sufficient admission of possession, and of a sufficient description of the documents, the Court will not make an order for their production. The possession of an agent, it may be observed, or of any other person whose possession the defendant could control (*o*), would be a possession by the defendant for the purpose of the motion. A joint possession by the defendant and a person not under the control of the defendant or of the Court, would, in general, disable the Court from enforcing its order, and therefore prevent the Court from making it.

295. Supposing the answer to contain the requisite admission of possession by the defendant, and a sufficient description of the documents, the plaintiff must next shew *from the answer* that he has a right to see them (*p*). This is commonly expressed by saying—that the plaintiff must shew that he has *an interest* (*q*) in the documents, the production of which he seeks. There can be no objection to this mode of expressing the rule, provided the sense in which the word *interest* is used be accurately defined. But, the want of such definition, has introduced some confusion

(*n*) 14 Ves. 213, in *Atkyns* v. *Wright*.

(*o*) *Ex parte Shaw*, Jacob, 272.

(*p*) See per Lord Cottenham, in *Storey* v. *Lord George Lennox*, 1 Myl. & Cr. 525; and *Adams* v. *Fisher*, 3 Myl. & Cr. 526.

(*q*) *Adams* v. *Fisher*, 3 Myl. & Cr. 549; *Att.-Gen.* v. *Ellison*, 4 Sim. 238; and supra, pl. 280: *Smith* v. *Duke of Northumberland*, 1 Cox, 363.

in the cases under consideration. The word *interest* must here be understood with reference to the subject-matter to which it is applied. Now, the *purpose* for which discovery is given is (simply and exclusively) to aid the plaintiff on the trial of an issue between himself and the defendant. A discovery beyond or uncalled for by this particular purpose, is not within the reason of the rule which entitles a plaintiff to discovery. The word *interest*, therefore, must in these cases be understood to mean, an interest in the production of a document for the purpose of the trial about to take place. According to this definition of the word *interest*—if the object of the suit or action be the recovery of an *estate* —the plaintiff in a bill in aid of proceedings to recover that estate, will (primâ facie) be entitled, *before* the hearing of the cause, to the production of every document *the contents* of which will be evidence at that hearing of his right to the estate. But the same reason will not *necessarily* extend to entitle the plaintiff, *before* the hearing of the cause, to a production of the title deeds appertaining to the estate in question. He may, indeed, and (if his bill be properly framed) he will be entitled to have these title deeds *described* in the answer, and also to a discovery whether they are in the defendant's possession; because, without proof of such matters, (and whatever the plaintiff must prove the defendant must primâ facie answer) a perfect decree could not be made in the plaintiff's favour. The same observations will apply to a case, in which the object of the suit is to recover

the possession of documents. The plaintiff is entitled to know *what* the documents are, and *who holds them*. But there is no reason why the plaintiff should, in cases of the description here noticed, inspect the documents *before* the hearing of the cause. Unless the meaning of the word "*interest*" be limited in the way pointed out, it is obvious that the effect of a simple claim (perhaps without a shadow of interest) would be to open every muniment room in the kingdom, and every merchant's accounts, and every man's private papers, to the inspection of the merely curious. The cases cited in the observations upon the word "material" (*r*), seem conclusive upon this point.

296. However, in the case of the *Attorney-General* v. *Ellison* (*s*), the Vice-Chancellor appears to have reasoned differently.

297. In that case the information sought to impeach the validity of two leases of 999 years each, by which the corporation of Lincoln had demised the navigation and tolls of the river *Topdike* to persons under whom the defendants claimed the leases. The leases purported to have been granted under powers for that purpose given to the corporation of Lincoln. The information charged that the leases were not warranted by the act, and were therefore void. The answer set forth a schedule of deeds, including (among others) four deeds dated in the years 1810, 1814, and 1828,

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(*r*) Supra, pl. 224; see particularly *Lingen* v. *Simpson*, pl. 230.

(*s*) 4 Sim. 238.

which were described by the names of the parties, and were also described as the family settlements of the defendant. The answer further insisted, that the defendant ought not to be compelled to produce the four deeds above mentioned. The Vice-Chancellor, upon a motion for their production, said:—"The information in this case is filed for the purpose of setting aside two leases for 999 years, granted by a corporation, of certain tolls; and the defendant having, by his answer, stated that he has in his possession four deeds relating to the leases, and dated in the years 1810, 1814, and 1828, a motion is made, on the part of the Attorney-General, that those deeds may be produced. It is met by alleging that the deeds, though they relate to the leases, in fact only tend to shew the interest of the defendant and of persons claiming under him; and that, though the Attorney-General has a right to see the leases, he has no right to see the subsequent deeds, which, it is said, relate only to the defendant's title. It is to be observed, however, that the Attorney-General claims to have the tolls free from the leases; and, if he succeeds, every portion of the legal estate in the terms for 999 years must be assigned or surrendered, so that the leases may be no longer set up. He, therefore, has a *direct interest* in the deeds in Mr. Ellison's possession. They do not relate solely to any separate and independent title of the defendant; and, therefore, they must be produced."

298. The judgment in this case—according to the sense attached by the writer to the word "*interest*,"—is of

questionable accuracy. The object of the suit was to set aside two *principal* leases. The ground for impeaching those leases was *unconnected with the derivative leases,* the production of which was ordered. It is true, that, if the original leases were rescinded, the derivative leases would fall with them, and the plaintiff might, in that case, be entitled to have those derivative leases delivered up or cancelled under the decree of the Court. With a view to this possible end, he might (as was argued in the case) be entitled to know the names of the derivative lessees, in order that his suit might be perfect in respect of parties (*t*), and he might also be entitled to have the documents described in the answer, and to compel the defendant to admit or deny having possession of them; because, without such evidence, the Court might not, at the hearing of the cause, be in a condition to make a perfect decree. But, for what purpose and upon what principle could the plaintiff be entitled to know the *contents* of the derivative leases, until, by proving his right to rescind the original leases, —a purpose for which it was *not suggested* that the derivative leases could assist him—he had established an interest in the leases also? It may be said, that the evidence obtained by an inspection of the documents, even for the purpose of knowing the names of the parties and the description of the leases, would be better evidence than that which the mere oath of the defendant would supply. This may be admitted,—but the argument founded upon it is inadmissible. It

(*t*) *Finch* v. *Finch*, 2 Ves. sen. 492; Redes. Plead. 307.

proves too much. If, in such a case, the oath of the defendant as to the names of the parties to and the description of the leases—a point after all unconnected with the rights in question in the cause — were not deemed sufficient, the defendant would be deprived of all possible means of defence, although the plaintiff's case should be wholly fictitious—a consequence which carries with it a refutation of the proposition from which it flows. At all events, the utmost to which this argument could carry the plaintiff's right would not extend beyond an inspection of that portion of the leases which contained the names of the parties to them. The interest of the derivative lessees is also a ground, upon which, *in their absence* from the record, the propriety of the order might be questioned (*u*). The reader is referred back to the cases cited in support of the writer's observations upon the word "*material,*" in a former page, as a further justification of the foregoing observations upon the case of the *Attorney-General* v. *Ellison*.

299. Assuming, then, that the word "*interest*" (as applied to the present point) is to be understood in the sense above explained,—and that a plaintiff, in order to entitle himself to the production of documents scheduled to or described in the defendant's answer, and admitted to be in his possession or power, must

(*u*) Infra, pl. 327.

read from the answer an admission which shews that he has *such* interest,—what admission in the answer shall suffice for this purpose(*x*)? The documents must, of course, be *relevant* to a case made by the bill, or there can be no ground for their production. Attending to this—the judgment of the Vice-Chancellor in the cause of *Tyler* v. *Drayton*(*y*), suggests a convenient mode of stating the general rule which answers the above question. The rule to be extracted from the judgment is this,—that an admission of *relevancy* to the plaintiff's case alone will entitle a plaintiff (*as between himself and the defendant* (*z*)) to an order for production of documents, *unless* that admission be qualified by some additional matter(*a*), which, in the judgment of the Court, is a sufficient reason for refusing to make the order; or *unless* from the nature of the documents themselves, (*e. g.* general title deeds, or that they are the defendant's evidence), there is ground for inferring—notwithstanding their relevancy—that the plaintiff has no "*interest*" in the documents, or that, for some other reason, the

(*x*) Adverting to the equivocal import of the word *interest*, the practitioner will find advantage in referring to the practical tests by which a plaintiff's right to a production of documents is determined, rather than in trying the right by the use of that abstract term.

(*y*) 2 Sim. & Stu. 309. And see *Storey* v. *Lord George Lennox*, 1 Keen, 341; S. C., 1 Myl. & Cr. 525.

(*z*) Infra, pl. 327. (*a*) Supra, pl. 293, note (*k*).

defendant has ground for refusing to produce them (*b*). The generality of this proposition is amply borne out by the exceptions to the "general rule" noticed in a former page (*c*).

300. An important principle is involved in the rule above stated. The rule establishes, that where the *relevancy* of the documents to the plaintiff's case is admitted, the defendant cannot, merely by denying the effect of such documents, protect himself against an order for producing them,—or, in other words, that where the *relevancy* of documents to the plaintiff's case is admitted, the plaintiff is the party to judge of their effect (*d*).

301. But, if the defendant—admitting by his answer the *relevancy* of the documents to the case made by the bill, or some of the matters therein—qualify that admission by further statements, which shew *to the satisfaction of the Court* that the plaintiff is not entitled to a discovery of the documents within the scope of the Second Proposition as above explained, there the Court will entertain and give effect to the defendant's objection to the production of his documents (*e*). In *Adams*

(*b*) *Adams* v. *Fisher*, 3 Myl. & Cr. 549: *Storey* v. *Lord George Lennox*, 1 Myl. & Cr. 534.

(*c*) Supra, pl. 127—147.

(*d*) Common Practice. And see *Gardiner* v. *Mason*, 4 Bro. C. C. 480: *Firkin* v. *Lowe*, 13 Price, 199: *Knight* v. *The Marquis of Waterford*, 2 Younge & Coll. 22: *Storey* v. *Lord George Lennox*, 1 Myl. & Cr. 525; Hare, 228, et seq. And *Jerrard* v. *Saunders*, supra, pl. 105.

(*e*) See Prop. III. infra.

v. *Fisher*, the Lord Chancellor said: "I apprehend it is a mistake to say that the documents scheduled are part of the answer; the schedule itself is part of the answer. All that the plaintiff asks is, that the defendant may set forth a schedule of the documents. Can you except because he has set out the documents in the schedule instead of in the answer? If that had been asked, the defendant must have protected himself in the regular way, and shewn that he was not obliged to comply with your demand. But if the defendant sets them out in the schedule to his answer, the question is upon the whole record, whether the plaintiff has such an interest in them as entitles him to call for their production" (*f*).

302. But it may be asked, assuming that an admission of relevancy to the plaintiff's case is primâ facie sufficient to entitle a plaintiff to an order for the production of documents in the defendant's possession, is an admission of their relevancy indispensable for the purpose? Suppose the defendant to be an executor, and ignorant of the affairs of his testator, and therefore unable to set forth, without previous examination, whether documents in his possession relate to a case

(*f*) 3 Myl. & Cr. 549. The observations which the author has presumed to make upon *Adams* v. *Fisher*, in a former page, do not apply to the principle here quoted, but to the application of it in the circumstances of that and analogous cases.

suggested in the bill, or not? Or suppose the defendant to decline looking into documents in his possession, or simply to declare his ignorance of their contents, or to decline to swear positively to their contents in some material particular, shall the absence of a direct admission of relevancy deprive the plaintiff of evidence which may be material to his case? All that can be said in the abstract with reference to such cases as these is, that the Court would certainly give the defendant his option of examining the documents for himself, and would receive his account of them, if positive, as conclusive upon the subject. If the defendant should decline this option, the Court would probably give the same option to the plaintiff, under such restrictions as the circumstances of the case disclosed by the answer might require. Cases of this description, however, cannot be considered as forming exceptions to, or as even qualifying, a general rule. A Court can do no more than tender to a party the means of defending himself. It cannot compel him to use them, or allow him to deprive an opponent of his right, because he chooses to be ignorant. It is not, perhaps, too strong a proposition, in cases of this nature, to say, that the bill might *pro hâc vice* be taken to be true against a defendant, who, having the means of contradicting it, declined to do so.

303. Passing from the two cases which have been noticed, 1. The case of admitted relevancy; and 2, the case in which relevancy is neither admitted nor denied;

to the 3rd and extreme case, in which the defendant, without qualification, *denies* the possession of any documents relevant to the "plaintiff's case," it is clear that such denial must be conclusive against the plaintiff's right to an order for the production of any documents the possession of which may be admitted by the defendant.

304. The preceding observations, it will be observed, apply to documents relevant to the *plaintiff's* case. Where they are relevant exclusively to the defendant's case, the plaintiff will not in general be entitled to see them (*g*). In fact, it may be observed, generally, that, in making or refusing to make an order for the production of documents *upon motion* before the hearing of the cause, the Court is merely applying to a particular class of cases the general principles which have already been investigated. These general principles ought, therefore, to regulate and pervade this class of cases; and the cases themselves, if uniform, would, from their frequent occurrence in practice, be the best evidence of the extent and limits of the general jurisdiction of the Court in compelling discovery, and of the rules to which that jurisdiction is subject.

305. In the application of the preceding rules to ordinary cases, little difficulty is experienced in practice; but in their application to extreme cases, in which

(*g*) See infra, Prop. III.

the evidences of the contending parties become nearly identified with each other, and in which the *relevancy* of a document in a given case is scarcely distinguishable from its *effect* upon that case, difficulties of considerable weight present themselves.

306. To illustrate this, — suppose the defendant not to insist upon any special ground of protection depending upon some or one of the grounds of exception to the general rule before adverted to, but to insist only that *upon the case made by the bill and the answer to it*, the plaintiff is not entitled to an order for the production of the documents in his possession. Three cases of this description may be suggested for observation. First,—suppose the bill to state certain transactions in trade, which had in fact been carried on by the defendant, and to allege (untruly) that the plaintiff was a partner with the defendant in those transactions. Suppose, further, the bill to contain a charge that the defendant had in his possession books and papers relating to the transactions in question, and that, if the same were produced, the truth of the plaintiff's allegation as to the partnership would thereby appear—Shall the defendant, by *answer* admitting the trading transactions, but denying the partnership, be compelled to produce his books and papers relating to his private transactions, because the plaintiff has alleged that they will evidence his case? Again, to put a second case. In *Bolton* v. *The Corporation of Liverpool* (*h*), the defendants had

(*h*) 3 Sim. 467 ; S. C., 1 Myl. & Keen, 88.

brought an action against the plaintiffs to recover a sum alleged to be due to the corporation for Town dues. The defendants filed their bill in aid of the defence at law, charging that the corporation had no right to the dues in question, and that the corporation had in its possession documents relating to those dues, and that, if the same were produced, it would appear that they had no such right. The defendants admitted the possession of documents relevant to the dues claimed in the action, and set forth a schedule of them, but insisted they were not bound to produce them, upon the ground that they related exclusively to the case of the corporation—Ought the corporation in this case to have been compelled to produce the documents in its possession relating to the dues in question, merely because the plaintiffs in equity alleged (perhaps truly) that if the documents were produced, they would furnish evidence destructive of the case of the corporation at law? Thirdly,—suppose the bill to impeach a deed, under which the defendant claimed, for fraud, and to charge that if the deed were produced, the fraud would appear—Ought the defendant in this case to be compelled to produce the impeached deed for the plaintiff's inspection, before the hearing of the cause?

307. The first and third of the above examples suppose the plaintiff to seek a discovery of documents, in support of the case upon which he grounds his title to relief in equity. The second supposes him to seek similar discovery, appertaining exclusively to his adversary's case, in order to destroy it. The possibility

that the documents might, in each case, support the plaintiff's charge is manifest. The defendant's objection to produce the documents in each of the three cases would not, as in *Adams* v. *Fisher*, be, that he ought not to be compelled to produce evidence relevant to a subordinate point in the plaintiff's case, until the principal point upon which the plaintiff's title depended should first have been tried. The objection applies to discovery alleged by the bill, and perhaps truly, to be material evidence upon the very point which must first be tried between the parties—that upon which the title to all relief depends.

308. One observation of the greatest importance applies at the very outset to each of the three cases which have been suggested, namely, that the position of the defendant with respect to his means of resisting discovery, must be precisely the same, whether he should demur, plead to, or answer the bill. For, if the defence were by demurrer or plea, as the charge in the bill was that the discovery would in the first example prove the partnership—and, in the second, that it would disprove the right of the corporation to the dues in question—and, in the third, that it would support the charge of fraud upon which the plaintiff's equity depended—the defendant could not cover the charge by demurrer or plea; some answer to it would undoubtedly be necessary; and if an answer be thus necessary, the nature and extent of that answer must be the same, whether the defence be made by

demurrer, plea, or answer. It follows, therefore, that unless, in such cases, the defendant be permitted by *answer* to demand the judgment of the Court, whether he should give the discovery or not, he must be wholly without the means of defending himself, although the plaintiff might have no right to the discovery objected to.

309. In the example first suggested, that of an alleged partnership denied by the answer, the plaintiff is supposed to seek discovery in support of the case upon which he founded his title to relief. No reported case suggests itself to the author precisely applicable to the example proposed; but he submits without any hesitation, that the defendant would not, in such a case, be compelled to produce documents relating to his transactions in trade before the hearing. The author's defence of this position will hereafter be given (*i*).

310. In *Bolton* v. *The Corporation of Liverpool* (*k*), which was the second example proposed, the Vice-Chancellor, and the Lord Chancellor on appeal, decided, that the plaintiff was not entitled to the production of

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(*i*) Infra, pl. 313. It is scarcely possible that the neat question, suggested in the 309th paragraph, should ever arise. For the bill, if properly framed, would contain a charge that the books, &c., would shew the *amount* of the plaintiff's demand, as well as his title to it, and such a charge would reduce the question of discovery to that which arose in *Adams* v. *Fisher*.

(*k*) *Bolton* v. *The Corporation of Liverpool*, 3 Sim. 467; S. C., 1 Myl. & K. 88.

the documents in question, the express ground of the decision being, that *it appeared by the answer* that they were relevant to the defendant's case only, and did not sustain that of the plaintiff. The judgment of the Lord Chancellor in that case, which is too long for quotation, abounds with the most pointed and valuable observations, to which the reader is referred. In the recent case of *Nias* v. *The Northern & E. Railway Company* (*l*), the Lord Chancellor expressed his approbation of the decision in *Bolton* v. *The Corporation of Liverpool;* and the cases hereafter cited, in support of the author's third proposition, will place the soundness of that decision beyond the reach of controversy.

311. The third class of cases above suggested, remains, namely, that in which the object of the suit is the impeachment of a deed or other document (*m*), and in which the question is, whether the plaintiff has a right before the hearing to have the impeached deed produced for his inspection. The cases of *Beckford* v. *Wildman* (*n*), *Tyler* v. *Drayton* (*o*), and *Valch* v. *Symes* (*p*), are cases of familiar reference upon this point. Since these cases, the Vice-Chancellor has had the point before him in *Kennedy* v. *Green* (*q*), and in *Fencott* v. *Clarke* (*r*). In *Kennedy* v. *Green,* the bill alleged that the plaintiff executed the impeached deed under the impression that it was a

(*l*) 3 Myl. & Cr. 357.
(*m*) Hare, 240.
(*n*) 16 Ves. 438.
(*o*) 2 Sim. & St. 309.
(*p*) Turn. & Russ. 87.
(*q*) 6 Sim. 7.
(*r*) 6 Sim. 8.

power of attorney, and that a fraud was practised upon her, at the time she signed the deed, by folding it in a particular manner. This the bill insisted would appear upon inspection of the deed, and the Court made an order for its production. In *Fencott* v. *Clarke* (*s*), the facts of the case do not appear, but the order for producing the deed was made. The case of *Balch* v. *Symes* (*t*) is sometimes referred to in argument, as an authority for the proposition, that where the *object of the suit* is to impeach a deed, the plaintiff is entitled, for reasons founded in the object of the suit alone, to have the deed produced upon motion. The case of *Balch* v. *Symes* does not, nor do the other cases above cited, when carefully examined, sanction any such general proposition; in fact they negative any such conclusion. The proposition, indeed, involves an absurdity; for, if it were founded, it would follow that a plaintiff, by merely filing a bill purporting to impeach a deed, might, without more, exact a production of it. Cases of this class must, it is conceived, be governed by the general rules of the courts, and not by any rules peculiar to the cases themselves. Where a deed is impeached upon grounds, the evidence of which is alleged to be *upon* the deed itself, as in *Kennedy* v. *Green*, an inspection before the hearing — limited according to the exigencies of the particular case— would probably upon principle be permitted, unless the answer effectually displaced the charges affecting

(*s*) 6 Sim. 8. (*t*) Turn. & Russ. 87.

it. Where a conveyance is impeached on the ground of the relation in which the parties stood to each other, as that of trustee and cestui que trust, or solicitor and client, or on any other ground *dehors* the deed—a production of the deed would in general be immaterial to the issue, and would not, it is conceived, be ordered.

312. However, since the first edition of this book was published, three cases have been reported which deserve particular notice, as being in some degree at variance with the cases referred to in the last paragraph, inasmuch as they apparently decide, that the *object of the suit alone* may determine a plaintiff's right to the inspection of a document impeached by the bill. In *Neate* v. *Latimer* (*u*), a judgment creditor filed a bill impeaching a prior deed executed by his debtor. Upon reference to this case, as reported in the House of Lords (*x*), the answer of the defendant appears to have been very contradictory and evasive; and by the report of the case in the Exchequer Reports, it appears that the Lord Chief Baron treated the case as one, in which the admission in the answer raised a strong case of suspicion against the defendant. Upon a motion for the production of the deed impeached by the bill, the Lord Chief Baron said: "The general rule upon this subject is liable to so

(*u*) 2 Younge & Collier, 257. (*x*) 11 Bligh, 149.

many exceptions, that it is difficult to know to what cases it may be applied. The general rule is, that a party is not bound to produce his own title deeds for the inspection of his opponent; yet, if the party seeking their production has an equal interest in them with the holder, that gives him an equal right to their production. Again, a party is not bound to produce title deeds which are only collateral to the title of the party seeking their production. A mortgagee, generally, is not bound to produce his title deeds without payment of the money due to him; but supposing the mortgagor says, that the mortgage deed has been falsified, and that a larger sum has been inserted in it than he ever received, or intended to receive; if he impeach it for fraud, in this manner, he is entitled to have that question tried before he pays even the sum which he admits to be due. *But it follows, that unless he has the inspection of the deed he may fail in his object, because he may wish to take advantage of some particular part of the instrument.* It is clear that if he wants to know what sum is due, he is bound to trust to the oath of the mortgagee. So that, in many cases, it depends upon the *particular object* which the plaintiff seeks to accomplish, whether he has a right to inspect the deed or not." And in a subsequent part of the judgment his Lordship says: "*In the present case I do not see in what way a Court of equity could relieve the plaintiff, unless the deed were brought into Court; and as it must be produced at some time or other, why not before the hearing?*" With respect to the last position, that because the deed

must be produced at the hearing, *therefore* it should be produced before the hearing, some observations will be found in a later page, to which, in order to avoid repetition, the reader is referred (*y*). With respect to the other point, that the "object of the suit alone" may determine the plaintiff's right to inspect a document which gives title to the defendant,—if the language of the judgment is to be considered as governed by the contradictory and evasive answer of the defendant, or by the suspicion attending upon the defence—no observation need be made upon it. But if the points made in the judgment are to be taken in the abstract, their consequences would, it is conceived, affect many prior decisions. In *Pilkington* v. *Himsworth* (*z*) the defendant in equity sued the plaintiff upon a note for 10*l*. The consideration for which the note was given had formed an item in a general account, arising out of the defendant's agency for the plaintiff. The plaintiff in equity (defendant at law) filed his bill to have the account taken, and suggested that the note had been paid, and left confidentially in the defendant's custody. The defendant by his answer admitted the account, but denied the allegations in the bill as to payment of the note, and the circumstances under which it was alleged to be in his possession. Upon a motion for the production of the note, the Lord Chief Baron made the order, assimilating the case to that of

(*y*) Infra, pl. 409.

(*z*) 1 Younge & Coll. 612.

a bill impeaching an instrument for forgery, and stating that a court of law would order an inspection under similar circumstances. The last point is observed upon in a later page (*a*). The other point falls under the observations just made upon *Neate* v. *Latimer*. In *Carter* v. *Goetze* (*b*) the plaintiff sought by his bill to set aside an agreement for the sale by the defendant to the plaintiff of a secret for the manufacture of sterine. The bill alleged a case of fraud, and insisted that the defendant had no secret, and had not communicated any to the plaintiff, and required the defendant to set out what his alleged secret was. It was part of the contract between the plaintiff and defendant, that the secret should not be disclosed. The defendant answered the whole bill, except that part which required him to set out what his alleged secret was, and traversed the whole case made by the bill. To the interrogatory which required him to set out his alleged secret, the defendant demurred. The Master of the Rolls held that a demurrer was not the proper mode of defence. He observed further, that the defendant could not refuse to answer the interrogatory, *regard being had to the object of the suit.*

313. With respect to these three cases, the author, upon the authority of the language of the Court in

(*a*) Infra, pl. 330.

(*b*) 2 Keen, 581. (June, 1838.)

Beckford v. *Wildman*, *Balch* v. *Symes*, and the decisions in *Tyler* v. *Drayton*, and *Sampson* v. *Swettenham*, presumes to say, that the "object of the suit" cannot *alone* determine the right of a plaintiff to discovery in cases of the nature here referred to, however important a consideration the object of the suit may be in determining the effect to be given to other circumstances. The author presumes respectfully to submit, that in the cases of bills to impeach deeds or agreements, as in other cases, the right of a plaintiff to the production of any documents must depend upon the answer; and that it can never depend *exclusively* upon the object of the suit. A plaintiff cannot, by *affecting* to impeach a deed or agreement, acquire a right to see it, if the grounds of impeachment are displaced by the answer. The judgment of the Lord Chancellor in *Latimer* v. *Neate*, in the House of Lords, is extremely guarded. From that judgment, it will be seen that the defendant had put in several answers, and had set up inconsistent cases,—that one of his answers was inconsistent with another as to the documents in his possession,—and that exceptions had been *allowed* to the first of his answers, involving the same question as arose upon the motion,—and that the order allowing the exceptions was not appealed from. The Lord Chancellor's words "under the circumstances" (*c*), and the stress he laid upon the admission of the

(*c*) 11 Bligh, 149.

appellant's counsel at the bar are, it is conceived, material. This case is further observed upon in a later page, with reference to another point (*d*). If the general proposition were admitted, *e. g.*, that the object of a suit alone (to impeach a deed) were sufficient, it would follow, that every vendor and mortgagor would retain a running interest in the conveyance he had executed, to which he might give effect merely by seeking to impeach such conveyance; and it seems equally difficult to see how any document of title could be protected, if the principle were admitted. The sound view of the case appears to be, that the moment the deed is executed, giving title to the grantee, it becomes *his* deed, and must primâ facie be under the protection which the Third Proposition gives to instruments of that character. This protection must remain until the plaintiff, by the evidence of witnesses, or the admission of the defendant, establishes an interest in it. The cases referred to, undoubtedly, try the principle in the severest manner, but the difficulty of applying a principle should not be permitted to destroy it.

314. But, it may be asked, does not the principle contended for, in the three cases suggested above (*e*), in some degree trench upon the generality of the rule, which entitles a plaintiff to the right of determining

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(*d*) Infra, Prop. V.

(*e*) Supra, pl. 306.

upon the effect of evidence (*f*)? These cases do, undoubtedly, lie upon the very verge of the line, by which the rights of the litigating parties are divided from each other. But the rule referred to is not infringed upon by a strict application of the law according to that exposition of it, which the supposed decision upon the first example, and the actual decisions upon the second and third, demand. The rule that a defendant is not to be the judge of the effect of evidence applies only to those cases, in which an admission of the relevancy of documents to the plaintiff's case has given the latter a right to call for their production. Now, an admission of relevancy to the plaintiff's case, which is necessary to found his title to an order for production of documents before the hearing, is incompatible with a denial by the defendant of that case. An admission of relevancy necessarily supposes an admission, to some extent, of the plaintiff's case. And where the oath of the party is the only evidence available to the plaintiff, the Court cannot assume that which the answer *credibly* denies (*g*). The soundness or unsoundness of these observations, can be determined only by observing the consequences to which an opposite conclusion would lead. Suppose a plaintiff by his bill to claim an estate, his right to which was represented in the bill to be intercepted by con-

(*f*) Supra, pl. 300.

(*g*) See further, infra, pl. 317, 318, 319.

veyances; and suppose the bill to charge *generally* that the conveyances had been obtained by fraud, without any such specification of the particulars constituting the alleged fraud as would enable the defendant or the Court to know what the case was upon which the plaintiff relied. This allegation would, in general, be sufficient to let in evidence in support of the charge of fraud (*h*), subject (in equity) to a question at the hearing, whether, if, by reason of the generality of the charge, the evidence were a surprise upon the defendant, the Court, in the exercise of its discretion, would direct inquiries before a Master. The allegation would also be sufficient for the purpose of discovery, so far as to oblige the defendant to answer (generally) the charge of fraud,—for a demurrer to the whole bill would leave that charge in admission (*i*). Now, suppose the plaintiff (in the case suggested) to charge that the defendant had in his possession documents, papers, and letters, relevant to the conveyances impeached by the bill, and to the circumstances attending the execution thereof, and that, if the same were produced, the imputed fraud would thereby appear. It is clear (as already observed), that to this charge some an-

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(*h*) 1 Chitty, Plead. 570: 9 Co. 10: *Watkins* v. *Watkins*, 2 Atk. 96: *Clarke* v. *Periam*, 2 Atk. 337: *Wheeler* v. *Trotter*, 3 Swans. 174, note: *Gordon* v. *Gordon*, 3 Swans. 471, 474: *Attwood* v. ———, 1 Russ. 353. And see supra, pl. 203.

(*i*) Redes. Plead. 212, 213.

swer must be given. But, suppose an answer were given, fully and unequivocally denying the general charge of fraud, — would a Court of equity, in such a case, as a matter of course, compel a defendant to subject his documents, papers, and writings, to the inspection of an adversary? The answer to this question must, it is conceived, be given in the negative, for, independently of the observation already made—that the relevancy of the documents to the plaintiff's case is, of necessity, excluded by the supposed denial of that case—a bill so framed is purely a fishing bill. The object of such a bill can scarcely be intended by a Court to be legitimate, unless some reason be assigned for the generality of the plaintiff's statement. The only postulate necessary to prove that, a defendant, denying (to the satisfaction of the Court) a general charge of fraud, may successfully object to the production of documents in a case like that suggested, is this:—that a party cannot, in a Court of justice, be without an opportunity of making his defence, if, in truth, he has one. The mode of taking the objection is another point (*k*). But if a defendant be not provided with some means of doing this, it will follow, as was before observed, that a plaintiff, merely by suggesting a fictitious case, may secure to himself an inspection of another man's documents, in which he has no interest. That a defendant should be allowed *by answer* to protect

(*k*) Infra, Prop. IV. and V.

himself against discovery in cases similar to the second example proposed above, is, indeed, a merely logical conclusion from the third proposition, which privileges a defendant to withhold from his adversary the evidences exclusively relating to his (the defendant's) case, for that rule would be merely nugatory, if the plaintiff, by fictitious charges simply, could compel the defendant to produce his privileged evidence. A general charge that the defence is untrue, and that it would so appear if the defendant's documents were produced, is open (and perhaps more strongly) to the observations which have been applied to a general charge of fraud. The defendant would, of course, be compelled to swear to the truth of his defence, and to admit or deny the truth of the charge as to the effect of his documents; but his obligation to produce them would, (it is conceived), be a matter for the judgment of the Court depending upon the effect of the defendant's answer.

315. In contending against the sufficiency of a general charge in a bill to confer upon a plaintiff an absolute right to a production of documents,—the author will not be misunderstood as admitting that a fictitious case in a bill will necessarily baffle the powers of a Court to do justice, because it purports to give details, provided the defendant sufficiently denies the case suggested in the bill. The observations which apply to a general charge apply with equal force to a particular case detailed in the bill, provided the answer precisely and substantially denies the case

suggested. The plaintiff may of course suggest any case which ingenuity can devise, for the purpose of eliciting the fact that his case, or even his name, appears in the defendant's documents relevant to the subject of his suit; and he may, perhaps, compel the defendant to give him every extract in which his name appears, and to pledge his oath that his (the plaintiff's) name appears in no other places than those which the defendant may admit. All that the author contends for is, that a plaintiff cannot by a bill, the case made by which the defendant swears is fictitious, obtain an inspection of documents, which upon the answer appear to be exclusively relevant to matters in which the plaintiff has no interest (*l*).

316. The case of *Emerson* v. *Harland* (*m*) does not conflict with the views here taken. That case decided only that some answer must be given to the charge relating to the possession of documents material to the proof of the plaintiff's case, and not that the defendant—denying that charge—should produce his documents for the plaintiff's inspection.

317. The great difficulty which the Court is sometimes under in refusing to make an order for the production of documents, arises from the consideration, that it is giving final effect to the oath of the defendant

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(*l*) *Storey* v. *Lord George Lennox*, 1 Myl. & Cr. 525; and cases cited under Prop. III.

(*m*) 3 Sim. 490; S. C., 8 Bligh, 62; supra, pl. 117.

(the interested party) upon the plaintiff's right to discovery,—a difficulty which is increased by the observation, that, from the nature of documentary evidence, the defendant may be swearing to that which is rather matter of law than of fact, or at best a mixed question of law and fact. The whole of the plaintiff's case may hinge upon a point like this. On the other hand, it must be observed, that, in refusing to make an order for the production of a document, a Court of equity deprives the plaintiff of no evidence to which the law entitles him, and which he can obtain without the aid of a Court of equity. A Court of equity professes to do no more than add to that evidence which the plaintiff can obtain without its assistance, such admissions as he may obtain by the examination of the defendant upon oath. Nor is this technical view of the case unsupported by more general reasoning. The bill may be filed, not to prove a case *known* or *even believed* to be true, but to elicit discovery for the *chance* of what may appear from the defendant's answer, and an inspection of his papers. Now it has been shewn, that, in some cases, there is *no* form of pleading by which a defendant can by demurrer or plea protect himself from *all* discovery, however false the bill may be. The difficulty suggested is, therefore, strictly unavoidable. The oath of the defendant *must* be received, or the defendant must be without *the means of* a defence, which in truth belongs to him,—a proposition too absurd for argument. The Court, however, though bound to receive the defendant's

oath, is not necessarily bound to believe it. If there be nothing, indeed, to impeach the credit due to the defendant's oath, and his case be clearly brought (by his oath) within any of the cases, already noticed, to which the *right* of the plaintiff to discovery does not extend, there the Court must (it is conceived) give conclusive effect to the oath it receives, and protect the defendant's documents from the plaintiff's inspection. If, on the other hand, the answer be equivocal or possibly evasive, the judgment of the Court—regulated by the ordinary rules of evidence—must be applied in determining whether the answer is credible or not (*n*). In such a case a reference to documents, (as in *Hardman* v. *Ellames*), "for greater certainty," "for fear of mistake," or other saving expressions, might be highly material in determining the judgment of the Court. No positive rules can, however, in the abstract be laid down upon a point like this.

318. By what rules, then, are the opposite interests of a plaintiff and defendant respectively to be protected? As a general rule, it may perhaps be stated —that the defendant, in order that he may entitle himself to the protection he claims, must give the Court the best means he can of judging of the truth of what he swears to, short of course of that discovery, which he is desirous of withholding; that is, he must claim protection by means of the best

(*n*) See *Shaftesbury* v. *Arrowsmith*, supra, pl. 228: *Purcell* v. *Macnamara*, infra, pl. 319.

evidence the nature of the case admits of. A mere general assertion that all the documents in the defendant's possession are evidence exclusively of his own case, *without describing them*, might not, perhaps, in *some cases*, though in *others* it clearly would, be sufficient. A description of the documents, however, coupled with the same averment, would, probably, in all cases, be sufficient, unless from the nature of the documents or other circumstances appearing in the answer, the Court found reason for discrediting the answer, or refusing to give effect to it. The nature and extent of the *averments* must determine a question like this. But such averments must be precise and definite. A statement of the possible effect of the documents, for example, would not in general be sufficient. The observations of the Lord Chancellor in *Storey* v. *Lord George Lennox* (*o*), in *Desborough* v. *Rawlings* (*p*), and in *Bowes* v. *Fernie* (*q*), will be found to contain a most valuable commentary upon this point in the law of discovery. In the last of those cases the Court held that a discrepancy between two different parts of an answer entitled the plaintiff to the benefit of that which was most favourable to himself.

319. The following case, which the writer received from a late Lord Chancellor of Ireland (*r*), strongly illustrates the weight given to the oath of a defendant upon an interlocutory proceeding for the production

(*o*) 1 Myl. & Cr. 525.
(*p*) 3 Myl. & Cr. 515.
(*q*) 3 Myl. & Cr. 632.
(*r*) Sir Anthony Hart.

of documents. In *Purcell* v. *Macnamara*, the defendant was ordered to produce certain account books, with liberty to seal up such parts as he should upon oath declare related to private matters other than those mentioned in the bill. The defendant did accordingly seal up certain parts of his books under the liberty reserved to him by the order, and in this state they were produced. In the index at the end of one of the books was contained a reference to a page in the sealed parts of the book, which shewed, if the index were correct, that the page referred to related to the matters in the bill. Upon this being discovered, the plaintiff applied to the Court for liberty to break the seals, but Lord Eldon refused the motion, upon the ground that the answer concluded the question. And in *Clapham* v. *White*(*s*), upon a motion to *revive* an injunction which had been dissolved upon the answer coming in—the motion proceeding upon the fact that the grand jury had found a true bill for perjury in that answer—Lord Eldon, referring to the great weight which a Court of equity gives to an answer upon interlocutory proceedings, said, "If the answer denies all the circumstances upon which the equity is founded, the universal practice as to the purpose of dissolving or not reviving the injunction is, *to give credit to the answer;* and that is carried so far, that, except in the few excepted cases, though 500 affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be read as to

(*s*) 3 Ves. 36.

this purpose. That being the rule, and the injunction being dissolved upon the credit given to the answer for this purpose, the question is, whether the answer is to be thus accused (for it is no more) of perjury. This is a grave ground certainly for conceiving, that the answer may be all false; and morally false, whether the matter of perjury is material, or not; though not judicially, if it is not material. The difficulty as to the principle is, that the grand jury may have believed, and in most cases must have believed, those very persons upon their oaths for that purpose, whose depositions this Court would not permit to be read for the purpose of discrediting the answer. It is therefore in a circuitous way destroying *the rule of this Court, giving credit to the answer for this purpose.*"

320. The observations in the preceding paragraphs, commencing with the 313th, apply specifically to each of the three cases proposed in the 306th paragraph.

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321. Before concluding the subject which has been considered so much at length—the meaning of the expression "*full answer*" in its application to the production of documents before the hearing,—some special points remain to be noticed, by which the general principles which regulate this branch of practice are explained or limited, but which could not, without interruption, have been suggested in an earlier place.

322. If the defendant (without more) admits the possession of documents relevant to the plaintiff's case,

it is not necessary that he should in terms refer to the contents of the documents, in order that the plaintiff may be entitled to an order for producing them (*t*).

323. If the defendant (without more) admits the possession of documents relevant to the plaintiff's case, it is not necessary that the plaintiff should have called upon the defendant to set out the contents of the documents in the answer, in order that the plaintiff may be entitled to an order for producing them (*u*).

324. From the language of some cases (*x*), it might, perhaps, be inferred that title deeds and documents of title were privileged in a manner not applicable to other documents. The author is not aware that any such privilege can be defended upon principle. If a plaintiff can read from the defendant's answer an admission, which shews that he has an interest in a title deed for the purposes of the suit, all the cases shew that he will be entitled to have it produced, and if he cannot read such admission as to any other document, the cases equally shew that he will not be entitled to see it. In practice, indeed, a difference may exist between title deeds and other documents,—such, for example, as letters, &c.,—but this difference, it is conceived, is to be attributed only to that laxity in practice which invariably increases as

(*t*) Common Practice.

(*u*) Common Practice.

(*x*) *Knight* v. *The Marquis of Waterford*, 2 Younge & Coll. 23 (1835).

the importance of applying principles with strictness is diminished.

325. If a plaintiff is entitled to the production of a deed or other document within the terms and meaning of the proposition now under consideration, as being applicable to *his* case, his right to such discovery will not be affected by the circumstance, that the same document is evidence of the defendant's case also (*y*). The case of a mortgagee before the day for payment would probably be considered within the scope of the last observation. The position of a mortgagee after the day of payment may, perhaps, be subject to different considerations. This point is noticed in a later page (*z*).

326. And if a defendant, bound to keep distinct accounts for another party, *improperly* mixes them with his own, so that they cannot be severed, he must produce the whole (*a*).

327. It was shewn in a former place (*b*), that an admission of the relevancy of documents in the defendant's possession to the plaintiff's case will—as

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(*y*) *Burrell* v. *Nicholson*, 1 Myl. & K. 680, and cases there cited. And see the judgment in *Bolton* v. *The Corporation of Liverpool*, 1 Myl. & K. 88, and infra, pl. 367 : *Attorney-General* v. *Lamb*, 3 Younge & Coll. 162.

(*z*) Infra, Prop. III.

(*a*) *Freeman* v. *Fairlie*, 3 Mer. 29 : *Earl of Salisbury* v. *Cecil*, 1 Cox, 277 ; Hare, 245.

(*b*) Supra, pl. 299.

between the plaintiff and defendant who makes the admission—entitle the plaintiff to an order for their production, upon motion before the hearing. It should be observed, that it is only between those parties that the rule applies. The circumstance, that a person not before the Court, or that a party to the suit who has not answered, has an interest in a document, will in general (*c*) deprive the plaintiff of his right to inspect it, in the absence, or until answer, of the third party, notwithstanding a sufficient admission by a defendant on the record as against himself. The case of a joint possession by the defendant and another has already been adverted to (*d*). The cases here suggested apply to a joint *interest* in one defendant and another person, the *possession* being in that defendant alone, by whom the admission has been made. Cases of this description may be ranged under three heads: —1. Cases in which the party having the interest is a defendant in the suit:—2. Cases in which the party having the interest is a proper party to the suit, but has not been made a party thereto:—3. Cases in which the party having the interest is not a party to the suit, and is not a proper party thereto. In the first class of these cases the answer of both defendants may be referred to, not for the purpose of reading the answer of either defendant

(*c*) Hare, 126. But see *Walburn* v. *Ingilby*, 1 Myl. & K. 61: *Few* v. *Guppy*, Hare, 124.

(*d*) Supra, pl. 294.

against the other, but for the purpose of determining the plaintiff's rights against each. In the second class, the question would be, whether the nature of the case suggested by the answer of the defendant who had possession of the document shewed such an interest in the absent party, as made it improper in the Court to order its production in his absence. There is nothing, it is conceived, in the nature of the subject which necessarily makes it improper for a Court of equity to order a party having possession of a document to produce it, by reason only that some absent party has an interest in it. At all events the same reasons which excuse the absence of a party to a suit, (e. g. his being out of the jurisdiction), would, it is conceived, prevail also upon a motion to produce documents, if no other objection existed. The third class fall within the scope of the last observations. In *Lambert* v. *Rogers* (*e*), the absence of a cestui que trust was held a sufficient reason for not ordering the production of an instrument in which he had an interest. In *Grane* v. *Cooper* (*f*), the plaintiff filed his bill against his two co-partners. The three had mortgaged joint property of the partnership, and some documents relating to that mortgage were held by one of the defendants as solicitor for the mortgagee. The Lord

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(*e*) 2 Mer. 489.

(*f*) Lord Chancellor, Lincoln's Inn Hall, 15th Dec. 1828.

Chancellor refused to make an order for their production in the absence of the mortgagee. In *Murray* v. *Walters* (*g*) the plaintiff, as representative of a deceased party, filed his bill against the three surviving partners of his testator, praying an account of partnership profits up to June, 1828, and praying to be declared a partner after June, 1828, under an agreement alleged in the bill. The answer disclosed the names of other partners, between thirty and forty in number, and stated that the books of the partnership were in the hands of a treasurer as agent for all parties. The Lord Chancellor refused to make any order for producing partnership books admitted by one of the defendants to be in his possession or under his control. In this case the Lord Chancellor said, that he considered the case of *Walburn* v. *Ingilby* as not reconcilable with the ordinary practice of the Court, and as a case which must be referred to some specialty in it. The case of *Fenwicke* v. *Reed* (*h*), may also be referred to upon this subject. From these cases it seems to follow that the interest of a person not a party to a suit, and who cannot lawfully be made a party to it, might deprive the plaintiff of evidence to which, as against the parties to the suit, he might clearly be entitled.

328. It was shewn in a former page (*i*) that if a de-

(*g*) Lord Chancellor, Lincoln's Inn Hall, 7th Aug. 1829.
(*h*) 1 Mer. 114. (*i*) Supra, pl. 301.

fendant admits the relevancy of documents in his possession to the plaintiff's case, and afterwards states reasons why, notwithstanding that relevancy, he should not be compelled to produce them, the Court will allow him to appear upon a motion for their production, and take its judgment upon his liability. The proposition stated in a former page (*k*) was broken in upon by some recent decisions, in which a question was made, whether a plaintiff in equity, who obtains a discovery of documents in the possession of the defendant in aid of a trial at law, is entitled to an order in equity for the production of the documents at the trial, *separate from the body of the answer*. In *Crowley* v. *Perkins* (*l*) (1832), the Vice-Chancellor ordered a defendant to a bill of discovery in aid of an action, to produce at the trial, separately from the body of the answer, documents set forth in the schedule to his answer as being in his custody. In *Angell* v. *Westcombe* (*m*), and in *Brown* v. *Thornton* (*n*), the same point came before the Vice-Chancellor, and his Honour in both cases adhered to his decision in *Crowley* v. *Perkins*, and made the same order as in that case. The objections to such an order, considered as an order of course, are manifest. The effect of it is, that—whereas documents scheduled

(*k*) Supra, pl. 11.
(*l*) 5 Sim. 552.
(*m*) 1st seal after Hilary Term, 1836.
(*n*) Lincoln's Inn, 9th March, 1836.

to an answer are only *part* of the answer—the plaintiff in equity, by means of the order, would be enabled to read them at law as if they were the *whole* answer, and thereby to get rid of all qualifications which the answer might introduce (*o*). At law, the judges will not, as of course—for the reason just suggested—permit *secondary* evidence to be given of the contents of documents, which a party obtains only as part of an answer to a bill in Chancery. Lord Lyndhurst so ruled in *Gurney* v. *Whitbread,* at Nisi Prius, — he said, application should be made in equity for the production at the trial.

329. The above considerations induced an appeal in *Brown* v. *Thornton.* The Lord Chancellor in that case, after directing a search for precedents, and after communicating with the Judges at common law upon the point, discharged the Vice-Chancellor's order (*p*). His Lordship, in giving judgment, said: "The uniform opinion of the Judges of the Courts of common law is, that where a bill of discovery has been filed, to which an answer has been put in, and documents are produced at the trial as part of the answer, in which character alone the plaintiff in equity is entitled to use them, the answer must be read; but, on the other hand, when a Court of equity has interfered, and has ordered the documents to be produced and read, the

(*o*) *Hylton* v. *Morgan,* 6 Ves. 293: *Aston* v. *Lord Exeter,* 6 Ves. 288; Hare, 16, 19, 21, 22.

(*p*) 1 Myl. & Cr. 243.

Court of Law, sitting at Nisi Prius, pays such respect to the order of the Court of equity, that it allows the documents to be read alone, without inquiring into the grounds of the order. That is the rule established at law, and it is consistent with what is the situation of the parties. The question is, whether, upon a mere bill of discovery, a Court of equity ought to interfere, so as to relieve the plaintiff in equity from the necessity of doing that which he is, by law, bound to do; that is, on a bill of discovery, to give the plaintiff in equity a benefit beyond that which he is entitled to derive from the answer to such a bill. I was surprised to hear the affirmative contended for in the argument; because I thought that such a course would be giving relief; the Court would not in that case be used for the purpose of obtaining discovery. It is obvious that the effect of the Vice-Chancellor's order was to give the party a benefit he could not otherwise have, namely, the power of using a document in a manner in which he would not in other respects be entitled to use it. I directed the registrars to search whether there was any precedent of such an order having been made on a bill of discovery. The result is, that no such order can be found upon a bill of discovery, except that in the case of *Crowley* v. *Perkins*, which was cited in the argument. That result is quite consistent with the doctrine of the Judges at law. This Court does not, upon a bill of discovery, interfere with the rights of the parties; it merely gives the discovery sought. If the Court were to go further,

the bill would not be a bill of discovery, and there would be a departure from the practice of the Court upon a bill of discovery. As soon as the defendant in equity has put in his answer, he is entitled to his costs, and the office of the Court is discharged. The Court has no jurisdiction to exercise on a bill of discovery; it leaves the parties to make the best use of the discovery they can." The observations of Lord Eldon, in *The Princess of Wales* v. *The Earl of Liverpool* (*q*), strongly support the reasoning of the Lord Chancellor in *Brown* v. *Thornton*.

330. From the language of some reported judgments it might be inferred, that the judges by whom they were pronounced were of opinion, that if a document was so stated in an answer in equity that a Court of law would, in analogous cases, order its production, a Court of equity should, *therefore*, do the same (*r*). Assuming that such a principle was intended to be expressed by the dicta referred to in the note, the author presumes to say that it cannot be too strongly objected to. It may, indeed, be questioned, whether the jurisdiction exercised by Courts of law in compelling the production of documents, merely because they are stated in the pleadings, has not been introduced upon the erroneous supposition that they were doing

(*q*) 1 Swanston, 114.

(*r*) 1 Myl. & Kee. 93, in *Bolton* v. *The Corporation of Liverpool* (1833); 1 Younge & Coll. 618, in *Pilkington* v. *Himsworth*.

no more in such cases than Courts of equity would do in the same case,—an observation, which, if well grounded, would make a reference to the practice of Courts of law inadmissible for *any* purpose in deciding what a Court of equity should do. But, however that may be, it is certain that a Court of equity never gives the plaintiff in equity the benefit of the defendant's oath, without giving the defendant the benefit, as far as it may go, of his own oath also (*s*). The observation of Lord Eldon in the case of *The Princess of Wales* v. *Lord Liverpool*, and the principle of the Lord Chancellor's judgment in *Brown* v. *Thornton*, appear to place this point beyond the reach of controversy. In the former case Lord Eldon (referring to the practice of Courts of law in compelling the production of written instruments) says (*t*): "Those Courts, adopting a special mode of proceeding, have assumed a jurisdiction which was formerly exercised exclusively by Courts of equity. They have done so on the supposition that they were doing what Courts of equity did; but I believe it will be difficult to admit, that, in the exercise of that jurisdiction, they have acted between the parties as this Court would act. That, however, is the principle on which they have since proceeded, in compelling, on motion, the production of bills of exchange or promis-

(*s*) *Princess of Wales* v. *The Earl of Liverpool*, 1 Swan. 114: *Brown* v. *Thornton*, 1 Myl. & Cr. 243: and *Evans* v. *Bicknell*, 6 Ves. 182, 185.

(*t*) 1 Swan. 119.

sory notes, the subjects of an action; and I believe that Lord Mansfield first adopted that rule, on the supposition that he did no more than was constantly done in Courts of equity. Speaking with all the deference due to Lord Mansfield, it does not appear to me that he exactly recollected what a Court of equity would do in such a case; because there is a mighty difference between simply producing an instrument, and producing it in answer to a bill of discovery, where the defendant has an opportunity of accompanying the production with a statement of every thing which is necessary to protect him from its consequences. On the present case we must refer to the practice of this Court; and admitting that there may be exceptions to the rule of practice, we must admit also that great care must be taken in each particular instance to ascertain that the case of exception actually exists. It becomes, therefore, necessary to consider the case with reference to all our rules for compelling production of instruments, whether instruments mentioned in the bill or in the answer; recollecting what those rules require the plaintiff in the one case, and the defendant in the other, to admit relative to the possession of the instruments." And again his Lordship adds (*u*): "Many doctrines have been introduced into Courts of law on a supposed analogy to the practice in equity, but without the guards with which

(*u*) *The Princess of Wales* v. *The Earl of Liverpool*, 1 Swans. 124.

equity surrounds the case; as in the instance of dispensing with *profert*, no man can enter this Court without guarding his entrance by sanctions which the Courts of law cannot impose; and it happens whimsically enough, that there are cases in which Courts of law, proceeding on the principle of giving a remedy because one might be obtained in equity, have compelled the party to resort to equity for protection against that practice at law. When Courts of law held, that because the production of promissory notes might be obtained in equity, they would compel the plaintiff to produce them, they forgot that in equity, if the promissory note will not, on the face of it, furnish explanation, the defendant to the cross-bill accompanies the production with an explanation by his answer of all the circumstances; and that the mere compulsory production would deprive him of the safeguards which this practice affords."

331. It has been shewn in a former page (*x*), that a plaintiff has no right to exact from the defendant a discovery of evidence obtained or prepared by his professional adviser, with a view to the litigation between the parties. A question has lately been agitated, whether the privilege of the defendant to withhold such discovery applies to evidence which the defendant himself may have obtained for a purpose, and under circumstances, which would clearly have protected it if obtained by his professional adviser. The

(*x*) Supra, pl. 136.

point was argued, but not decided, in the late case of *Storey* v. *Lord George Lennox* (*y*), before the Lord Chancellor, and the impression on the mind of the author at the time of the argument was, that the Lord Chancellor considered the privilege as depending in principle upon the purpose for which, and the circumstances under which, the evidence was obtained, and not exclusively upon the person who might actually obtain it. A contrary decision would preclude a party,—even though a solicitor,—from taking any steps in the prosecution of his own cause; and many of the reasons assigned for admitting the privilege in any case apply as strongly to the case of evidence obtained by the party himself, as to the evidence obtained by his professional adviser (*yy*). In *Greenlaw* v. *King* (*z*), the Master of the Rolls, after deciding that letters written by one Leigh, a solicitor, were not privileged, added: "If those letters were written to Leigh, for the purpose of being communicated, by that channel, to counsel, another question might have arisen;—I might have thought it subject to a different rule, but that is not so." However, his Lordship added: "the cases of privilege are confined to solicitors and their clients (*zz*)."

332. In *Taylor* v. *Sheppard* (*a*), the Lord Chief Baron ordered the production of a document, contained in an answer, under singular circumstances.

(*y*) 1 Myl. & Cr. 525.

(*yy*) 1 Myl. & K. 94.

(*z*) 1 Beavan, 145.

(*zz*) But see *Curling* v. *Perring*, 2 Myl. & K. 380, and 1 Younge & Jer. 178.

(*a*) 1 Younge & Coll. 271.

The plaintiff in equity was defendant in several actions at law, brought against him by different parties upon similar grounds. The plaintiff in equity having, by means of his bill against Sheppard, the plaintiff in one of the actions, obtained a discovery of a document, which he thought material to his case at law in an action brought against him by another party, moved that the officers of the Court, in whose hands the documents had been deposited under the usual order, might attend with the documents at the trial of the last-mentioned action; and the Lord Chief Baron made an order in accordance with the motion. The principle involved in this decision appears to deserve great consideration (*b*). In the same case, an order was made for the production of the documents in the answer upon the trial of an indictment against a third party.

333. The right of a defendant to withhold from the plaintiff a discovery of the evidences exclusively relating to his (the defendant's) case, and the circumstances under which a defendant may be held to have lost or waived that right, are the subject of the Third Proposition. But, it may be proper, in this place, to notice some of the leading points which occur in that proposition, in order to render more complete the observations upon the plaintiff's right to a production of documents in the defendant's possession before the hearing.

334. The reader, for this purpose, must give credit to the accuracy of the Third Proposition, so far as it

(*b*) Supra, pl. 327, 328, 329.

asserts the original privilege of a defendant to withhold from his adversary a discovery of the evidence which relates exclusively to his (the defendant's) case.

335. If, however, the defendant purports to set out the contents of a merely defensive document in his answer, and "for greater certainty" as to such contents craves leave to refer to it, that reference will, according to the case of *Hardman* v. *Ellames* (*c*), be a waiver of the defendant's privilege, and the plaintiff will be entitled to an order for production of the document upon motion.

336. But the rule introduced by *Hardman* v. *Ellames* is, it is conceived, confined to documents, the contents of which are *stated or purported to be stated* in the answer, and does not extend to documents merely mentioned in the answer, or in a schedule to it, although the defendant may say in his answer that he relies upon those documents to prove his case.

337. According also to the case of *Latimer* v. *Neate* (*d*), a defendant may, by *pretending* to give discovery which he might have refused, be held to have waived his privilege, so as to entitle the plaintiff to inspect the defendant's documents in order to see whether his answer *be correct or not.*

338. Some observations upon the case of *Latimer* v.

(*c*) Infra, pl. 386 et seq.

(*d*) 2 Younge & Coll. 257 ; 11 Bligh, 149.

Neate will be found in a later page (*d*). The special circumstances of that case are such as to prevent its being an authority for any abstract point of law.

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339. In the argument of a recent case (*e*), it was said by counsel at the bar, that the cases in which the Court orders the production of documents in the answer before the hearing, were reducible to three heads:—1. Where the plaintiff has an interest in them, *for the purposes of the suit;* 2. Where the defendant states them partially in the answer, and also refers to them; 3. Where the plaintiff has an interest in them *quà property*, as may be the case in a bill by a cestui que trust against his trustee, or by a tenant in common against his companion.

340. The first of these heads has been already considered, and it is hoped established. The second will be examined in considering the Third Proposition. With respect to the third head, the author is not aware of any authority for it, in the abstract. The word *interest* is undoubtedly used as the test by which the right of a plaintiff to the production of documents in the answer is to be tried,—but the sense in which it is so used, is not that which this third head supposes. The

(*d*) Infra, Prop. V.

(*e*) *Bannatyne* v. *Leader*, Sittings after Trin. Term, 1836.

case of *Lingen* v. *Simpson* (*f*), and the other cases already referred to, negative the interpretation of the word "interest" ascribed to it in the third head. It would, perhaps, be difficult to suggest a case of admitted interest *quà property* in a document (and it is only to the case of an admitted interest that the argument can apply), in which the right to production would not attach under the first head. An admitted cestui que trust, or an admitted tenant in common, would, unless under very special circumstances, have an interest in the documents relating to the trust or common property *for the purposes of the suit*, and the third head would, therefore, become merged in the first. And in the case of admitted property in a document, the Court would be indisposed to try the plaintiff's right by any very severe test. But, in principle, it is conceived, the *right* of a plaintiff to the production of documents referred to in the answer, before the hearing, must be reducible to one of the two first heads above suggested; for the decree is the only occasion upon which the Court can regularly administer rights; and orders upon interlocutory applications are regular only when made as ancillary to the decree (*g*).

341. Adverting to the actual state of the authorities, a fourth head, depending upon the *waiver* of the de-

(*f*) Supra, pl. 230.

(*g*) See the cases cited in *Shaw* v. *Shaw*, 12 Price, 163.

fendant, ought, perhaps, to be separately considered. This will be noticed under the Fourth and Fifth Propositions. The reader will easily exhaust the questions which arise under the head of waiver, by referring to the case of *Adams* v. *Fisher* in a former page, and the cases of *Hardman* v. *Ellames* (*h*), *Latimer* v. *Neate* (*i*), and *Lowndes* v. *Davis* (*k*), which follow.

(*h*) Infra, pl. 386 et seq.

(*i*) Infra, Prop. V.

(*k*) Infra, pl. 377.

THIRD PROPOSITION.

The right of a plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case — *and does not extend to a discovery of the manner in which the* defendant's case *is to be established, or to evidence which relates exclusively to his case* (*a*).

342. It has been contended, (by the Second proposition), that where a plaintiff *makes a case* in his bill, which would disprove the truth of, or otherwise invalidate the defence, he may be entitled to discovery from the defendant, in order to enable him *so* to impeach the defendant's case.

343. So far, then, the plaintiff has a *right* to discovery, directed—as evidence—not to the case upon

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(*a*) The cases which establish this proposition are not (it may be observed) *exceptions* to the First Proposition. They are *not* within its *terms*. See supra, pl. 139. "The principle of the present objection involves, in fact, the boundary which divides the rights of the litigating parties to the exclusive knowledge or possession of their evidence; and it is, therefore, upon the application of this rule, that the main controversy will always arise."—Hare, 134.

which his right to relief is founded, but to the purpose of attack upon *the defendant's case*.

344. It seems also clear, that this right of a plaintiff to discovery in support of *his own case* is not abridged, as to any particular discovery, by the consideration that the matter of such particular discovery may be evidence of the defendant's case *in common* with that of the plaintiff (*b*).

345. Further,—by the rules of equity, a defendant is (in general) (*c*) bound to pledge his oath to the truth of his defence. At law, it is otherwise; and it may, perhaps, be thought, that the equitable rule which thus requires the sanction of an oath to the truth of the defence, is to be referred to the principle (the Second proposition) which entitles a plaintiff in equity to make the defendant a witness against himself; in other words, that the oath pledged to the truth of the defence is in the nature of *discovery*. Where a defence consists in a simple denial of that which is contained in the bill, and which is made the subject of interrogation, there, *defence* and *examination* or *discovery* are identified with each other; and the question here adverted to does not present itself; but, where the *defence* consists of matter not alleged or referred to in the bill—as by a pure affirmative plea—it is obvious that the words *examination* or *discovery* are in spirit,

(*b*) Supra, pl. 325.

(*c*) The exceptions are few. See Redes. Plead. 9, 16.

as well as in terms, inapplicable. The true explanation of the rule which requires the defence to be upon oath, it is conceived, is this:—The Court requires the *oath* of the defendant, not for the better information of the plaintiff, but in order to exclude the possible case of a defendant availing himself of a defence which *he may know* to be unfounded in fact. The analogies for this view of the subject are numerous, and that it is the correct view, appears to follow from several considerations:—1. The oath is required in the case of a pure affirmative plea to which discovery is inapplicable:—2. The *extent* to which the defendant may think fit to disclose his defence, is unaffected by the obligation he is under to put in that defence upon oath; and the defendant is the party who alone would suffer, if his case upon the record were not consistent with his evidence:—3. The defendant has the same right to the oath of the plaintiff, in support of *his* case, as the plaintiff has to the oath of the defendant, if, by cross bill, the plaintiff thinks fit to require it. And,—lastly, if the right of the plaintiff to the defendant's oath, as to the truth of his defence, were founded upon an interest in the plaintiff in the documents upon which the defence was founded, the plaintiff should be entitled to *see* those documents before the hearing; but this, except in special cases, he is not entitled to do (*d*). The point is of no great practical

(*d*) In referring to *Hardman* v. *Ellames*, the Lord Chancellor said: "It is because the defendant chooses to make it part of his

importance; for if the defence were not originally upon oath, the plaintiff might, by amending his bill, and charging the defence to be untrue, make it so far part of *his* case, as to entitle him to an answer from the defendant, whether it was true or not. This has been already shewn. The point however, has been thought worthy of notice, as it might possibly be considered a qualification of the general observations which follow; and the principle is by no means neutral in its bearing upon some collateral questions.

346. Subject, then, to the qualification (if so to be considered) which the four preceding paragraphs introduce — a plaintiff is not entitled to exact from the defendant any discovery exclusively relating to *his* case, or of the evidence by means of which that case is to be established. This, however, only means, that the plaintiff has no *original* right to exact such discovery. The defendant may, of course, give such discovery *gratis;* and he may, by a neglect of the settled rules of pleading, be held to have irrevocably conceded to the plaintiff a right to discovery, to which, *à priori,* he had no title (*g*). Considerations like these, however, cannot affect the accuracy of

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answer, that the plaintiff is entitled to see it: *not because the plaintiff has an interest in it.*" 3 Myl. & Cr. 549. This is conclusive to shew that a plaintiff is not considered as having an *interest* in the defendant's case for the purposes of discovery.

(*g*) See the observations on *Hardman* v. *Ellames*, infra, pl. 336, et seq.; and see Propositions IV. and V. infra.

the proposition, which denies to a plaintiff an *original* right to a discovery of the defendant's evidence. A Court of justice *gives*, but does not compel a party to *use*, the means of defending himself.

347. If it were now, for the first time, to be determined, whether, in the investigation of disputed facts, truth would best be elicited by allowing each of the contending parties to know, before the trial, in what manner, and by what evidence, his adversary proposed to establish his own case; arguments of some weight might *à priori* be adduced in support of the affirmative of this important question. Experience, however, has shewn—or (at least) Courts of justice in this country act upon the principle—that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury (*h*), which must inevitably be incurred, when either party is permitted, *before* a trial, to know the precise evidence against which he has to contend; and, accordingly, by the settled rules of Courts of justice in this country (approved as well as acknowledged) each party in a cause has thrown upon him the onus of supporting his own case, and meeting that of his adversary, without knowing beforehand by what evidence the case

(*h*) *Jones* v. *Purefoy*, 1 Vern. 47: *Cann* v. *Cann*, 1 P. Williams, 727: *Whitelock* v. *Baker*, 13 Ves. 512: *Willan* v. *Willan*, 19 Ves. 593: *Bligh* v. *Benson*, 7 Price, 205; S. C., infra, pl. 358: *Cowslade* v. *Cornish*, 2 Ves. sen. 270: *Hall* v. *Maltby*, 6 Price, 240.

of his adversary is to be established, or his own opposed (*i*).

348. The balance of the authorities which follow, appears satisfactorily to establish the Third proposition, in its general bearings, if not to the full extent; and the attentive reader will (it is hoped) detect in those authorities, a clear recognition of the distinction so often referred to in former pages, between *defence* and *examination* as parts of the *same* answer; and of the principle which—as to the former—denies a right to discovery, and which—in the latter—leaves that right *unquestioned.*

349. In some comparatively early cases, indeed, the point now contended for (the immunity of the defendant's evidence) does not appear to have been recognised to the full extent, although the special grounds of departure from it, in the cases referred to, strongly corroborate the general principle. Thus, in *The Earl of Suffolk* v. *Howard* (*k*), (1723), the late Earl had suffered recoveries of settled estates, and devised them to the defendant for life, with remainders over, excluding the plaintiff, upon whom the title descended, from the succession. The plaintiff brought a bill to discover *the defendant's title,* setting forth the old entail under which he was heir male, and praying, *inter alia,* that the writings might be produced. The defendant shewed *by*

(*i*) See *The King* v. *Holland*, 4 Term R. 691.
(*k*) 2 P. Wms. 177.

answer, that the late Earl had, by deed inrolled, made a tenant to the præcipe, and had suffered a recovery to the use of himself in fee, and that he had afterwards made a settlement. Upon a motion for the production of the deeds and writings, the Lord Chancellor adverted to what he considered the injustice of *excluding the heir of the family honor,* whereby he was *consiliarius natus,* from all provision; and, added,—"*Therefore more ought to be done in this case for the plaintiff than in a common case.* Let the defendant bring before the Master all deeds and writings, and let the plaintiff, the present Earl, either by himself or agents, have the inspection of them, *that if anything has slipped the conveyance, or if the entail be not well docked, he may have the benefit of it.*" And in the case of *Bettison* v. *Farringdon* (*l*), (1735), where a similar point arose, the Lord Chancellor said, "Though both parties are volunteers, yet it is of some weight that *the honor of the family* is descended on the plaintiff; and *as at the hearing you admit the Court would do what has been desired,* so it is for the benefit of all parties that it should be done before the hearing (*m*); for, if the deed be a proper one to make a tenant to the præcipe, the plaintiff will go no further, which will put an end to the suit." In this latter case, in addition to the reasons for the judgment already noticed, the Lord Chancellor assigned another, which will be the subject of observation in a future page (*n*). The *multiple* as well as *special*

(*l*) 3 P. Wms. 363. (*m*) See as to this infra, pl. 409.
(*n*) Infra, pl. 409.

reasons (independently of their anomalous character) assigned for these two judgments, must alone be sufficient to prevent the cases in which they were pronounced from being authorities against the Third Proposition. These cases have, moreover, been the subject of much judicial comment. Lord Loughborough (in speaking of them) says: "In the two particular cases cited (I do not quite go along with the reasoning in either of them) the Court did no more than what according to the state of the case *was perfectly innocent, and led to no mischievous consequence.*" And (after explaining what the course at law would be) his Lordship adds: "The Court, therefore, in those cases gave him no discovery, that in the course of his legal pursuit he would not come at; and the only advantage was to give him a little time to consider, whether it would be worth his while to go on to prosecute his right at law" (*o*). The special ground upon which Lord Loughborough thus explains the cases, is (alone) clearly inconsistent with the current of authorities hereafter cited, down to and *including Hardman* v. *Ellames*(*p*). Lord Eldon, in speaking of *The Earl of Suffolk* v. *Howard*, says (*q*): "It is impossible to follow that last case in some points. The defendant made the deeds part of his answer; and upon that the Court

(*o*) 4 Ves. 71, in *Shaftesbury* v. *Arrowsmith;* and see 6 Ves. 296.

(*p*) See infra, pl. 350 to 371.

(*q*) 6 Ves. 296, in *Hylton* v. *Morgan*.

seems to have ordered the production, and upon principle; but they did that, I apprehend, *upon the ground that the answer offered it.*" The report of this case in Peere Williams does not appear to warrant the explanation here given; unless the *reference* to the deed in the answer be equivalent to *profert*, which, according to modern cases, it clearly is not. However that may be, the explanation itself is sufficient to destroy the case as an authority opposed to a general rule. The case of *Bettison* v. *Farringdon* has also been the subject of Lord Eldon's judicial notice, in *Hylton* v. *Morgan* (*r*), and in *The Princess of Wales* v. *The Earl of Liverpool* (*s*). But, as Lord Eldon's observations have an important bearing upon a particular question considered hereafter, the reader (to avoid repetition) is referred to them in the place where that question is discussed (*t*). It is deserving of remark, that in Peere Williams's reports two other cases are found, which, *in principle*, strongly corroborate the Third Proposition. The first of these is *Hodson* v. *The Earl of Warrington* (*u*), (1729). In that case, a question was made, at the hearing of the cause, whether the plaintiff could compel the defendant to produce a deed which he had proved by a witness, and which deed it was said would prove the plaintiff's case. For the plaintiff it was said, that the witness, *by referring to it in his deposition, had made it part thereof.* For

(*r*) 6 Ves. 296.
(*s*) 1 Swans. 121.
(*t*) Infra, pl. 409.
(*u*) 3 P. Wms. 35.

the defendant it was said, *that it remained at his election whether he would make use of it or not* (*x*); that it was so ruled in *Calmady* v. *Calmady*, where the Court would not oblige the defendant to produce a deed which he had proved. The Lord Chancellor held this to be the course of the Court, and would make no order for the defendant's producing the deed. The other case is *Davers* v. *Davers* (*y*), (1727), in which an application similar to that in *Hodson* v. *The Earl of Warrington* was made. The Master of the Rolls had made an order for producing the instrument. This order was carried by appeal to the Lord Chancellor, before whom the counsel for the appellant argued, that the other side had no right to see the strength of his case, *or the evidence of his title, before the hearing;* and, if the order were sustained, such motion would be made every day, since it would be every one's curiosity to try to pick holes in the deed by which he was disinherited. To which the reporter adds, "which the *Lord Chancellor* thought very reasonable, and *therefore* discharged the order" (*z*).

350. In *Stroud* v. *Deacon* (*a*), (1747), the bill was to have a discovery of the *defendant's title*, by setting forth a settlement by which he claimed that his wife, upon her marriage, settled the premises to her separate use,

(*x*) See infra, pl. 412. *Atkyns* v. *Wright*, 14 Ves. 211.

(*y*) 2 P. Wms. 410.

(*z*) It is now matter of settled practice that a defendant is not bound to produce his exhibits, even at the hearing of the cause.

(*a*) 1 Ves. sen. 37.

and that he was her representative; the bill alleging, that if that settlement was produced, it would appear that she was only tenant for life. To this bill the defendant demurred; because the plaintiff did not claim under that settlement. The Lord Chancellor said: "As the plaintiff hath made a title *in contradiction to yours, he hath no right generally to look into your titles;* but the bill charging, that by producing this deed it will appear that her title was only for life, you must give *some* answer to that."

351. In *Buden* v. *Dore* (*b*), (1752), the bill stated a title, and that certain old terms were outstanding. The defendant *answered* the bill, and set up a title *inconsistent* with the plaintiff's, but did not set out what deeds and writings he (the defendant) had relating to his own title. The plaintiff *excepted to the answer*, and the Master allowed the exception. The Lord Chancellor allowed an exception to the report. His Lordship said: "You cannot come by *a fishing* bill in this Court, and pray a discovery of the deeds and writings of the *defendant's title*. If, indeed, there was any charge in the bill, general or special, that the defendant had in his power deeds and writings of the *plaintiff's title*, an answer must be given thereto."

352. In *Burton* v. *Neville* (*c*), (1790), the plaintiff claimed under a settlement; the defendant under recoveries. In his *answer*, the defendant admitted that

(*b*) 2 Ves. Sen. 444. (*c*) 2 Cox, 242.

he had the deeds in his possession, but did not submit to produce them. The Lord Chancellor, upon a motion for the production of the deeds, refused it. Afterwards, the motion was renewed, and the Lord Chancellor again refused it, saying, that he thought the principle was, that the plaintiffs could call for production *of those papers only in which they had shewn that they had a common interest with the defendant, and that the Courts had never gone beyond that* (*d*).

353. In *Ivy* v. *Kekewick* (*e*), (1795), the bill stated, that the testator had, after the execution of his will, contracted for the purchase of an estate, which purchase was completed by his executor Kekewick, who conveyed to his son; and that they were, or one of them was, in possession; that the plaintiff was heir *ex parte maternâ*, and that there was no heir *ex parte paternâ*. The defendant Kekewick, by his *answer*, claimed as heir *ex parte paternâ*. The plaintiff, by the amended bill, prayed that the defendant might set forth in what manner he was heir *ex parte paternâ*, and all the particulars of the pedigree, and the times and places or particulars of the births, baptisms, marriages, deaths, or burials, of all the persons who should be therein named. To this part of the amended bill, the defendant demurred. The Lord Chancellor said: "This is a

(*d*) This case and *Shaftesbury* v. *Arrowsmith* are decidedly standard authorities.

(*e*) 2 Ves. jun. 679.

fishing bill, to know how a man makes out his title as heir. *He is to make it out; but he has no business to tell the plaintiff how he is to make it out. Allow the demurrer.*"

354. In *Shaftesbury* v. *Arrowsmith* (*f*), (1798), the general principle now contended for was recognised with great clearness, and upon full consideration. And in *Aston* v. *Lord Exeter* (*g*), (1801), and *Hylton* v. *Morgan* (*h*), (1801), the same general principle was as clearly recognised by Lord Eldon.

355. The observations of Lord Eldon upon the case of *Worsley* v. *Watson* (1800), stated in a future page (*i*), are also important as an authority on the present point.

356. In *The Princess of Wales* v. *The Earl of Liverpool* (*k*), (1818), the Lord Chancellor said—" In *Bettison* v. *Farringdon* (*l*) to a bill for relief, the defence was, that a recovery had been suffered, which barred the plaintiff's right, and the answer referred to a lease and release making a tenant to the præcipe, and leading the uses of the recovery; on motion, Lord Talbot ordered the production of the deed, *merely on the ground of that reference in the answer;* assigning as his reason, that, as it must be produced at the hearing, it ought to be produced on motion. *Subsequent cases appear to question that doctrine on both its points.* In

(*f*) 4 Ves. 66.
(*g*) 6 Ves. 288.
(*h*) 6 Ves. 293.
(*i*) Infra, pl. 410; S. C. cited 6 Ves. 289.
(*k*) 1 Swans. 121.
(*l*) 3 P. Wms. 363.

Lady Shaftesbury v. *Arrowsmith* (*g*), and in *Burton* v. *Neville* (*h*), the Court held, that a plaintiff has a right to call for the instruments creating the estate-tail under which he claims, but expressed great doubt whether he can call for the instrument *on which the defendant founds his title;* and later decisions seem to have established *that it is not the mere reference that makes the documents part of the answer for the purpose of production* (*i*); though by amending the bill and addressing further questions, the plaintiff may, perhaps, compel the defendant to make those documents part of the answer for that purpose.

357. In *Micklethwaite* v. *Moore* (*k*), (1817), the bill was filed to set aside a partition, one ground being gross inequality of value; and, to prove this, the plaintiff set forth in a schedule certain valuations of the property recently made, but without setting forth the particulars. A motion was made by *the defendant* that the plaintiff might produce the entire valuations. For the plaintiff two objections were taken:—1. That the orders sought for could not be obtained upon motion by a defendant; and 2. That, although a plaintiff had a right to an inspection of documents admitted to be in

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(*g*) 4 Ves. 66.

(*h*) 2 Cox, 242, cited 4 Ves. 67.

(*i*) It is material to observe, that, in the cases referred to, the answer admitted the documents to be in the defendant's possession; so that the judgment turned upon the nature of the documents alone.

(*k*) 3 Mer. 292.

the defendant's possession, *upon which his own title rested,* he could not compel the production of those which *related only to the defendant's title,* which was independent of his own. The Lord Chancellor refused the motion with costs, saying—" *But this case goes much further than any I have ever yet heard of;* and even if a cross bill were filed (which is the usual course) I should not here be able to compel a production of the documents." It may, perhaps, be doubtful whether the latter observation was grounded upon the second point made by the plaintiff's counsel, or upon the circumstance that the bill did not distinctly admit the possession by the plaintiff of the documents in question, but most probably upon the former.

358. In *Bligh* v. *Benson* (*l*), (1819), the defendant moved for the production of a book, admitted by the defendant to be under his control. The Lord Chief Baron said—" This book is *part of the defendant's evidence,* and the rule is clear that you have no right to call upon your opponent in this way to expose his case to his adversary. It would be opening a wide door to perjury."

359. In *Glegg* v. *Legh* (*m*), (1819), the Vice-Chancellor expressed a clear opinion, that a defendant is not bound to discover *his* title, or to set forth *his title deeds or the contents of them.*

360. In *Tyler* v. *Drayton* (*n*), (1819), the bill was

(*l*) 7 Price, 205. (*m*) 4 Madd. 193.
(*n*) 2 Sim. & St. 309.

filed to set aside a conveyance for fraud. The defendant (as appears by the register's book) (*o*) set out his purchase deed (being the conveyance in question) fully, *and craved leave to refer to it when produced.* He further admitted the possession of the deed, but objected to produce it. The Vice-Chancellor (Sir J. Leach) said, that, — where a defendant referred to his schedule, as containing all deeds, papers, &c., in his custody or power, *relating* to the matters in question,— there, the plaintiff was entitled to the inspection of all such deeds, papers, &c., as of course; *unless* it appeared, by the description of any particular instrument in the schedule, or by affidavit, that it was evidence *not of the title of the plaintiff, but of the defendant,* or that the plaintiff had otherwise no interest in its production; and he refused to order the production of the deed in question.

361. In *Sampson* v. *Swettenham* (*p*), (1820), a motion was made for the production of a deed *referred* to in the defendant's answer *upon which he founded his title.* Upon examining the register's book, it appears, that the answer in this case contained a special reference to the document, "as by the said indenture when produced will appear" (*q*). The Vice-Chancellor refused the motion, saying—"The plaintiff is entitled to the production of a deed which sustains *his own title,*

(*o*) See 2 Myl. & K. 754, n. (*b*). (*p*) 5 Madd. 16.
(*q*) See 2 Myl. & K. 754, n. (*b*).

but he has no right to the production of a deed which is not connected with his title, and which gives title to the defendant.

362. In *Firkins* v. *Lowe* (*r*), (1824), a vicar filed his bill against an occupier for tithes. The occupier insisted upon a modus of 17*s.* for the tithes of two farms, and filed a cross bill against the vicar, in which he charged, that the vicar had in his possession books, papers, &c., from which the uniform payment of the 17*s.* would appear. The defendant *answered* this bill. Upon a motion for the production of the books, papers, &c., scheduled to the answer, the Court ordered an inspection of those entries only which related to the payment of the 17*s.*; the answer admitting that in some of the books there were such entries. The Court laid down the rule, that a plaintiff was entitled to a production of such documents as were material to *his own case.* Hullock, Baron, said: "The question is, whether a party to a suit be compellable to afford an inspection of his own private books, *to enable his adversary to find out evidence against him.* I always understood that he was not."

363. In *Wilson* v. *Forster* (*s*), (1825), the bill was filed to recover payment of legacies, alleged by the bill to be charged upon certain lands of which the testator was seised in fee, and which had descended

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(*r*) 13 Price, 193; 1 M'Cleland, 73; Hare, 194 et seq.
(*s*) M'Cleland & Y. 274.

upon the defendant, subject to the charge. The defendant *answered* the bill, and insisted that the testator was tenant in tail only, and that he (the defendant) was seised as heir in tail. Upon a motion to produce the deed alleged by the answer to create the entail, the Chief Baron said: "The difficulty in the way of the application *is the rule of the Court.* There is reason enough, but is there any authority for the motion? The alleged hardship is one which happens in every case where a party desires to see deeds *which constitute the title of the person who is called upon to produce them; he must take the effect of them on the oath of the individual who holds them.*"

364. In *Compton* v. *Earl Grey* (*t*), (1826), upon a demurrer to discovery, the Lord Chief Baron (Sir William Alexander) observed: "It has been ingeniously said, that the plaintiff has an interest in the deeds, but the same observation might apply to almost every case. The effect of the argument is this:—the plaintiff says, *if you will produce your deeds it will appear that you have no title,* and I of necessity must have." The demurrer was allowed.

365. In *Tomlinson* v. *Lymer* (*u*), (1829), the plaintiff sued for tithes of hay, milk, grass, and agistment. The defendant *answered* the bill. In answer to a charge in the bill, the defendants admitted they had in their possession several receipts for moduses, and

(*t*) 1 Y. & J. 154. (*u*) 2 Sim. 489.

compositions, given to them by the plaintiff and his predecessors; but insisted they were not bound to produce them, inasmuch as some of the receipts were given for compositions of tithes of corn, (which were not claimed by the bill), and the others *were evidence for the defendant and not for the plaintiff*. Upon a motion by the plaintiff for the production of the receipts, it was argued, that the plaintiff was entitled to have them produced, as it *might* appear from an inspection of them that they varied in amount, or did not include all the articles stated to be covered by them. On the other side, the above-mentioned cases of *Bligh* v. *Benson,* and *Firkins* v. *Lowe,* were cited. The Vice-Chancellor said, that, as to those receipts which were given for the tithes of corn, the plaintiff had no right to see them, as *they related to matters not in dispute;* and, as to those that did relate to the matters in dispute, he would make no order upon the authority of the cases referred to.

366. *Wilson* v. *Foster* (*w*), (1831), was a bill by legatees, whose legacies were charged on real estate. The defendant was the heir-at-law, and heir in tail, of the testator; and also the heir-at-law, and heir in tail, and devisee, of the original devisee in trust of the testator; and which original devisee was, in his lifetime, heir-at-law, and heir in tail, of the testator. The bill suggested (which was the fact) that the original devisee

(*w*) Younge, 280.

in trust, and also the defendant in the suit, insisted that the testator was *tenant in tail* only of the greater part of the estates of which he died seised; and that all the estates of which he was seised in fee had already been sold. The bill then charged, that the only estates of which the testator was tenant in tail were comprised in a settlement dated in the year 1698; and that he was seised in fee simple of all the other estates. The bill then charged, that the defendant had in his possession the title deeds and writings relating to the said estates, and, particularly, the settlement of 1698; and that, if the defendant should persist in the allegation that the testator was tenant in tail of the said hereditaments, he ought to set forth the date &c. of the deed or instrument by which such intail was created; and ought also to put into a box or bundle all the title deeds, evidences, and writings, relating to the said estate, in his possession or power, and produce and leave the same in the hands of his clerk in Court, for the usual purposes. To the charges above stated the defendant demurred; and answered the remainder of the bill, denying, by his answer, that the testator was tenant in tail of the estates mentioned in the bill, or that he was not seised in fee simple thereof, or of any part thereof. The demurrer was allowed.

367. In *Bolton* v. *The Corporation of Liverpool* (*x*),

(*x*) 1 Myl. & K. 88; S. C. 3 Sim. 467. The judgment of the Vice-Chancellor in this case is particularly deserving of attention.

(1833), the Lord Chancellor, upon a motion for a production of documents scheduled to the answer, said: "I take the principle to be this: a party has a right to the production of deeds sustaining *his own title affirmatively;* but not of those which are not immediately *connected with the support of his own title, and which* form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which *both* claim he may have, or those under which he alone claims. Thus, an heir-at-law cannot, in that character, call for the general inspection of deeds in the possession of a devisee. In *Lady Shaftesbury* v. *Arrowsmith* (*y*), Lord Loughborough said, "he could not find any spark of equity for such an application as that;" admitting that the heir in tail (and so he decided) had a right to inspect settlements creating estates in tail general; the party stating himself to be the heir of the body. The plaintiff here does not claim any thing positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title *may* aid his defence. How? By proving his title, he says. But, how can these documents prove his title? *only by disclosing some defect in that of the cor-*

The ground upon which he rests his judgment, supports the Third Proposition in a very striking manner. He considers the *onus* wholly on the Corporation, and the plaintiff's case as primâ facie requiring no proof, and, therefore, no discovery.

(*y*) 4 Ves. 66.

poration. The description of the documents is, that they rebut or negative the plaintiff's title: they are the *corporation's title,* and not *his,* and they are only his negatively, by failing to prove that of the corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs; and he says, 'Prove me liable if you can.' The corporation have certain documents which, they say, prove this liability. *He cannot call for these documents, merely because they may, upon inspection, be found not to prove his liability, and so to help him, and hurt his adversary, whose title they are.*" In the answer in this cause, the corporation expressly craved leave to refer to the documents in question for their greater certainty (*z*). The motion was refused.

368. In *Tooth* v. *The Dean and Chapter of Canterbury* (*a*), (1829), a bill was filed by the lessees of the Dean and Chapter, who were rectors of the parish of Cranbrook, against certain occupiers of land within the parish, for payment of tithe of hops. The occupiers insisted, that the rectors were entitled only to the tithes of corn and grass; and filed a cross bill against the lessees and the Dean and Chapter, suggesting that the defendants had in their possession grants, and other documents, from which it would appear that the right of the rectors was confined to tithes

(*z*) Upon inspection of the pleadings, see 2 Myl. & Kee. 754, n. (*b*).

(*a*) 3 Sim. 49.

of corn and grass; and prayed a discovery. To this bill the Dean and Chapter demurred, and the demurrer was allowed, principally upon the ground that the Dean and Chapter, not being parties in the original suit, were mere witnesses. In the course of the judgment, however, the Vice-Chancellor made the following observations: "It has been said, by the counsel for the occupiers, that this case falls within the principle of the exception to the rule, that a mere witness cannot be made a party to a suit. But, before we are to consider the benefit which the parties who filed this bill might have by obtaining the discovery which they ask by it, against the Dean and Chapter, we ought to consider the extreme inconvenience and mischief that would arise, if merely because a tenant in fee makes a lease, he is, when a dispute arises between his lessees and others, to be compelled to produce his title deeds; not at the request of the lessees, but at the request of other persons; *not for the purpose of supporting his title, but for the purpose of destroying it;* for that is, in effect, what is asked by this bill; and it appears to me that this is not in the least like any one of those excepted cases to which Lord Eldon alludes in *Fenton* v. *Hughes;* but, on the contrary, that this is rather to be assimilated to the case in which the lessor or landlord is to be protected from any discovery of his own title. And, inasmuch as no instance is produced of such a bill having been filed before, I will not make a precedent so extremely dangerous as overruling this demurrer

would be; therefore the demurrer must be allowed, with costs in the usual way."

369. In *Bellwood* v. *Wetherell* (*b*), MS. (1835), Wetherell filed his bill, as lay impropriator, against Bellwood, for an account and payment of the single value of tithes. Bellwood filed his cross bill for a discovery, and, amongst other things, prayed a discovery of matters relating exclusively to the title of Wetherell. Wetherell, *by his answer*, insisted he was not bound to give such discovery; and, upon argument of exceptions to the answer, the Lord Chief Baron (Lord Abinger) overruled the exceptions, upon the express ground that a plaintiff has no right to inquire into the evidences of the defendant's case.

370. In the case of *Pilkington* v. *Himsworth* (*c*), the Lord Chief Baron laid down some general propositions, which are not (in the full sense of the expressions attributed to his Lordship), reconcilable with his own opinions expressed in other cases, or with the cases above referred to.

371. The case of *Knight* v. *The Marquis of Waterford* (*d*), does not, when examined, conflict with the preceding cases. The order for the production of the

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(*b*) In the Exchequer, before Lord Abinger, C. B.; S. C. 1 Younge & Coll. 211.

(*c*) 1 Younge & Coll. 612.

(*d*) 2 Younge & Coll. 22.

documents was made, in that case, upon the principle that they related to the plaintiff's title. This appears from the last passage in the judgment. At the same time, it must be admitted, that the Lord Chief Baron, in the *application* of an approved principle, went to the extreme point which previous authority could be supposed to sanction.

372. Lord Redesdale, however, in speaking of the purposes for which discovery is given, says—the plaintiff may require "a discovery of the case on which the defendant relies, *and of the manner in which he intends to support it* (*e*)." The first of these propositions—that a plaintiff is entitled to a discovery of the case on which the defendant relies, that is, that the plaintiff is entitled to *know what the case is*—admits of no doubt. The common rules of pleading make it necessary that the defendant should so state his case, that the plaintiff may know with certainty what case he has to meet; and—in the strict observance of those rules—a plaintiff is secure against surprise. It is at the peril of the defendant, if his pleadings are defective in this respect (*f*); but this is quite independent

(*e*) Redes. Plead. 9.

(*f*) *Sidney* v. *Sidney*, 3 P. Wms. 269: *Watkins* v. *Watkins*, 2 Atk. 96: *Hall* v. *Maltby*, 6 Price, 240: *Clark* v. *Turton*, 11 Ves. 240: *Gordon* v. *Gordon*, 3 Swans. 471, 474: *Birce* v. *Bletchley*, 6 Madd. 17: *Fitzgerald* v. *Flaherty*, *Blacker* v. *Phepoe*, *Mulholland* v. *Hendrick*, 1 Molloy, 347, 354, 359: *Hardman* v. *Ellames*, 5 Sim. 640; S. C. on appeal, 2 Myl. & K. 732.

of the law of discovery. The second part of the above quotation from Lord Redesdale, namely, that the plaintiff has a right to know *in what manner the defendant intends to support his case* — must (it is conceived) be an inaccuracy. It is decidedly opposed to all the authorities. It cannot, indeed, be well imagined, that the noble and learned writer intended to lay down so broad a proposition as his words express, for, in a later part of the same work, he expressly says (in conformity with the Third Proposition): "In general, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is *not* bound to discover the evidence of the title under which he claims (*g*)." This is all which (in effect) the writer contends for. The case of *Baker* v. *Booker* (*h*), (1819), may also be referred to in this place.

373. Of these cases it may be observed, that the privilege of the defendant is not confined to documents of any particular kind. If they are exclusively the defendant's they are privileged (*i*), and the privilege, it will be seen, extends as well to the instrument

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(*g*) Redes. Plead. 190.

(*h*) 6 Price, 379.

(*i*) See Hare, 194, 195. But Mr. Hare, in another place seems to think a distinction may, for some purposes, be taken between a deed or deeds under which a defendant *claims or justifies*, and documents merely corroborative of such claim or justification. Hare, 218.

under which the defendant *claims or justifies,* as to documents merely corroborative of such claim or justification.

374. The case of a mortgagee was referred to in a former page (*k*). And it was observed respecting it, that, before the day for payment of the mortgage money, the mortgage deed was the common property of mortgagor and mortgagee. It may, perhaps, be said, that the position of the parties is not altered after the day of payment. For that, although the terms of the mortgage-deed no longer give a right to redeem, the equitable right to do so *results* from the actual contract found in the deed. The answer to this reasoning *might* be, that, as the right to redeem is a creation of Courts of equity opposed to the legal rights of the parties, a Court of equity *may* have modified the right by precluding the mortgagor from a right to inspect the mortgage deed, *until, by its decree, embodying an undertaking on the part of the mortgagor to pay the mortgage money, it shall have precluded him from the power of taking advantage of any possible defect in the mortgage deed.* The author has a strong impression that he has seen it laid down by authority, that a mortgagee, *submitting, by his answer, to be redeemed,* cannot be compelled, before the hear-

(*k*) Supra, pl. 325.

(*l*) See 2 Younge & Coll. 262, in *Neate* v. *Latimer*.

ing of the cause, to produce his mortgage deed (*l*). Where the answer contains no such submission, the ordinary rules of the Court must be applied.

375. The preceding cases must establish, if authority can establish, the original privilege of a defendant to withhold discovery appertaining to his own case alone; and the absence of all original right in a plaintiff to call for such discovery. And from those cases it will be seen that the privilege of the defendant is the same, whether he is defendant in an original suit in which relief is sought, or is plaintiff in that suit and is made defendant to a cross bill, for the purpose of discovery (*m*).

376. Notwithstanding these decisions, however, language has been attributed to the Vice-Chancellor, in a recent case, which, unless it can be referred to some special ground, necessarily overrules the Third Proposition in its application to cases in which the defendant in the bill of discovery is plaintiff in the suit in which relief is sought.

(*m*) See *Glegg* v. *Legh*, *Bolton* v. *The Corporation of Liverpool*, *Tooth* v. *The Dean and Chapter of Canterbury*, and *Bellwood* v. *Wetherell*, cited supra, pl. 359, 367, 368, 369: see also *Bolton* v. *The Corporation of Liverpool*, 3 Sim. 486: *Parker* v. *Legh*, 6 Madd. 115: *Duke of Bedford* v. *Macnamara*, 1 Price, 208: *Storey* v. *Lord George Lennox*, 1 M. & Craig. 525. The observations of the Lord Chancellor in *Latimer* v. *Neate*, 11 Bligh, 149, clearly recognise the same principle.

377. The case referred to is *Lowndes* v. *Davies* (*n*). 29 Ch. D. 40.
In that case, Davies and his wife issued a writ of right against Lowndes to recover estates in his possession. On the same day, Davies and his wife filed their bill against Lowndes, seeking to recover the same estates, or that the right might be tried at law. The plaintiffs claimed the estates in question in right of Mrs. Davies, as the heir of a person named Selby. By a decree in a former suit, to which neither Davies nor his wife was party, Lowndes had been declared entitled to estates, as devisee of Selby. Upon the institution of the foregoing proceedings by Davies and his wife, Lowndes filed his cross bill against them for discovery. Part of the discovery thus sought went directly to the title of the plaintiffs in the action and original bill (defendants in the cross bill), who thereupon demurred to so much of the discovery as was relevant only to their own title. The defendants' counsel, in support of the demurrer, argued that the plaintiff (Lowndes) was not entitled to the discovery, because it "related to the defendants' pedigree, and other particulars of their case, which *they* must prove at the trial of the writ of right." The Vice-Chancellor said: "But, having regard to the case which is stated, I think that it was very judicious in Mr. Lowndes to file this bill, because it enables him to extort, from Mr. and Mrs. Davies, an answer to

(*n*) 6 Sim. 468.

every fact *which can be brought forward by them to sustain their case at law,* it being admitted that the case by which they are to succeed at law is the identical case by which they are to succeed in equity. *And if a person will file a bill, he is, of course, exposed to the ordeal which the defendant may subject him to by filing a cross bill; and he is then bound to set forth an answer to all the matter which concerns his title; for the truth of the matter which concerns his title is material to the defendants' defence in equity.*"

378. Now if the rule of the Court be, that each party is to stand upon the strength of his own case, and is not entitled before the hearing to pry into that of his opponent, this case is directly opposed to those cited above; for the discovery sought by the cross bill was in no way necessary to the defence of the defendant in the action and in the original bill, (plaintiff in the cross bill), except so far as it might enable him to disprove the case of his adversary. The only special ground to which the decision can be referred, and to which the language of the Vice-Chancellor appears to point, is this:—that a plaintiff seeking relief in some original proceeding, if made defendant in a cross bill in respect of that proceeding, is subject to a more inquisitorial jurisdiction than a defendant against whom relief is sought; or, in other words, (for to that the argument must come), that a party, by seeking to enforce his rights, submits by so doing to have his title inquired into in a manner more rigid than that which is sanctioned by Courts of equity

in the ordinary exercise of their jurisdiction. But can such a principle be sustained? The rule which privileges the case of a party from the scrutiny of his opponent, is a rule of public policy (*a*); and the case of a defendant in a cross suit is as clearly within the scope of this rule as the case of a defendant in an original suit. The plaintiff, who makes an unjust claim, is amenable to no greater censure than a defendant who makes an unjust defence; and if the case of the plaintiff in the original proceeding be well founded, it is not equal justice which subjects his case to the inquisition of the defendant in a manner and to an extent which the case of the original defendant is not subjected to, and which, upon the principles of the Court, is unfavourable to a fair trial. Upon the authority of the cases referred to in a former page (*b*), the author submits that the party who seeks relief in an original proceeding is, when he himself is made defendant in a cross suit, entitled to precisely the same privileges as the defendant in such original suit, with respect to the evidences of his own title only.

379. The case of *Metcalfe* v. *Hervey* (*c*), and cases of that class, do not conflict with this view of the subject. In *Metcalfe* v. *Hervey*, an ejectment was brought against a party *who claimed no interest in the property* which the plaintiff sought to recover. The defendant in ejectment filed his bill against the plaintiff, praying

(*a*) Supra, pl. 347. (*b*) Supra pl. 375, p. 288, n.
(*c*) 1 Ves. Sen. 249.

that he might interplead with some other supposed claimant to the estate; and from the judgment in the cause it would appear, that the bill inquired into the title under which the plaintiff in the ejectment claimed. The defendant (plaintiff in ejectment) put in a general demurrer, which Lord Hardwicke appears to have considered good, so far as the bill purported to be a bill of interpleader, but overruled it upon the ground expressed in the following passage of his judgment:—"The question comes to this—whether any person *in possession of an estate, as tenant, or otherwise,* may not bring a bill to discover the title of a person bringing an ejectment against him *to have it set out, and see whether that title be not in some other.* I am of opinion he may, to enable him to make a defence in ejectment, even considering him a wrong-doer against every body."

380. The facts of the case of *Metcalfe* v. *Hervey,* and the nature of the charges in the bill, are not given in the reports. The judgment decides only that *some* answer was necessary with reference to those facts and charges appearing on the face of the bill. It does not decide that the defendant *setting up an adverse title in himself by answer,* would have been bound to disclose one particle of the evidences of that title. It is consistent with the supposition that the bill might have contained charges which made it necessary for the defendant to give some answer as to the *nature,* as distinguished from the evidence, of his title.

381. If *Metcalfe* v. *Hervey* does not admit of this

explanation, it must, it is submitted, be considered as overruled by more modern cases. In *Bowman* v. *Lygon* (*d*), Chief Baron Eyre strongly expressed his disapprobation of the case of *Metcalfe* v. *Hervey;* and in *Bellwood* v. *Wetherell* (*e*), Lord Abinger expressly says, that the defendant in equity (plaintiff at law) is in *cases of that class* to set out, not the evidence, but the *nature* of his title, (e. g. whether he claims as heir at law or as devisee, or whether he alleges any imperfection in the defendant's title deeds); and his Lordship adds, that in cases of recent possession there is no ground to compel even that discovery.

382. The case of *Metcalfe* v. *Hervey*, and the cases of *Glegg* v. *Legh* (*f*), *Parker* v. *Legh* (*g*), *The Duke of Bedford* v. *Macnamara* (*h*), and *Bowman* v. *Lygon*, *Bellwood* v. *Wetherell*, just referred to, and *Whyman* v. *Legh* (*i*), are not, it will be observed, cases in which the plaintiff and defendant claimed adversely, but in which the defendant at law was quasi a stakeholder (*j*). The opinion of Lord Hardwicke, in the case of adverse claims, is clearly expressed in *Stroud* v. *Deacon* and in *Buden* v. *Dore* (*k*), and the rule of the Court seems to be clearly established by the cases cited in a former page (*l*).

383. The observation will not, it is hoped, be deemed

(*d*) 1 Anstr. 1.
(*e*) 1 Younge & Coll. 218.
(*f*) 4 Madd. 193.
(*g*) 4 Madd. 203.
(*h*) 1 Price, 208.
(*i*) 6 Price, 88.
(*j*) See Hare, 204, et seq.
(*k*) Supra, pl. 350, 351.
(*l*) Supra, pl. 375, p. 288, n.

disrespectful, but it would appear that the Vice-Chancellor has at all times leaned more strongly than has been thought safe by other Judges to the proposition, that a party who comes into equity submits himself altogether to the discretion of the Court. Upon that principle exclusively his Honor decided the case of *Agabeg* v. *Hartwell* (*m*), and *Brown* v. *Newall*, both which cases were afterwards reversed. The true scope and bearing of the rule, that "he who would have equity must do equity," cannot, it is conceived, be carried beyond this, that a party, by filing his bill, submits to do every thing which may be necessary on his part to give effect to the rights of his opponent in the subject-matter of the suit. He submits to give his opponent all his existing rights; but he confers no new rights upon him by seeking to establish his own (*n*).

384. The cases which have been cited, excluding *Lowndes* v. *Davies*, recognise and support the distinction between *defence* and *examination*, as constituent parts of an answer, and prove, with the aid of the first proposition, that each of these parts is—in matters of discovery—governed by rules peculiar to itself; and, *in particular*, that a plaintiff is not entitled to a production of documents which appertain exclusively to the defendant's case—1. whether the defendant simply describes such documents in his answer, or in a sche-

(*m*) Not yet reported.

(*n*) See the cases cited in *Brown* v. *Newall*, 2 Myl. & Cr. 558.

dule to it, *without referring to their contents*; or—2. states their purport and effect in the answer, *without further reference*. Both these points were confirmed by the judgment in the recent case of *Hardman* v. *Ellames*. This case, however, raised another point which must now be adverted to.

385. In the case of *Hardman* v. *Ellames*, the question was raised—whether, if a defendant states in his answer the purport and effect of a document which is evidence only of *his own case*, and *also refers to such document* (*o*), he does not, *by force of that reference*, make the document part of his answer, so as to entitle the plaintiff to have it produced upon motion, although *without* the reference the document would be privileged.

386. In *Hardman* v. *Ellames* (*p*), the plaintiff by his bill claimed a moiety of certain estates in the possession of the defendant *Ellames*, as heir-at-law of the testator *John Hardman*, under an ultimate remainder in his will, expectant upon the deaths of the testator's nephews *John Hardman* and *James Hardman* successively without issue, to his own right heirs. To this bill the defendant *Ellames* pleaded two pleas, which were both overruled. The defendant *Ellames* then put in his answer. The answer consisted of *two* dis-

(*o*) By the *reference* here alluded to, is meant the *common reference*, "but this defendant for his greater certainty, &c."

(*p*) 2 Myl. & K. 732.

tinct parts:—1. The *defence;* and, 2. An answer to the interrogatories in the bill. The defendant, in setting out his defence, with which the answer commenced, stated four several fines and the effect of the several deeds declaring the uses of the fines, and concluded: "as by the said several fines and the proclamations made thereon respectively, now remaining of record in the said Court, and by the said several deeds hereinbefore mentioned, to which, *for greater certainty*, the defendant craves leave to refer when produced, will appear." These deeds were enumerated in a schedule, and admitted to be in the defendant's possession. In a subsequent and distinct part of the answer, (the examination), which was directed to the case set up by the bill, the defendant denied that the fines or any of them were or was declared to any uses under which the plaintiff, as heir-at-law of the testator, supposing him to be such heir, was entitled to a moiety of the estates or any part thereof; the defendant further denied, that the documents in his possession contained any recitals or references shewing the truth of the matters in the bill or any of them; and he further said, *that the said documents related to and made out his* (*the defendant's*) *title to the estates and premises, and did not, according to the best of his information and belief, shew or tend to shew any title in the plaintiff thereto, or to any part thereof.* A motion was made that the defendant Ellames might produce and leave with his clerk in Court for the plaintiff's inspection, the several deeds declaring the uses of the aforesaid

fines respectively. The Master of the Rolls (Sir C. Pepys) made an order granting the application, upon the ground, that the defendant had, *by the words of reference,* incorporated the deeds in question into his answer, *so as to make them a substantial part of it, and that the plaintiff was entitled to see every part of that answer.* From this order the defendant appealed to the Lord Chancellor, (Lord Lyndhurst), whose opinion upon the subject had been expressed in the case of *Sparke* v. *Montriou* hereafter stated (*q*). Before the motion could be made, Lord Lyndhurst resigned the great seal, and the motion was made before the Lords Commissioners, Sir Launcelot Shadwell and Sir J. B. Bosanquet. For the appellants (defendants in the cause) all the cases above stated, with others hereafter noticed, were cited or referred to — the distinction between the *defence* and the *examination,* as constituent parts of an *answer,* was pressed upon the attention of the Court—and, it was further insisted that the reference in the answer which the Master of the Rolls had relied upon as the ground of his decision, was inserted for the *protection* of the defendant only, in case he should by mistake have pledged his oath to that, which the Court might afterwards determine to be, in construction, untrue. For the plaintiff, the cases of *Herbert* v. *The Dean and Chapter of Westminster*(*r*),

(*q*) 1 Younge & Coll. 103; S. C. infra, pl. 413.
(*r*) Infra, pl. 407.

Aston v. *Lord Exeter*, and *Hylton* v. *Morgan*, and other cases were cited—the reason assigned by the Master of the Rolls was relied upon—the doctrine of *profert* at law was referred to—and, it was argued, that injustice would be done to a plaintiff, if the rule was not in accordance with his Honor's decision; for that otherwise *a defendant, by reason of the reference to the deed in his answer, would be entitled to the full benefit of the contents of the deed, even if they were more beneficial to him than the case made in his answer suggested or supposed.* The Lords Commissioners, on the 9th of May, 1835, gave the following judgment, which was delivered by Sir Launcelot Shadwell:—"The object of the present application is to discharge an order made by the Master of the Rolls upon the defendant for the production of certain indentures admitted by the defendant to be in his possession. The defendant has by his answer in part set forth the deeds in question, which are comprised in a schedule annexed to the answer, as being documents in his possession, and he has, for greater certainty, craved leave to refer to the indentures themselves when produced. If by so doing the defendant has made the indentures a part of his answer, it seems to follow as a necessary consequence, that the plaintiff, having a right to read the whole of the defendant's answer, has a right to read the documents so made a part of his answer. The question which arises in this case has been involved in some confusion on account of its having been mixed up with questions of a different kind. There are three cases

which may arise: the documents may not be referred to, but they may be admitted to be in the defendant's possession; they may be referred to, and not admitted to be in the defendant's possession; or they may be in part set forth or shortly stated in the answer, and referred to, as in the present case, for the defendant's greater certainty when produced. Where the documents are not referred to, but are admitted to be in the defendant's possession, there the question, whether the defendant shall produce them or not is determined by considering whether the documents do or do not relate to the title of the plaintiff. If they relate solely to the title of the defendant, in that case the order for production is not made; this appears from the case of *Bligh* v. *Benson* (*s*): on the other hand, if they are material to the plaintiff's case, the Court will order their production, as in the case of *Firkins* v. *Lowe* (*t*). In both of those cases the documents were admitted to be in the defendant's possession, and in neither of them were the documents so referred to as to be made part of the defendant's answer. In *Burton* v. *Neville* (*u*), where the plaintiff claimed under a settlement, and the defendant under recoveries; and the defendant admitted the deeds to be in his possession, but did not submit to produce them, a motion for their production was refused, the Lord Chancellor observing, that plaintiffs could only

7 Q.B.D. 406

(*s*) 7 Price, 205. (*t*) 13 Price, 193.
(*u*) 2 Cox, 242.

call for those papers in which they had shewn that they had a common interest with the defendant. Secondly, in the case where the documents are referred to, and not admitted to be in the defendant's possession, it is perfectly clear that the Court cannot order production unless it turns out that the documents stated not to be in the possession of the defendant happen to be in the hands of some person over whom the defendant evidently has control. Thus, in the case of *Darwin* v. *Clarke* (*x*), where the answer admitted the execution of an instrument, but did not admit it to be in the defendant's possession, custody, or power, the motion for production was refused. A third class of cases is where the contents of instruments are in part stated in the answer, and referred to for greater certainty. In *Atkins* v. *Wright* (*y*), a motion was made for the production of a document which appeared to be in the possession of the defendant Graham; and Lord Eldon was of opinion, under the particular circumstances of that case, that the plaintiff could not compel the production of the deed; but he observes, that where a defendant had in a great measure set forth the contents of an instrument, and for the truth of what he set forth referred to the instrument, there was no question of production, as he made the instrument part of his answer. This appears from the case of *Herbert* v. *The Dean and Chapter of Westminster* (*z*), where Lord Macclesfield says, that, 'as to

(*x*) 8 Ves. 158. (*y*) 14 Ves. 211. (*z*) 1 P. Wms. 773.

the motion that the plaintiffs should produce the vestry books before a Master, since they in their answer to a cross bill refer thereto, and by that means make them part of their answer, referring to them (as it is said) for fear of a mistake; for that reason the Court ought to let the defendants see them.' So in *Bettison* v. *Farringdon* (*a*), Lord Talbot says—'The defendants, by referring to the deeds in their answer, have made them part thereof.' There is a query in the note to that case, whether the bare referring to a deed without setting it forth in hæc verba, will make it part of the answer; and *Hodgson* v. *The Earl of Warrington*, in the same book, is referred to; but I may take this opportunity of observing, that the cases in the third volume of Peere Williams are not of equal authority with those in the two preceding volumes, which were published in his lifetime. In *Marsh* v. *Sibbald* (*b*), Lord Eldon says, that every book, letter, memorandum, &c., referred to by the answer, is a part of the answer; and in *Evans* v. *Richard* (*c*), the same learned Judge says, that when the Court orders letters and papers to be produced, it proceeds upon the principle, that those documents are by reference incorporated in the answer, and become a part of it. It appears, therefore, upon a review of the cases, to be perfectly settled, that, where a defendant in his answer states a document shortly or partially, and for the sake of greater caution refers to the document, in order to shew that

(*a*) 3 P. Wms. 363. (*b*) 2 Ves. & B. 375. (*c*) 1 Swanst. 7.

the effect of the document has been accurately stated, in such a case the Court will order the document to be produced. It was said, in the present case, that the document ought not to be produced, because it only manifests the defendant's title; but the answer to that is, in the first place, *that it may by possibility* do something more than merely manifest the defendant's title. It would be a strange thing to say that the defendant should, at the hearing, have the advantage of other parts of the deed than those set forth in the answer, and that the plaintiff, who looks to the answer for information, should not be at liberty to avail himself of a knowledge of the deed. It seems to be consistent with justice, that if the defendant makes a document a part of his answer, the plaintiff is entitled to know what that document is, because he has a right at the hearing to read such parts of the defendant's answer as he thinks fit. It is to be observed also, that if the plaintiff should think proper to amend his bill, and require the deed to be set forth at length, it would be a matter of course that the deed should be so set forth."

387. From this judgment the writer presumes, respectfully, to dissent;—and, conceiving that it involves the compromise of a principle of the greatest importance, he submits the following observations to the consideration of his reader.

388. And first—As to the *precise* question to which the decision gives rise. If the general subject, —of which the point in *Hardman* v. *Ellames* is part

only—namely, the right or liability of a *defendant* to withhold or give discovery of the evidence of *his own case,* were untouched by authority or undefined in principle, it might, perhaps, be difficult to *demonstrate* that the common words of reference in an answer did not make the document referred to part of the answer, for the purpose of production. This, however, is not the predicament in which the question is found. It has been shewn, and the judgment in *Hardman* v. *Ellames* distinctly affirms the rule, that a plaintiff has no *original* right to see the documents which constitute the defendant's evidence—and, further, that a plaintiff does *not acquire* any such right, merely because the defendant states the effect of such documents in his answer, *and* admits them to be in his possession. It has also been shewn, that the rule which thus protects the defendant's evidence from the plaintiff's inquisition is not a rule of a neutral character; but is to be explained upon a principle allowed and approved of by all Courts of justice in this country, (equity as well as others), as best calculated to promote the investigation of truth, and the ends of justice (*d*). The

(*d*) Mr. Hare seems to understand the case of *Hardman* v. *Ellames* differently. He thinks the judgment is to be referred to the expression of *uncertainty* in the reference. Hare, 214. The author—not acceding to this view of the case—would equally dissent from the decision in *Hardman* v. *Ellames*, if the view were correct. Mr. Hare afterwards (p. 228) adds—"If it," (the judgment in *Hardman* v. *Ellames*) "should be construed to apply to documents which are so stated exclusively in the de-

neat question, then, which the case of *Hardman* v. *Ellames* raises is—whether, *as an abstract proposition* (*e*), the common words of reference in an answer conclusively confer upon a plaintiff a right to discovery, which, *without those words*, principle, (admitted and approved), authority, and common practice, alike deny him?

389. It is not, of course, as suggested in a former page (*f*), intended to be argued, that words of reference to a document, partially stated in the pleading, may not be material in determining, "upon the whole record," whether the plaintiff has such an interest in them as entitles him to call for their production (*g*). All that is intended is, that a reference to a document partially stated in the answer, ought not conclusively to decide the plaintiff's right to the production of it, irrespective of the nature of the instrument, or what may otherwise appear upon the whole of the record.

390. Nor is it intended to be argued, that a rule which, in certain cases, should entitle a plaintiff to call for the production of a defensive document before the hearing, would be improper or objectionable. In a case in which the *onus* was upon the defendant, as

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fence, it might be an important question, whether a new principle is not involved in the decision."

(*e*) Supra, pl. 347.

(*f*) Supra, pl. 317.

(*g*) 3 Myl. & Cr. 549.

in the case of a plea of a release, and the defence confined to that single point, it might be reasonable and convenient that the plaintiff should be entitled to see the release before the hearing, a corresponding right being conceded to the defendant, with respect to an instrument upon which the plaintiff might sue. But this concession is independent of the questions, whether the defence is by plea or answer, or whether the defendant refers to the document or not. The objection which the author presumes to urge to the judgment in *Hardman* v. *Ellames,* is founded on the *conclusive* effect given to the reference in the answer, to the exclusion of those considerations, which, in other cases, are of the essence of the question between the parties, namely, the nature of the document, and the case appearing upon the whole record.

391. The answer, then, to the question which *Hardman* v. *Ellames* raises may possibly be found in *principle,* in *authority,* or in *common practice;* and to each of these sources the author has felt bound to refer, as his best apology for the freedom with which he has examined the judgment from which he presumes to dissent.

392. The points of principle relied upon in the judgment are apparently three in number.

393. First, it is said—" It would be a strange thing to say, that the defendant should at the hearing have the advantage of *other parts of the deed* than those set forth in the answer; and that the plaintiff, who looks

to the answer for information, should not be at liberty to avail himself of a knowledge of the deed. It seems to be consistent with justice, that, if the defendant makes a document *a part of his answer*, the plaintiff is entitled to know what the document is, because he has a right, *at the hearing*, to read such parts of the defendant's answer as he thinks fit (*h*)." The proposition that a defendant, by referring to a document, makes it part of his answer, treats the words of reference as having the same effect as if the document referred to were actually transcribed in words into the answer. Such certainly is not the necessary or even natural meaning of the words, when applied to a document which is purely defensive, and which the defendant has not been called upon to set out in his answer. The natural import of the words coming from a defendant, is simply this:—" Here is *one* ground of my defence which I may or may not have occasion to resort to at the hearing of the cause. You, the plaintiff, have no such interest in the document as to entitle you to see it until that hearing. For my own protection, I reserve to myself a right to refer to the document, *if I shall have occasion to use it*." Passing from this—the exact scope and bearing of the passage above quoted from the judgment are not, perhaps, altogether manifest. If the document referred to by

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(*h*) Supra, pl. 386; and 2 Myl. & K. 758.

the answer be part of the *discovery* called for by the bill, and also material to the "*plaintiff's case*" (*i*), he will be entitled to see it before the hearing, *whether it be referred to or not.* The question is, whether he is so entitled where the document is *not* part of such discovery, but is *exclusively defensive?* Now, it is difficult to see how the observations quoted from the judgment apply to a purely *defensive document.* A plaintiff must begin by proving *his own case.* This done—if *no* defence be made, and the plaintiff's case be one which entitles him to relief, a decree in his favour follows of course. If—the plaintiff having proved a *primâ facie* case—the defendant should produce a document by way of defence, the plaintiff will, as of course, have the benefit of such parts of this document (if any) as may make in his favour. It is not necessary, for *this purpose,* that the plaintiff should see the document which constitutes the defence, *unless* (if ever) the defendant—by having such primâ facie case made against him—should be obliged to make use of it, and not *until* the defendant does so, i. e., *not until the hearing of the cause.* And, accordingly, where the *answer* does *not* refer to the document upon which the defence is founded, the plaintiff (by all the cases, *Hardman* v. *Ellames* included) is not entitled to see such document *until* the hearing of the cause—nor *then*—unless the defendant elects to use it. The meaning of the pas-

(*i*) Supra, Prop. II.

sage quoted from the judgment must, therefore, it is conceived, import two things: 1. That, by force of *the common words of reference,* a defendant secures to himself advantages to which, without those words, he would not be entitled; and 2. That justice to the plaintiff requires that, *for that reason,* he should, before the hearing, be allowed to see the document to which the defendant so refers, notwithstanding the approved policy of the law which, *without the reference,* denies him such right; and such, in fact, was the argument of the plaintiff's counsel upon the motion (*j*). This argument, if founded, is entitled to great weight. But—is it founded? Does a defendant, *by force of the common reference* alone, acquire, *as of right,* advantages *for the purposes of the cause* which, without those words, he would not possess? If a defendant, after stating his case, should say, that document A. (to which the *answer referred*) proved a specific part of his case, and that document B. (*to which the answer also referred*) proved the residue of his case—whereas in fact document A. proved the whole case—it must be admitted that the defendant would be at liberty to prove his whole case by document A. alone, without making use of document B. And, it is equally clear, that he might do precisely the same thing, whether the answer referred to the document or not—it being perfectly immaterial by what legal proof the case of a party is esta-

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(*j*) 2 Myl. & K. 752.

blished. The reference, therefore, in such a case, is merely nugatory—so far (at least) as the interests of the plaintiff *for the purposes of the cause* are concerned. His position is unaffected by it. Why then, in such a case, should the plaintiff, *before the hearing*, see document B.? *It* (the document) *is the defendant's evidence, if he shall use it; but, whether he will use it or not*, cannot be known until the cause is heard(*k*). Considering the common words of reference, then, simply as they affect the *evidence* in the cause, the writer submits that undue effect would be given to them, if—with reference to any supposed effect upon the evidence—they should be made the foundation of an exception to the general and approved rule, by which the privilege of the defendant's case is established. If, however, the passage cited from the judgment in *Hardman* v. *Ellames*, is to be understood as sanctioning what appears to have been the argument of the plaintiff's counsel, that a defendant who has *stated a given case* in his answer, is entitled, *by force of the common reference alone*, to vary, or—which in principle is the same thing—to abandon such case at the hearing of the cause, and claim (to the plaintiff's surprise and prejudice) the benefit of another and different case from that which he has put upon the record, and that the defendant is not *as strictly* confined to the case he has pleaded *with* the common reference, as *without* it,

(*k*) 14 Ves. 211, in *Atkyns* v. *Wright*.

(and to that length the argument must go), the author presumes to controvert the proposition altogether. The contention in support of it must be, that a party (by force of the common reference alone) creates for himself a right to allege one case in his pleadings, and claim the benefit of another at the hearing. The argument, of course, supposes a substantial variance between the case and evidence—the degree of which (if substantial) cannot affect the principle of the argument. The case of *Cox* v. *Allingham* (*l*), (1821), though so argued, warrants no such conclusion. In that case, the plaintiff relied upon a lease in his own possession, the purport of which was set forth in the bill. The defendant admitted the lease to be as stated in the bill, *but craved leave to refer to it when produced.* The lease was produced at the hearing of the cause, and proved by the admission in the answer. Between the original hearing of the cause, and a subsequent hearing on further directions, the lease was lost, and, at this second hearing, the plaintiff offered to read the admission in the answer, *without producing the lease.* To this the defendant objected; and the Master of the Rolls (Sir Thomas Plumer) decided, that the plaintiff could not, in any stage of the cause, read the admission in the answer, without the qualification which, by referring to the document, it contained. It is unnecessary for the author here to contend, that it is

(*l*) Jacob, 337.

not competent to a Court of equity to allow a party (plaintiff or defendant) in a case of mistake or surprise, to make a new case, when, at the hearing, a variance exists between the defence and the evidence, and the latter discloses a good defence (*m*). All that the author contends for is, that the claim which a party may have to correct his case, when such a variance occurs, is not matter *of right*, but is addressed to the indulgence of the Court—that this indulgence is never granted to one party without giving the other an opportunity of meeting it—and that the discretion of the Court in granting such indulgence is irrespective of the reference in the answer, upon which alone the judgment in *Hardman* v. *Ellames* proceeded. The *possibility*, moreover, of such an indulgence being either asked or granted cannot, *à priori*, be the foundation of a sound decision upon a general rule of law. The case of *Hardman* v. *Ellames*, it will be observed, was not put upon this or *any* special ground. It decided—and was *intended* to decide—an *abstract* point of law.

394. The second point of principle relied upon in the judgment is thus stated:—"It was said, in the present case, that the document ought not to be produced, because it only manifests the defendant's title; but the answer to that is, that it *may*, by possibility, do something more than merely manifest the defendant's title" (*n*). This reason, it will be observed, is not

(*m*) *Parken* v. *Whitby*, Turn. & Russ. 366.

(*n*) Supra, pl. 386; and 2 Myl. & K. 758.

founded upon any specialty in the case to which it is applied. To try its validity let it be asked—where the operation of such a reason is to end? If there be one point in the law of discovery which is better established than another, it is that which denies to a plaintiff a right to look into the defendant's evidence, for the chance of what he may *fish out* to his advantage. The reason assigned clearly proves too much. It is independent of the ground—the words of reference—upon which alone it is founded in the judgment, and applies as strongly to a case in which the document is not, as to one in which it is, referred to by the answer. Unless, therefore, the operation of this reason—once put in motion, is *arbitrarily* to be stopped, it must, in its legitimate course, overrule every case by which the privilege of a defendant is established, a privilege which the judgment in *Hardman* v. *Ellames* (provided the words of reference are not used by the defendant) recognises as clearly as any case in the books.

395. The remaining point upon which—as matter of principle — the judgment in *Hardman* v. *Ellames* is rested, is this: "It is to be observed also, that if the plaintiff should think proper to amend his bill, and require the deed to be set forth at length, it would be a matter of course that the deed should be so set forth" (*o*). This takes for granted the very point in

(*o*) Supra, pl. 336; 2 Myl. & K. 758.

dispute. The question as to the plaintiff's right to the production of a deed, (in the circumstances of a case like *Hardman* v. *Ellames*) and his right to have it set out in the answer, are identical. The one is a mere *substitute* in practice for the other(*p*). The author challenges the production of a single approved case, prior to *Hardman* v. *Ellames,* in which a defendant has been compelled to produce a defensive document, unless the admissions in the answer gave the plaintiff an interest in it as being relevant to his own case — a supposition which takes from it its purely defensive character.

396. But — the objection *in principle,* to which the decision in *Hardman* v. *Ellames* is open, is not seen in its full force, until it is considered, at what expense the sacrifice of the general rule (by which a defendant's case is privileged) is purchased. The rule—as already observed—is not of a neutral character. It is founded on a settled and approved principle, which is deserted by the order objected to(*q*). And a judge, who admits the principle, cannot (*in curiâ*) deny the reality of the mischief against which that principle is levelled, or his own obligation to observe it—until reasons, at least *as cogent* as those upon which the principle is founded, occur to justify a departure from it. But, the sacrifice of an approved and acknowledged principle is not the only cost at which the

(*p*) Supra, pl. 285-289. (*q*) Supra, pl. 347.

decision in *Hardman* v. *Ellames* has been purchased. The observations of Lord Eldon upon the *Newcastle case* (*r*), and those of Lord Thurlow in *Shaftesbury* v. *Arrowsmith* (*s*), apply here with irresistible force. The discovery *may* be attended with irreparable mischief. It may be *argued* indeed, (as was argued in *Bettison* v. *Farringdon*) that the document must be produced at the hearing; but the answer to this argument has already been given, by shewing that it is not necessarily true. It is true only in cases in which the affirmative of the issue is upon the defendant, and his defence confined to a single point, and applies to a defence by plea as strongly as to a defence by answer. This argument also is open to the observation, that it applies as strongly to cases in which the answer does not, as to those in which it does refer to the document, and, therefore, that it destroys itself by proving too much. There is a fallacy, moreover, in arguing upon the production of a document as evidence at the hearing of a cause, and the production of the same document, before the hearing, as *parallel* cases. They are not so. At the hearing of the cause, the plaintiff has a right to hear the document, *if then produced*, read; and the Court cannot prevent him from taking notes (*t*); but he has no right then to take a copy of the document; nor, indeed, has he at the

(*r*) Supra, pl. 5. (*s*) Supra, pl. 5, n. (*f*).

(*t*) *Brazier* v. *Mytton*, 1 M'Cleland & Younge, 618.

hearing an opportunity of doing so. Whereas, under the common order for producing documents, the plaintiff may take and keep as many copies as he pleases. It is one thing for a man to have his title deeds *read* in evidence, and another to have *examined copies* thereof put into circulation. An extreme case may be put, in which a party (without reference to the immediate cause in question) would be well advised in risking the success of his cause upon other evidence, rather than expose his title deeds to strangers.

397. To the above may be added the observation—that the rule laid down in *Hardman* v. *Ellames* would, apparently, make the trial of a cause vary, in principle, with the accidental *locality* of a material document. If the document were in the hands of a witness, production would be out of the question (*u*), notwithstanding the answer referred to it. But it cannot be successfully argued, that the effect—as evidence—to be given to a document at the trial of a cause, or the benefit which the defendant would acquire by referring to it, would be touched by the *locality* of the instrument at the time the answer was sworn.

398. For these reasons, the author (though with the greatest distrust of his own judgment) cannot resist the conclusion—that the use by a defendant of the common words of reference, is not, in *principle*, a safe foundation for the *abstract rule* which the case of *Hard-*

(*u*) *Hodson* v. *The Earl of Warrington*, 3 P. Wms. 35: *Davers* v. *Davers*, 2 P. Wms. 410; and see supra, pl. 349.

man v. *Ellames* purports to establish, unless something more can be urged in principle than the judgment in that case has furnished.

399. After the first edition of this work was published, Mr. Bosanquet addressed a letter(*x*) to the author, in answer to the above objections to the judgment in *Hardman* v. *Ellames;* and he adduces some arguments in support of his views which are not to be found in the judgment itself. Without attempting a systematic answer to all the arguments which are to be found in the letter referred to, there are some upon which the author feels bound to offer a few observations.

400. And first as to *principle*. Mr. Bosanquet begins by observing, that the general rule of pleading in Courts of law is, that in all pleadings where a deed is alleged under which the party claims or justifies, profert of such deed must be made. He then observes, that in cases where profert is not necessary, but the action is founded upon a writing stated in the pleadings, the Court will in general compel the party who relies upon it to give a copy of it to his opponent, distinguishing the case in which a party declares upon the writing from that in which the declaration is upon an agreement generally, and the writing only evidence of the agreement. And, in a note to page 10, he ob-

(*x*) A Letter on the Production of Documents before the Hearing, by W. H. Bosanquet, Esq., of the Inner Temple, Barrister-at-law. (1836).

serves, that, within certain limits, the same practice is extended to cases in which the writing is not relied upon in the pleadings. The effect of the practice at law according to this statement is, that in *all* cases each party is entitled to see or have a copy of the instrument upon which his opponent relies in his pleadings, and that he has the same right, in some cases, in which the document is not relied upon in the pleadings. Now, the practice which is thus considered as established in Courts of law, certainly does not exist in Courts of equity. This seems to be admitted, for there certainly is no difference in equity between instruments under seal, and instruments not under seal, so far as the present controversy is concerned: "But why (says Mr. Bosanquet) should not the defendant in equity be bound to make profert of the deeds as well as the defendant at law? *That he is not bound to do so, there can, indeed, be no question;* but why? because it is the *privilege* of the defendant in a Court of equity to set out his title upon oath, and the plaintiff must take his word for it."(*y*) It is afterwards observed, that the principle upon which a copy is granted to the opposite party, of a written instrument stated on the pleadings, is—not for "the purpose of enabling the party to make use of it as evidence of the case he has made or intends to make on the record,—but for the purpose of enabling him to determine *what*

(*y*) Bos. page 14.

that case shall be." According to these statements, the ground upon which a copy of an instrument stated in the pleadings by either party is furnished to his opponent is the interest which he has in the instrument for the purposes of the suit; but, notwithstanding this interest, he is obliged in equity to take the defendant's word for its effect. Now, these two propositions certainly cannot stand together. Where the right of a party to know the contents of an instrument is founded upon his interest in it for the purposes of the suit, he is invariably entitled to judge of its effect for himself. The oath of the defendant is ineffectual for any such purpose (*z*). It is effectual only where the admission of the defendant is in the first instance necessary, in order to give the plaintiff an interest in it (*a*)—an admission which cannot be necessary where a knowledge of the contents of the instrument is wanted "for the purpose of enabling the party to determine what his case shall be." The Lord Chancellor certainly has not supposed that *Hardman* v. *Ellames* could be supported upon any such ground. On the contrary, in the case of *Adams* v. *Fisher,* his Lordship said, with reference to *Hardman* v. *Ellames,*—"It is because the defendant chooses to make it part of his answer that the plaintiff is entitled to see it; not because the plaintiff has an interest in it" (*b*). This observation of the Lord Chancellor ap-

(*z*) Supra, pl. 300. (*a*) Supra, pl. 314. (*b*) 3 Myl. & Cr. 549.

pears to be conclusive against the reasoning above referred to. That a plaintiff may, in a very intelligible sense of the term, have an interest in seeing the defendant's defensive documents, cannot be denied,—but the cases (*Hardman* v. *Ellames* included) all decide, that this interest is not legitimate for the purpose of enabling a plaintiff to call for the production of a purely defensive document, before the hearing, unless the defendant, by his mode of pleading, gives him such right. The Lord Chancellor carefully negatives the supposition that the order in *Hardman* v. *Ellames* was founded upon the plaintiff's interest in the instrument, and refers the judgment to the only ground upon which it could be supported, viz. that the defendant himself had *de facto* made it part of the record.

401. Mr. Bosanquet further observes: "Whether a Court of law ought, or ought not, to give the defendant a copy of a written instrument upon which a plaintiff in the declaration founds his demands, *it is admitted, on all hands,* that the defendant might obtain such copy by filing a bill in equity" (*c*). This proposition, if well founded, might well supersede the necessity of all other argument,—but, with deference to Mr. Bosanquet, his assertion requires proof. If a defendant at law should file a bill in equity to obtain a copy of an instrument relied upon in the de-

(*c*) Page 10.

claration, the defendant in equity would make his defence to the demand; and the plaintiff's right to a copy of the instrument would depend upon the laws of discovery, as administered in Courts of equity. If the proposition contained in the last quotation from Mr. Bosanquet's letter be well founded, to the extent to which the language of the quotation goes, words of reference to an instrument would be merely superfluous for the purpose under consideration, unless the circumstance that the defendant in equity was plaintiff at law altered the case. But Mr. Bosanquet does not attempt to found any reasoning upon such a distinction,—nor could such a distinction be sustained. Whatever a Court of law would give, the defendant at law would obtain without restraint or interference from a Court of equity. But that which the defendant at law could not obtain of his adversary without the assistance of a Court of equity, he would obtain under all the qualifications by which the right to discovery is limited. Lord Eldon's observations in the case of *The Princess of Wales* v. *Lord Liverpool* are decisive upon this point (*d*).

402. A third ground upon which Mr. Bosanquet relies for supporting the case of *Hardman* v. *Ellames* upon principle, is thus stated:—"It is not only the privilege of the defendant, but it is the right of the plaintiff,

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(*d*) Supra, pl. 330.

to have the benefit of the defendant's oath to *the truth of the defence* (*e*)." This is undoubtedly true. But for what purpose, and in what sense, is the plaintiff entitled to the benefit of the defendant's oath? For the purpose only of excluding the possibility that a defendant might be in a condition to prove, by legal evidence, that which he knew to be unfounded. For no other purpose can the oath be material. If a deed, upon which a defendant relies, do not, when produced at the hearing, support the case upon the record, the defence will fail. If the *oath* were required for the better information of the plaintiff, with a view to the conduct of the cause, it is impossible that the defendant could be allowed, under any circumstances, to give the plaintiff so much information respecting it as he thought fit, and no more. Whereas it is clear that a plaintiff has no right to see any documents, relating exclusively to the defendant's case, unless the latter, by his mode of pleading, concedes it to him (*f*). The instrument itself, under which a party claims or justifies, though stated in the pleadings, is as strictly his *evidence* as if he alleged his right generally, and used the instrument only to prove his allegation.

403. There is still another ground upon which Mr. Bosanquet considers that *Hardman* v. *Ellames* is right in principle. It is this,—that a plaintiff is entitled to

(*e*) Bos. page 16. (*f*) Supra, pl. 346.

interrogate a defendant respecting all his documents, however private, however defensive. "The defendant," it is said, "*must* answer the questions, provided an answer in the affirmative would tend to prove affirmatively *the case made by the bill*, or his answer will be open to exception" (*g*). In this, Mr. Bosanquet and the author entirely agree. But the question (already considered in a former page (*h*)) is, —to what extent the defendant must answer the interrogatories? Suppose the defendant, without qualification, to deny all the statements in the bill, which take from a document its purely defensive character, and make it evidence of the plaintiff's case — it has already been submitted that the consequence of such denial would be that the documents upon which the question arose would remain upon the whole record purely defensive. Mr. Bosanquet adds: "The defendant is thus placed in a situation from which he can only escape by a reference for greater certainty. He answers the interrogatory in the negative, and, to avoid the consequence, refers, for fear of a mistake (? an indictment), to the document itself." The above quotation has no application to *Hardman* v. *Ellames*. It would apply undoubtedly to a case in which the bill alleged that an instrument relied upon by the defendant contained a clause of given con-

(*g*) Bos. page 17. (*h*) Supra, pl. 309, 310, 311.

struction, and in which the defendant alleged the construction of the clause to be different from what the bill represented it to be, and referred, for his greater certainty, to the instrument itself. In such a case, the Court, in judging of the case upon the whole record, would be justified in giving effect—perhaps, in some cases, conclusive effect—to the words of reference. But the case is widely different where the defendant denies, without qualification, the whole case *made by the bill,* and refers, for his greater certainty, *only to the evidences of his own defence,* which the plaintiff has no original right to see before the hearing. This, in substance, is an answer to Mr. Bosanquet's observation, that "documents, purely defensive, may be the subject of exception"(*i*). If a document be purely defensive, in the sense of not being attacked by the bill, it certainly cannot be the subject of exception. A plea and an answer, in such a state of circumstances, are undistinguishable. If a document, purely defensive in its nature, be attacked by the bill, and all the impeaching statements in the bill are denied by the answer, that document cannot be the subject of successful exception (*k*). If the admissions in the answer shew the charges in the bill to be well founded, the document, which was apparently defensive, loses, by those admissions, its purely defensive character.

(*i*) Bos. page 19. (*k*) Supra, pl. 309, 310, 311.

These cases, in short, are within the principle of the Lord Chancellor's observations, in *Adams* v. *Fisher*, which have already been referred to in several places. "The question is, upon the whole record, whether the plaintiff has such an interest in them as entitles him to call for their production" (*l*).

404. Next,—the *authorities*. Here, again, the reader is requested to keep in view the neat and *abstract point* which these authorities are supposed to decide. The author hazards the assertion, that not a single *decision* can be produced by which the judgment of *Hardman* v. *Ellames*—as an authority for an *abstract* point of law—is supported. To the *dicta* which (unexplained) apparently support that judgment, he would, implicitly, defer, if it appeared to him that the judges, to whom these dicta are attributed, *intended* thereby to establish any *abstract* proposition. But, his conclusion upon this point is directly the other way; for, in many cases the effect attributed, in *Hardman* v. *Ellames*, to the common words of reference, has been denied, and in every case in which stress has been laid upon those words, some specialty has, invariably, been relied upon *in addition* to that reference.

405. The following cases appear to exhaust the information which the reports afford upon the point.

406. In weighing these authorities, attention should

(*l*) 3 Myl. & Cr. 549; and see Hare, 222.

be alive to the dates of the several decisions. At the time of Peere Williams's Reports, the laws which regulate a plaintiff's right to discovery were, comparatively, unsettled. This is, in some degree, proved by the anomalous nature of the reasons assigned for the respective judgments, in *The Earl of Suffolk* v. *Howard*, and in *Bettison* v. *Farringdon* (*m*). It is proved, perhaps, more satisfactorily by the high authority of the cases of *Burton* v. *Neville* (*n*), and *Shaftesbury* v. *Arrowsmith* (*o*); cases which, as will hereafter be seen, have been considered as settling the law upon its true foundation.

407. The first case, in point of time, to be noticed, is *Herbert* v. *The Dean and Chapter of Westminster* (*p*), (1721), one of the cases relied upon by the Lords Commissioners in *Hardman* v. *Ellames*. In that case, a bill was filed to settle the right of nomination to a chapel; and it appears from the judgment that a cross bill was filed against the plaintiffs in the original cause. A motion was made *by the defendants* in the original cause, *that the plaintiffs* might produce certain vestry books referred to in their answer. The Lord Chancellor said—"As to the motion, that the plain-

(*m*) Supra, pl. 349. See observations upon these cases, and also other cases cited, Hare, 193.

(*n*) 2 Cox, 242, supra, pl. 352.

(*o*) 4 Ves. 66, supra, pl. 228.

(*p*) 1 P. Wms. 773.

tiffs should produce the vestry books before a Master, *since they in their answer in the cross bill refer thereto, and by that means make them part of their answer,* referring to them (as it is said) for fear of a mistake; *for that reason the Court ought to let the defendants see them;* otherwise there would be no relying upon the answer of those who are thus guarding themselves, by references, for fear of a mistake, *and to avoid exceptions to their answer;* wherefore, for that the plaintiffs, who were bound to hear their cause in a short time, have the favour and aid of the Court by an injunction; and to the intent that the cause may come more fully before the Court at the hearing, let them bring the vestry books before the Master, and the defendants, who are plaintiffs in the cross cause, if they please, take copies." This case does not appear to have been the subject of comment in any subsequent case, until it was cited in *Hardman* v. *Ellames.* The first observation which applies to it, is the *period* at which it was decided (*q*). But it is unnecessary to advert to this, as it is clear, that the Lord Chancellor did not intend in that case to decide the *abstract* point for which this case was considered as an authority in *Hardman* v. *Ellames.* The language of the judgment —"*to avoid exceptions to their answer*"—seems fully to warrant this observation. A purely *defensive* docu-

(*q*) Supra, pl. 349.

ment could not have been the subject of exceptions to the answer. The judgment, therefore, does not meet the neat and abstract question under examination.

408. The point in the judgment in *Bettison* v. *Farringdon*, (1735), which was reserved for consideration (*r*), arises here. The points made in that judgment were three in number: 1. That the honour of the family was concerned; 2. That the defendant could be *obliged* by the Court to produce the document at the hearing —and so it was for the benefit of all parties that it should be done before the hearing; and 3. (the point reserved), "And the defendants, *by referring to the deeds in their answer, have made them part thereof.* Wherefore, I think the order that has been made at the Rolls a *reasonable* one, and will not set it aside"(*s*). The period of this decision, and the multiplicity of reasons given for the judgment, must impair, if not destroy, the authority of the case for the purpose of establishing any *abstract* rule; and the anomalous nature of the two first reasons cannot but affect its general authority. It is observable, moreover, (as matter of strict criticism), that the Lord Chancellor

(*r*) Supra, pl. 349: *Bettison* v. *Farringdon*, 3 Peere Williams, 363.

(*s*) Upon this passage, the learned Editor of Peere Williams has the following note:—"Query, whether the bare referring to a deed, without setting it forth *in hæc verba*, will make it part of the answer? And see ante 35, the case of *Hodson* v. *The Earl of Warrington*."—5th Edit.

does not represent the effect of the reference in the answer as conferring *per se* the right contended for. His observation, *upon the whole case,* is, that the order is *reasonable,* and that he will not, therefore, disturb it.

409. This case has been the subject of much judicial comment. In *Shaftesbury* v. *Arrowsmith* (*t*), Lord Loughborough, (*not,* as he says, going along with the reasoning in *Bettison* v. *Farringdon*), so far from considering that case as having decided any *abstract* point, labours to explain it upon its own peculiar ground (*u*); and Lord Eldon, in his observations upon the case, in *Hylton* v. *Morgan* (*x*), does the same thing. The case of *Bettison* v. *Farringdon* is also observed upon, by Lord Eldon, in *The Princess of Wales* v. *The Earl of Liverpool* (*y*). "In *Bettison* v. *Farringdon,* (says Lord Eldon) to a bill for relief, the defence was, that a recovery had been suffered which barred the plaintiff's right, and the answer referred to a lease and release making a tenant to the *præcipe,* and leading the uses of the recovery; on motion, Lord Talbot ordered the production of the deeds, merely on the ground of that reference in the answer—assigning as his reason, *that as it must be produced at the hearing, it ought to be produced on motion. Subsequent cases appear to question that doctrine on both its points.*" Now, — what

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(*t*) 4 Ves. 71.
(*u*) Supra, pl. 349.
(*x*) 6 Ves. 296.
(*y*) 1 Swans. 114, 121.

are the *two* points upon which subsequent cases question the doctrine of Lord Talbot? One, clearly, was his treating the reference in the answer as equivalent to an admission that the defendant had the document in his possession (*z*). The *only other point* is that for which the case was considered an authority in *Hardman* v. *Ellames.* Lord Eldon (in *The Princess of Wales's* case) as if to put his meaning past doubt, adds, immediately after the passage quoted above, "In *Lady Shaftesbury* v. *Arrowsmith,* and in *Burton* v. *Neville,* the Court held that a plaintiff has a right to call for the instruments creating the estate tail under which he claims, but expressed great doubt whether he can call for the instrument on which the defendant frames his title" (*a*). It is clear that Lord Eldon did not consider the case of *Bettison* v. *Farringdon* as deciding — certainly not as a binding authority for — any *abstract* point of law or practice.

410. In *Worsley* v. *Watson* (*b*), (1800), the bill prayed a discovery of a deed of 1734, under which the plaintiff claimed, and of all other deeds &c. relating to the property claimed by the bill; and Lord Thurlow made an order for their production. Upon this case Lord Eldon says (*c*) — "With respect to this order, first, I do not find what the deeds were, described in

(*z*) 1 Swans. 121.

(*a*) 1 Swans. 121.

(*b*) Cited 6 Ves. 289, in *Aston* v. *Lord Exeter.*

(*c*) 6 Ves. 291, in *Aston* v. *Lord Exeter.*

the schedule. But this motion, if the schedule contained any deeds, under which the *defendant sought to make title against the deed of* 1734, was granted directly in opposition to the decree of Lord Thurlow in *Burton* v. *Neville,* and the order of Lord Rosslyn in *Lady Shaftesbury's case. My next objection* to this order is, that though the motion for the discovery and production of the deeds *might* be right, *because those deeds referred to in the answer might be considered as part of the answer,* the difficulty is, whether there is any case in which the bill being filed, not for discovery, but for relief, the Court acting upon motion, orders the production in ejectment brought after filing the bill, and before the cause is heard. *The authority of that order I question;* because I cannot find any case to that extent, and because it goes a length, to which Lord Rosslyn refused to go in the case of *Lady Shaftesbury,* Lord Thurlow in *Burton* v. *Neville,* and the Court of Exchequer in a case cited in that of *Lady Shaftesbury.*" Now, from the above quotation it appears, that Lord Eldon argued upon the answer in the case of *Worsley* v. *Watson,* as containing a reference to the documents in question, and still disapproved of Lord Thurlow's order, *because* those documents were the evidences of the defendant's case. Had the documents appertained to the "*plaintiff's case,*" and been part of the answer *in that sense,* there can be no doubt but the plaintiff would be compelled to produce them, upon motion, whether he sought *relief* in equity or at law, and yet to *that* one of Lord Eldon's objections to the order

applies. The application was special, *only* because the documents of which a production was sought to be obtained were the defendant's documents, and not those of the plaintiff; and, *for that reason, notwithstanding the reference in the answer,* Lord Eldon held the decision to be erroneous.

411. Lord Eldon's observations upon *The Earl of Suffolk* v. *Howard,* made in the case of *Hylton* v. *Morgan,* (1801), have already been cited (*d*); and to a *dictum* of Lord Eldon's the author cannot but bow as to an authority. But, did Lord Eldon, by the observations there attributed to him, *intend* to rule the abstract proposition which his words have been said to express? The writer submits that this question must be answered in the negative, for he is unable to reconcile an affirmative answer to it with the dicta of the same learned Judge, in *Worsley* v. *Watson* (*e*), and in *The Princess of Wales's case,* and he cannot, therefore, interpret the observations referred to, as implying an approbation by Lord Eldon of what was done in *The Earl of Suffolk* v. *Howard,* but (at the most) as admitting that the order in that case was in accordance with a principle acted upon by the Courts at the period when the order was made—subject always to the observations already made upon the case.

412. In *Atkyns* v. *Wright* (*f*), (1807) (as may be collected from the whole report) Graham and another

(*d*) Supra, pl. 349. (*e*) Supra, pl. 410.
(*f*) 14 Ves. 211.

were trustees for payment of debts, under a trust deed, dated the 13th June, 1723. Graham survived his co-trustee; and, by deeds of lease and release, dated the 20th and 21st January, 1725, Graham was discharged from the trust, and Wright was appointed sole trustee. The bill prayed an account of the trust, and charged the defendants Graham and Wright with fraud. Wright, by his answer, admitted the possession of certain deeds, denied the fraud charged by the bill, and set up, *by way of defence*, a release to himself *and others*, of all claims in respect of the matters complained of by the bill. He referred to this release in the common form—"as in the said indenture will appear"—and claimed the same benefit of the release as if he had pleaded it in bar. This release was not noticed in the bill, and Wright's answer contained (as Lord Eldon said) an admission sufficiently distinct, upon a fair construction, that the deed was in the possession of the defendant Graham." A motion was made for the production of this release, which Lord Eldon *refused*—a result which renders necessary an examination of the passage in his judgment which was relied upon by the Lords Commissioners. It certainly is not clear, what was the precise ground upon which Lord Eldon refused to order the production of the release. His observation, that the documents were not *described* in the answer, applied *not* to the release, but to other documents. The circumstance that the release was not admitted to be in *Wright's* own possession, might (in some cases)

have been a short answer to the motion; but, instead of so treating it, Lord Eldon proceeds to consider the case upon its merits—a course which excludes the supposition that he relied upon that point as the ground of his decision. He does not, indeed, once advert to it in terms, and his words—"with admission sufficiently distinct, &c.," rather import that he considered the possession of *Graham* as the possession of the plaintiff, and *the other parties* interested in the release. If that were so, the case would be a direct authority in favour of the writer's contention. Without, however, relying upon that—the *dictum* alluded to cannot be deemed an authority against that contention. Lord Eldon first adverts to a case (turning upon another point) in which he had *refused* to order the production of a document, and then proceeds as follows:—"In another case I said, that whether the party was or was not capable of setting forth the contents of the instrument, he had in a great measure set them forth; and for the truth of what he set forth he referred to the instruments; *there was, therefore, no question of production, as he made the instrument part of his answer.* But this defendant has said, in substance, that he denies all this fraud, negligence, and culpable conduct, with which he is charged; and, whether his answer is true or false in that respect, here is a deed, that is not impeached, viz. a release of all claims whatsoever, as in the said indenture will appear, and claiming the same benefit as if he had pleaded it. He must produce that instrument at the hearing of the cause; but his answer

means only, that in this stage he does not put his defence upon a plea with profert; stating merely, that there is such an instrument, *which is to be his defence, if he shall produce* it; not otherwise. My opinion is, that upon this bill and answer the plaintiff *cannot* compel the production in this stage of the cause." Now, the facts of that "other" case to which Lord Eldon referred, do not appear; and the case, for anything that appears, may have resembled *Marsh* v. *Sibbald,* and *Evans* v. *Richard* (*g*), in which he used similar expressions; but without affecting, in so doing, the point at issue. His expressed opinion, on other occasions must — in a case of equivocation — be referred to as a guide to his real meaning in the dictum attributed to him in *Atkyns* v. *Wright.* It is difficult to say that the *order* in that case is consistent with the *dictum* it contains, as that dictum was applied in *Hardman* v. *Ellames.*

413. The only remaining cases noticed, either in the argument or in the judgment in *Hardman* v. *Ellames,* are *Marsh* v. *Sibbald* (*h*), (1814), and *Evans* v. *Richards* (*i*) (1818). The reader will have little difficulty in satisfying himself, by a perusal of these cases, that the documents to which Lord Eldon's observations were there applied were *not* defensive documents, but part of the discovery which the defendant gave (without

(*g*) Next pl. (*h*) 2 Ves. & Bea 375.
(*i*) 1 Swanst. 7.

qualification) *in answer* to the interrogatories in the bill.

414. Should the preceding remarks upon the cases relied upon by the Lords Commissioners in *Hardman* v. *Ellames* be unsatisfactory to the reader, he is requested to bear in mind that—opposed to those dicta—stand the negative but cogent evidence which arises from the absence of any *decision* which in the *abstract* accords with that in *Hardman* v. *Ellames;* the observations of Lord Eldon in *Worsley* v. *Watson;* and the modern cases, before mentioned, of *Sampson* v. *Swettenham* (*j*), *Tyler* v. *Drayton* (*k*), the dictum of Lord Eldon in *The Princess of Wales* v. *The Earl of Liverpool* (*l*), *Bolton* v. *The Corporation of Liverpool* (*m*), *Roper* v. *Roper* (*n*), and *Sparke* v. *Montriou* (*o*). In this last case, Lord Lyndhurst, having the precise point before him, said: "*The reservation is merely in favour of the party who makes it.* He states his belief of the document; but, for greater certainty, refers to it when produced." To the reader, then, it is submitted that the Judges to whom the *dicta* relied upon by the Lords Commissioners in *Hardman* v. *Ellames* are attributed, did not by those *dicta* intend to decide, or imagine that they were laying down, any such abstract rule as that case establishes.

(*j*) 5 Madd. 16.
(*k*) 1 Swanst. 121.
(*l*) 2 Myl. & K. 755, n. (6).
(*m*) 2 Sim. & Stu. 309.
(*n*) 1 Myl. & K. 88.
(*o*) 1 You. & Col. 103.

415. Mr. Bosanquet, in the publication already referred to, cites in support of his opinion the cases of *Herbert* v. *The Dean and Chapter of Westminster, Bettison* v. *Farringdon, Atkyns* v. *Wright,* and *Evans* v. *Richards,* and two other cases which will presently be noticed. Mr. Bosanquet observes, "There are, I believe, only *four* cases reported in which it has been held that an instrument referred to in an answer has been thereby made part of the answer;" and, after suggesting that the case of *Evans* v. *Richards* has little bearing upon the subject, he adds: "In the three remaining cases which do bear upon the subject,—in one, (*Bettison* v. *Farringdon*) the documents were unquestionably purely defensive,—and in the other two, it certainly cannot be shewn that they were not" (*q*). In citing the four preceding cases, Mr. Bosanquet had been anticipated in the first edition of this work; and it is singular that Mr. Bosanquet should not have thought any argument necessary in support of those cases as authorities for an abstract rule of law, considering the observations to which they are certainly open, and those which judges of the first eminence have made upon them. It is singular also that Mr. Bosanquet should have confined his remarks to the four only reported cases in which it *has* been held that an instrument referred to in an answer has been made part of the answer, and should wholly have overlooked the cases and dicta which are authorities the

(*p*) Bos. page 33, Note A.

other way;—one of these cases being, in his own judgment, of no weight;—two out of the remaining three being, in the same judgment, of doubtful application;—and the fourth (the only case which he considers unequivocal) being founded upon three reasons, two of which are clearly indefensible, and the third put forward by the Court, not as a rule of practice, but merely as a "reasonable" ground for the conclusion it came to. The two cases brought forward by Mr. Bosanquet, in addition to those already referred to, are *Gardiner* v. *Mason*, and *Allcock* v. *Barrow*. "In *Gardiner* v. *Mason*" (*q*), (says Mr. Bosanquet), "Lord Rosslyn seems to consider the fact of the documents being *relied* upon as the foundation of the defence, as an additional reason for ordering them to be produced. His Lordship said: 'If the defendant *relies* on a paper, that makes it material;' and ordered it to be produced." It is obvious that this case either proves nothing, or proves a great deal too much. The remaining case of *Allcock* v. *Barrow*, is thus stated by Mr. Bosanquet (*r*):—"In the case of *Allcock* v. *Barrow*, Mr. Heald moved, on the part of the plaintiffs, to inspect the deeds set forth in the defendant's plea. The plaintiffs claimed as the heirs-at-law of Mary Allestric, and also of Thomas Allestric, the testator, under whose will a power of appointment was given to his widow, Mary Allestric, in default of which the estate

(*q*) 4 Brown's C. C. 479. (*r*) Bos. p. 26.

was devised to Mary Allestrie and her heirs. The defendant, by his plea, set forth articles of marriage in 1747, and a settlement in 1751, made in consequence, by which Mary Allestrie, the elder, duly executed her power of appointment in favour of T. Barrow, under whom the defendant claimed, and concluded, "as by the said indenture, now in the custody of this defendant, reference being thereunto had, would more fully appear." The Vice-Chancellor, (Sir Thomas Plumer), after consideration, decided in favour of the motion. "The defendant does not plead himself to be a purchaser for a valuable consideration without notice; on the contrary, he admits notice of the plaintiff's title, and admits it as stated in the bill, but sets up deeds by which the title of the plaintiffs, as heirs-at-law, is disappointed. Upon the authority of the case of *Harrison* v. *Southcote* (*s*) and *Potter* v. *Potter* (*t*), the *heir-at-law has a right to see the deeds by which he is disappointed.* In *Shaftesbury* v. *Arrowsmith* (*u*), Lord Rosslyn controverted the right of an heir-at-law by his *dicta*, but his decision did not impeach it, being only that an heir in tail was entitled to see the deeds creating the entail. In *Atkyns* v. *Wright* Lord Eldon *seems* to state another ground upon which the plaintiffs might be entitled, namely, the defendant having set forth the deeds and made them part of their answer." Mr. Horne was counsel

(*s*) 1 Atkins, 528. (*t*) 3 Atkins, 719.
(*u*) 4 Vesey, 66.

for the defendants (*x*). If the decision in *Hardman* v. *Ellames* be right, the decision in *Allcock* v. *Barrow* would be right also upon the ground last adverted to by Sir Thomas Plumer; for it is impossible to distinguish the defensive part of an answer from a plea of the same matter, for the purpose of the question under consideration. It is observable, however, that Sir Thomas Plumer decided the case upon a ground which (whether right or wrong) made his observation upon the point under examination unnecessary. It is not a little remarkable also that Sir Thomas Plumer should have relied upon a proposition of law, (the right of an heir to see the deed by which he is disinherited) which had long been exploded, if a settled point of practice gave him the same conclusion; and the circumstance that he treated the opinion of Lord Thurlow, in *Shaftesbury* v. *Arrowsmith*, otherwise than as the known and established rule of the Court, cannot but impair the authority of his judgment. And, so far is Sir Thomas Plumer from considering the point now under consideration as settled by *Atkyns* v. *Wright*, that, after ruling the case before him upon another ground, he says only, "Lord Eldon *seems* to state another ground upon which the plaintiffs *might* be entitled." Language of this character is inconsistent with the supposition, that the point was

(*x*) Lin. Inn Hall, 21st March, 1815. MS. note of his judgment by Sir Thomas Plumer, Reg. Lib. 1814, A. fo. 589.

known to the Bench or the Bar as a point of settled practice.

416. With respect to *common practice,* the evidence of this must be found in a uniform current of orders, tacitly proving the point, or in the experience of the Profession. The former of these evidences would be inconsistent with the cases referred to in the preceding paragraph, which negative the proposition affirmed in *Hardman* v. *Ellames,* and cannot, it is believed, be adduced. The experience of the profession is met by the same observation; and seems conclusively negatived by the fact, that, in the case of *Bolton* v. *The Corporation of Liverpool,* which was *twice* solemnly argued, the point was never suggested. If matter of common practice, it could not have been overlooked by the eminent and experienced counsel by whom that case was argued. The author states, without fear of contradiction, that the decision in *Hardman* v. *Ellames* was a surprise upon the Bar.

417. The doctrine of *profert* was not noticed in the judgment. Upon this point, it may be observed, that the doctrine of *profert* at law cannot apply. For *profert* at law is either *necessary,* or, if unnecessarily made, the offer is not binding(*y*); whereas there is no obligation upon a defendant in equity in any case to

(*y*) Stephen on Pleading, 88.

refer to the documents upon which he relies. If the doctrine of *profert* be inquired into, it will be found to have no bearing upon the present question (*z*).

418. It may further be asked—is not the decision in *Hardman* v. *Ellames* inconsistent with the principle of the last decision in *Jones* v. *Lewis* (*a*)? For, if a defendant, by referring to a document mentioned in his answer, is held thereby to make a *profert* binding upon him—how can a plaintiff by referring to a document do less, or be otherwise than subject to the same obligation to produce the document, as the defendant is supposed to come under by a similar form?

419. When the first edition of this work was published, the reasons upon which the Lord Chancellor's judgment in *Hardman* v. *Ellames* was founded, were not before the Profession. His Lordship has since declared them; and as those reasons differ materially from those of the Lords Commissioners, it was thought more convenient to postpone the consideration of them to this place. "It was certainly" (says the Lord Chancellor (*b*)) "no new decision, and I was very much surprised to hear any one treat it as such; and when I came to look into the doctrine laid down in the books, I felt no doubt upon the subject. Where a

(*z*) Stephen on Pleading, title "Profert."
(*a*) 4 Sim. 324.
(*b*) *Adams* v. *Fisher*, 3 Myl. & Cr. 548.

party has thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, he cannot be permitted to make any representation of it, however unfounded, which he pleases; but the plaintiff is entitled to see whether the defendant has rightly stated it. It is because the defendant chooses to make it part of his answer, that the plaintiff is entitled to see it; not because the plaintiff has an interest in it. The principle is, that a defendant shall not avail himself of that mode of concealing his defence." The difference between this judgment and that of the Lords Commissioners is too obvious to require comment. The latter proceeds mainly upon the ground of the plaintiff's *interest* in the documents. The former wholly repudiates such interest as the ground of the decision. But,—considering that the case of *Hardman* v. *Ellames* is an exception to an approved general rule, which exempts the evidence of the defendant's case from the examination of the plaintiff before the hearing—can the reasons of the Lord Chancellor, unless supported by practice, or warranted by authority, be deemed satisfactory? The answer to this question has, in a great degree, been anticipated. Where a defendant states the effect of a written instrument upon the record, and relies upon that statement as his defence, the effect which the defendant thus attributes to the instrument, and not the instrument itself, constitutes his defence. The instrument is only evidence of the case upon the record; and if there be a variance between that case

and the evidence which is adduced in support of it, the defendant may suffer, but can never gain by such variance. A defendant who, in answer to a bill for an account, should say that "the account had been taken, and the amount agreed between the parties, and acknowledged in writing under the hand and seal of the plaintiff," could not be permitted,—upon the evidence of an instrument, which, besides ascertaining the amount due upon the account between the parties, contained also a release of the demand itself—to claim as of right the benefit of that release, as he might have done if he had truly stated the effect of the whole instrument on the record. And between this extreme case and any case of variance between the defence upon the record and the evidence adduced in support of it, there is no difference in principle, nor any difference in practice, which can entitle a defendant to claim as of right the benefit of a case proved by evidence, but not fairly stated upon the record. And it cannot be seriously argued, that the defendant, by "referring to the instrument for greater certainty," would place himself in a different and more advantageous position. It is extremely difficult, therefore, to understand what is meant by a defendant not being permitted "to avail himself of that mode of concealing his defence;" or how the case of *Hardman* v. *Ellames* differs from the ordinary case in which a defendant is, unquestionably, permitted to withhold from the scrutiny of his adversary the evidence by which he intends to support the case upon the record. The au-

thor presumes further to suggest, that the very circumstance that the Lord Chancellor found it necessary "to look into the doctrines laid down in the books," before he decided the case of *Hardman* v. *Ellames*, is conclusive in support of the observation already made, that practice had not sanctioned that interpretation of the authorities which the Lord Chancellor gave them; for the case is (literally speaking) one of daily occurrence in practice. And—with respect to the previous authorities—unless practice had given them an interpretation according with that which *Hardman* v. *Ellames* has assigned to them, it cannot be too much to say, that practice would interpret the authorities, and not be itself determined by the very feeble and equivocal light they throw upon the subject.

420. In fine,—the writer cannot but think, that the case of *Hardman* v. *Ellames* suffered some degree of prejudice, from the stress laid upon the proposition, that the document—by force of the reference—was made part of the answer, without sufficiently attending to the various senses of which the word *answer* is capable, and in which it is used, and without distinguishing what *part* of the answer it was to which it belonged. The sound test to be applied to such cases is this: suppose the defence to be made by *plea*, instead of *answer*—would the *reference* alone, in that case, entitle the plaintiff to call for production of the document referred to? If the answer be in the negative—as (it is conceived) it must be notwithstanding

the case of *Alcock* v. *Barrow* (*c*),—the same answer must be given in a case like *Hardman* v. *Ellames*. The mere *association* of a particular defence with other points in the cause (which alone, for this purpose, distinguishes an answer from a plea (*d*)) cannot put the party who makes *that defence* in a worse position than if the defence were made alone.

421. It may not be unimportant to observe, that, if the rule laid down in *Hardman* v. *Ellames* be established, it is a rule which will be practically inoperative, except against those whom conscience makes cautious in what they swear to.

422. The author cannot too strongly press upon his reader (if indeed such a caution be necessary), the little attention which is due to the above observations, opposed, as in effect they are, by the judgments which he has presumed to criticise. But, having undertaken to state his own views of the law of the Court, in matters of discovery, he could not shrink from discharging his obligation, merely from an apprehension that, by doing so in a particular case, he might incur the charge of presumption. Should the freedom of his observations give offence to any, he is persuaded it will not be to those whose judgment he has presumed to review.

(*c*) Supra, pl. 415. (*d*) Supra, pl. 17, 40.

423. The author's conclusion is—That if the common reference (as in *Hardman* v. *Ellames*) be held sufficient to entitle a plaintiff to look into the defendant's evidence before the hearing, the plaintiff ought, *in all cases*, to have the same right, *without* that reference. And, if this general right be denied him in other cases, a line of special cases ought not to be established upon a ground which he presumes to say is inadequate to the effect ascribed to it.

424. The case, as decided, applied only to documents *stated in the answer*, and not to documents referred to generally, as supporting the defendant's case, without affecting to state the contents of them on the record. But the case must, it is conceived, apply to every document *stated in the answer*, whether it be the instrument under which the defendant claims or justifies, or an instrument merely corroborative of such claim or justification.

FOURTH PROPOSITION.

Every objection to discovery which is founded upon a denial of the plaintiff's right of suit, or of his right to proceed with it in its existing state, should regularly be taken by demurrer or plea, according to the circumstances of the case;—and where the objection is not so taken, and the defendant answers *the bill, he will, in general, be held to have waived the objection, and will be obliged to answer the bill "throughout."*

425. It has already been shewn, that if a plaintiff prays relief in equity, and the defendant disputes his right to such relief, he may, by demurrer or plea, according to the nature of the case, protect himself against the discovery sought. And the rule, it has been contended, is the same, whether the relief is sought in equity by original bill, or whether the defendant in the suit for discovery is plaintiff or defendant in some other suit for relief (*a*).

426. It has also been shewn, that the defendant has the same right, when, upon the ground of any defect or informality in the pleadings, the plaintiff has no right to proceed with his suit until such defect or informality is remedied (*b*).

427. The question which the present (the Fourth)

(*a*) Supra, pl. 32. (*b*) Supra, pl. 32.

proposition raises, is that which was considered with reference to the case of *Adams* v. *Fisher* in a former page; and the reader, to avoid repetition, is here referred to the observations upon that case (*c*).

428. The Fourth proposition is, it is conceived, open to no qualification but that which the case of *Adams* v. *Fisher* introduces. That qualification is marked by Mr. Hare in the following passage: "In none of the cases, however, does the defendant appear to have been allowed by answer to resist the discovery of matters which might be evidence of the plaintiff's title to sue, distinguishing, by this expression, the title to sue from the extent of the claim" (*d*). If, in short, a bill is open to any of the objections of substance or form stated by Lord Redesdale, the defendant may, by demurrer or plea, avoid all answer, except such as may be inconsistent with, or necessary to the trial of the defence he resorts to. If he *answer*, and by *answer* take the same objection, he will clearly be bound to give a full answer to every point but that which may be "a mere point, or consequence of title, or separate from and not evidence of the title itself" (*e*). And the only question will be, to what extent the case of *Adams* v. *Fisher* will protect him from giving discovery upon points unconnected with his title to sue, and which are a mere consequence of such title.

(*c*) Supra, pl. 148 to 185.
(*d*) Hare, 250, 251. (*e*) Hare, 251.

FIFTH PROPOSITION.

Every objection to discovery, which is not founded upon a denial of the plaintiff's right of suit, or of his right to proceed with his suit in its existing state, but depends exclusively upon the nature of the discovery sought, may regularly be taken by answer *as well as by demurrer or plea. As the mode of taking objections of this nature is thus unfettered by rules of form, a defendant, who has not actually answered an interrogatory or interrogatories to which the objection may apply, cannot as a general rule be held to have waived it upon any merely technical ground.*

429. If a bill requires an answer, which may subject the defendant to any pains or penalties, or to which the privilege of professional communication applies, the defendant may refuse to give it.

430. If the objection is apparent upon the face of the bill, the defendant may demur to the particular interrogatory by which the answer is required (*a*).

431. If the objection is not apparent upon the

(*a*) Redes. Plead. 195, et seq.

face of the bill so that the defendant can demur, he may, by plea, set forth his objection (*b*).

432. In any of the above cases also, the defendant may, by *answer*, insist that he is not bound to give the objectionable discovery (*c*).

433. The like observations apply to questions seeking an improper discovery of the evidences of the defendant's case (*d*); and, it is conceived, to every other case in which the objection to the discovery depends exclusively upon the nature of the question to which the objection is applied (*e*). Indeed, as already observed, there is no distinction, except in *name*, between these different modes of taking the objection. One trial disposes of the question, and, whether that trial be had under the name of a demurrer, plea, or answer, it is final. It is not, of course, meant by this last observation, that a defendant may demur or plead indifferently to questions which are open to the objections at which the Fifth Proposition points,—for these two modes of defence are applicable respectively to distinct cases. All that is meant is, that whatever might in such cases be objected to by demurrer or plea, may, with equal regularity, be objected to by answer.

434. It has already been shewn that the privilege

(*b*) Redes. Plead. 234, et seq.
(*c*) Id. 307.
(*d*) Supra, Prop. III.
(*e*) Supra, pls. 127 to 147; Redes. Plead.

of the defendant extends, not merely to the particular question to which the objection applies, but to every question in the bill, the answer to which would form a link in a chain of evidence, which, if perfect, would lead to the consequences against which the privilege is intended to guard (*f*).

435. Now, suppose a bill to be made up of a series of charges, twenty in number, all tending exclusively to, and ultimately terminating in, a charge, the admission of which would subject the defendant to a criminal prosecution—The defendant might clearly refuse to answer all the questions. Suppose him to answer the first nineteen—Shall he, therefore, be bound to answer the twentieth? Lord Eldon always dealt with questions of this nature with his habitual caution; and, although he often suggested the case in argument, he does not appear ever to have expressed his opinion upon it. The author submits, however, that the answer to the question above proposed must be in the negative. There is no analogy between cases of this nature and the ordinary cases in which a defendant answering a bill, instead of demurring or pleading, has been bound to answer the bill "throughout." In those cases, the defendant elects between different modes of bringing his cause on *for trial*. By answering the bill, he elects a mode of trial which requires an answer to each part of the bill, and to the

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(*f*) Supra, pl. 138.

whole of every part; because, where the defence is by answer, all the questions in the cause come on for trial simultaneously; and he, therefore, necessarily waives the benefits of a demurrer or plea as a protection against discovery—modes of defence under which discovery is excused only because the purposes of the trial do not require it. But, in the cases under consideration, the plaintiff has no right to the discovery even for the purposes of the trial. The privilege is unconnected with the trial or merits of the cause. Whatever the merits of the cause may be, the plaintiff has no right to ask the questions to which the objection applies. *The objection* (it is contended) *is several as to each question; and the answer to one cannot be a waiver of an objection which applies separately to another.*

436. In the case of a bill requiring an answer which would subject the defendant to pains or penalties, and other similar cases, the author cannot doubt that a Court of equity would consider the objections in question as several, and therefore not waived as to one question by an answer unnecessarily given to others. But, in a recent case of the highest authority, language has been attributed to the Lord Chancellor, which would apparently require that the terms of the proposition now under consideration (the Fifth) should be received with much qualification.

437. The case referred to is *Latimer* v. *Neate*(*g*).

(*g*) 11 Bligh, 149.

The facts, shortly stated, were as follows(*h*). Neate claimed to be a judgment creditor of the Duke of Marlborough. On the 22nd May, 1833, Neate sued out execution upon his judgment. The sheriff returned *nulla bona*, and thereupon Neate brought his action against the sheriff for a false return. The goods and chattels, in respect of which Neate sought to falsify the sheriff's return, were certain farming stock, both live and dead, together with plate, books, wines, liquors, and household furniture and effects, which at the time when the writ was delivered to the sheriff were in and about the mansion-house and estate at Blenheim, and of which the Duke of Marlborough had the use and enjoyment. The case in answer to this was, that the whole of the same goods and chattels had, by bills of sale, been assigned by the Duke to Latimer for value. The plaintiff Neate filed his bill in the Court of Exchequer against Latimer, charging that no consideration had passed between Latimer and the Duke, and that the transaction was colourable in order to enable the Duke to hold the property against the plaintiff and the other creditors of the Duke. The bill also charged that money dealings and transactions had taken place between Latimer and the Duke, since the date of the alleged assignments to Latimer, and that by means of such

(*h*) The statement is taken from the report in the House of Lords.

dealings and transactions the debt (if any) owing from the Duke to Latimer had been discharged. The bill relied upon the actual possession of the effects in question by the Duke as evidence of the fraud imputed to the transaction, and charged that if the defendant should claim to have any lien or security upon all or any of the goods and chattels for the repayment of any debt or debts due and owing to him from the Duke, *he ought to set forth the particulars of such lien or security.* The bill prayed that the instruments under which the defendant claimed might be declared void. It prayed, however, an account of what (if anything) was due to the defendant, and whether he had any lien upon the property in question, the plaintiff offering, if anything was due to defendant upon the security of the property, to pay it. Upon this prayer, which was the subject of much argument, the House of Lords was of opinion that the bill might be treated *as a bill to redeem the property in question,* notwithstanding it prayed a declaration that the instruments under which the defendant claimed were void. Latimer by his answer claimed to be the legal owner of the effects in question under bills of sale executed by the Duke to him. He averred that all the bills of sale were duly executed by all proper parties *for a full and valuable consideration, and insisted that the bills of sale were his title deeds,* and that Neate claimed the goods and chattels in question hostilely to him (the defendant) in his action at law. He further said, that, upon the execution of the bills of sale, one Richard

Wilson, as the agent and servant of the defendant, had been in actual possession of the effects in question; and that the use of them by the Duke, who resided at Blenheim, was merely permissive. He claimed to hold the property as a security for 8,000*l.*, and offered, upon that sum being paid into Court, to bring into Court all the bills of sale as the Court should direct. He further insisted that he was not bound to set forth, further than he had done, any particulars relating to his securities. To this answer the plaintiff took forty-eight exceptions, some of which were allowed. The particulars of these exceptions do not appear in the report, but from the judgment of the Lord Chancellor (p. 154) it appears, that the Court of Exchequer had decided upon the exceptions that Latimer was bound to "discover the nature, contents, and particulars" of some of the assignments under which he claimed. It appears also (p. 153) that the first answer of Latimer, and his further answer after the exceptions were allowed, were inconsistent with each other, as to the assignments under which he claimed. The plaintiff moved for the production of the assignments under which the defendant claimed, and the Lord Chief Baron made an order for their production. From this order the defendant appealed to the House of Lords. From the observations of the Lord Chancellor in moving judgment in the case, it appears that the appellant's counsel had admitted at the bar, that, if in the judgment of the Court it appeared, from the whole of the

pleadings, that the title claimed by the defendant was only a mortgage title, and that the plaintiff had so framed his record as to entitle him to deal with that mortgage title and redeem it, he would not argue that, *under the circumstances,* he could resist the right of the plaintiff to have the documents produced. The Lord Chancellor proceeded to shew, that the pleadings were in a state to which the admission of the appellant's counsel would apply. The Lord Chancellor then made the following observations: "Now, if the defendant was entitled to that protection against discovery, which he now seeks to enforce at the bar, the order of the Court of Exchequer was clearly wrong in allowing those exceptions; because a defendant may be bound to state in the answer and describe the documents; he may be compelled to admit he has such documents in his possession, but not compellable to state the contents, if he is entitled to protect himself by any rule which prevents a plaintiff asking for the production of the document. *If he professes to set out the document, the plaintiff has a right to see whether he has stated it correctly or not.* Therefore, to protect himself against the liability to produce the document, he should take his stand on the interrogatory, which asks him to set forth the particulars of the deed under which he claims. The answer would have been proper if it had said, I have the deeds in my possession, but you do not entitle yourself by the proceedings to see the contents of the documents. If the defendant chooses to pretend to give a discovery,

the plaintiff is not bound to take that representation, but is entitled to see the documents. There is, therefore, no question, but that the title of the defendant on his title deeds is only a mortgage title; and it is equally free from doubt, according to my view of the pleadings, that the plaintiff is entitled to redeem that mortgage upon the payment of what may be found due, not being precluded from that right by the mode in which he states his case. The object of the deeds being not to give an absolute title to this property against the Duke, or those who claim under the Duke, but for the purpose of securing a sum of money due from the Duke to Latimer." And, in a subsequent part, he adds: "On these two grounds, therefore, I think your Lordships may safely affirm the order of the Court below: the first, that this is a case in which the plaintiff is not only seeking to redeem, but is seeking to have an instrument treated as a mortgage security, which the defendant has set up as an absolute title; and secondly, because the defendant having set out what he states as the contents of the deed, (and most likely fairly), the plaintiff under those circumstances is entitled to see whether the abstract be, or not, a correct abstract of those deeds of which he asks the production. I therefore suggest, that the order of the Court below be affirmed."

438. So far as the Lord Chancellor acted upon the admission of Latimer's counsel, and so far as he expressed an opinion that the plaintiff in that case was entitled to see the instruments under which the de-

fendant claimed, *upon merits confessed in the answer*, (which is the first ground he relies upon), no observations appear to arise (*i*). But the second ground relied upon by the Lord Chancellor introduces a principle, which, if full effect be given to his Lordship's language, is of the greatest importance.

439. The argument of the Lord Chancellor upon this second point, (it will be seen), supposes a case in which the defendant might have *taken his stand upon the interrogatory, which asked him to set forth the deed under which he claimed*, and have refused to say more about it than suited his own defence. And with reference to that supposed case, he says: "If the defendant chooses to pretend to give a discovery, the plaintiff is not bound to take that representation, but is entitled to see the documents." This language is perfectly general. It applies in terms, *as it did in fact* in *Latimer* v. *Neate*, to the instruments under which a defendant may claim, as well as to those under which he may only support his title. Upon what principle does the observation of the Lord Chancellor rest? Not upon the ground that the plaintiff has an interest in the documents for the purpose of proving his case, for to that the observation of the Lord Chancellor is not applicable—Not upon the ground that the answers referred to the documents, as in

(*i*) See the case of *Brown* v. *Lockhart* in the Appendix, infra.

Hardman v. *Ellames;* for there was no such reference—Not upon the ground that the plaintiff had an admitted interest in the nature of property in the documents; for there was not, and could not be, any such claim in the case. Now, where a defendant neglects an appropriate mode of defence to discovery, as where a defendant answers a bill, the appropriate mode of defence being by demurrer or plea, the rule is logical at least, which holds him to have waived all the benefits of a mode of defence which he has neglected to use; but where the appropriate mode of resisting particular discovery is by *answer,* it is difficult to follow the reasoning which applies the doctrine of waiver to such a case at all. The appropriate *mode of objecting* is by answer. Why should not the right to object by this appropriate mode remain, except so far as the right may be actually destroyed by the answer given? The observation that the plaintiff has a right to see whether the defendant's representation is correct, is unanswerable in its application to discovery which the plaintiff has an original right to demand. But with respect to discovery which he has no original right to demand, and which the defendant may by answer refuse to give, as being exclusively his evidence, the undoubted rule of the Court (*j*) is, that the plaintiff must take the defendant's oath for it. It may be said, indeed, that a defendant who pretends

(*j*) See Prop. III.

to give discovery, may mislead the plaintiff by a false answer, and thereby put him in a worse position than if he (the defendant) took his stand upon the interrogatory, and refused to answer at all. But this observation proves too much when applied to a document, the discovery of which the defendant might by answer refuse to give. The unavoidable effect of it must be to enable a plaintiff to deprive the defendant of the privilege, which entitles him to withhold from his opponent, until the hearing of the cause, the instrument upon which he relies, and any other evidence by which he may propose to corroborate and support it. The defendant may be advised, that his defence will be stronger upon the record by setting out the very parts of a defensive document, as to which the bill may seek discovery. But the answer, if framed *for the purpose* of defence, will not lose its purely defensive character, because the unfounded charges in the bill may give to the answer the *appearance* of discovery as well as *defence*. Why should not the answer, so far as it corresponds with the interrogatories in the bill, be considered the defendant's statement of his own case, made to repel an unfounded statement in the bill? An opposite course of reasoning—that is, a course of reasoning which requires the defendant to take his stand upon the interrogatory, under penalty of being obliged to produce the instrument under which he claims—would enable an ingenious plaintiff to cripple the defence, by preventing the defendant from setting out his case as,

with reference to the charges in the bill, he might think best, or by subjecting him to the production of a document which the rules of equity entitle him to withhold. And, if this be just reasoning, as applied to a case in which the defendant may, *for the purpose of defence,* set out that to which the charges in the bill may give the appearance of discovery also, it must be true in every case; for the Court cannot try the *animus* with which a given part of the record, called an answer, has been framed. The rule of equity is, that the defendant shall not, before the hearing of the cause, be compelled to produce his own evidence. A rule which would destroy or even impair that privilege at the will of the plaintiff, cannot well be sound. In *Latimer* v. *Neate,* the documents in question were those upon which the defendant relied, and which the bill impeached, and a partial statement of them might well have been important to the defence, with reference to the charges which the bill contained respecting them. The judgment in *Latimer* v. *Neate* did not require any expression of opinion upon the second ground of the judgment, because the first of those grounds was decisive. But the opinion of the Lord Chancellor upon the second ground, though not necessary to the judgment, was not extrajudicial in the case (*k*). The conclusion to which the House of Lords

(*k*) The effect of this decision upon the practice of the Court, in combination with that of *Adams* v. *Fisher*, (supra, pl. 153), is singular. By *Adams* v. *Fisher*, a defendant who neglects the

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came in that case was, for the reasons already suggested, undoubtedly correct.

440. The cases of *Hardman* v. *Ellames,* and *Ewing* v. *Osbaldiston,* do not conflict with the Fifth Proposition. The principle of both the judgments in those cases was, that the defendant had actually given the discovery to which he might have objected.

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appropriate mode of protecting himself against discovery, by demurrer or plea, may yet, by *answer*, protect himself partially against discovery. But, by *Latimer* v. *Neate*, where the appropriate mode of defence is by *answer*, the defendant who answers partially only, is held to have waived his objection as to other parts of the discovery.

GENERAL CONCLUSIONS.

441. The preceding observations resolve themselves into four principal points:—

I. The original right of a plaintiff to discovery.

II. The privilege of the defendant to withhold a discovery of the evidences of his case.

III. The appropriate modes by which a defendant should object to discovery to which the plaintiff is not entitled.

IV. The consequences of a defendant omitting to avail himself of the appropriate modes of objecting to discovery.

442. With respect to the first of these points, it has been seen—

1. That the plaintiff's right to discovery is confined to the question or questions in the cause, which, according to the pleadings and practice of the Court, unconnected with the laws of discovery, is or are about to come on for trial. [*See Prop. I.*

2. That the plaintiff's right to discovery, confined to the point or points in the cause about to come on for trial, extends, as a general rule, to a discovery of all evidence material to the plaintiff's case upon that trial.

[*See Prop. II.*

The Exceptions to this general rule, are —

1. Where the discovery would subject the defendant to pain, penalty, or forfeiture, or where it is protected by professional privilege.

[*Supra,* pl. 127 *to* 147.

2. The undefined class of exceptions, which fall within the scope of the case of *Adams* v. *Fisher*.

[*Supra,* pl. 148 *to* 185.

443. With respect to the second point;—this forms the subject of the Third Proposition, and appears, at all events, to be subject to such qualifications only as may be referred to the voluntary submission of the defendant, as in the cases of *Hardman* v. *Ellames, Lowndes* v. *Davies, Ewing* v. *Osbaldiston,* and *Latimer* v. *Neate.*

444. The third point is considered under the Fourth and Fifth Propositions, and the author has there submitted, as general rules—

1. That objections to discovery, upon the grounds of *merit* or *form* (*l*), should regularly be taken by demurrer or plea.

2. That objections to "*particular discovery*" (*l*) may regularly be taken by answer.

445. And, lastly, with respect to the fourth point, the reader is referred to the Fourth and Fifth Propositions in support of the author's conclusions—

1. That when a defendant, who might, by demurrer or plea, have successfully objected to discovery upon grounds of merit or form, has submitted to answer the bill, he must, as a general rule, answer the bill "throughout."

2. That a defendant cannot, as a general rule, be held to have waived an objection to "particular discovery," by any answer short of one which actually gives the discovery he claims a right to withhold.

(*l*) Supra, pl. 34, 35.

APPENDIX.

Westminster, Hilary Term, 21*st January,* 1840.

BROWN *v.* LOCKHART.—*A Suit for Foreclosure.*

THE plaintiff was the executor of the mortgagee, and the defendant was the devisee of the mortgagor. It appeared, that no demand had been made by the plaintiff, before filing his bill, for the payment of the principal money of the mortgage; but application had been made for the interest. The defendant had offered to pay the interest, upon the plaintiff producing or furnishing him with a copy of the mortgage-deed under which it was claimed. The plaintiff, however, had refused to produce the mortgage-deed; and the interest being in arrear, the bill was filed, and prayed the usual decree for foreclosure.

Mr. *G. Richards,* and Mr. *Lowndes,* for the plaintiff.

Mr. *K. Bruce* and Mr. *Lloyd,* for the defendant, argued that the plaintiff was not entitled to the usual directions with regard to costs; inasmuch as the interest had been offered to be paid to him upon production of the mortgage-deed, which the mortgagor and his representatives were interested in, and therefore had a right to see; and the principal had not been demanded, and could not have been paid by the mortgagor without demand, or without giving six months' notice to the mortgagee. They cited 2 Cases and Opinions,

p. 52; Powell Tr. on Mortgages, by Coventry, p. 935, n. (*r*); *Anon.* Mos. 246; *Latimer* v. *Neate*, 4 Clarke & Fin. App. Ca. 570.

The Vice-Chancellor.—It appears upon the answer, that some information was sent to the defendant in November, 1836; a short account of the claim of the mortgagee, but not the deed. Then some dispute arose, and notice was sent by the solicitors of the defendant that the interest was ready to be paid. On the 11th of March, the letter was written on behalf of the defendant, which is stated in the answer, and by which he requested leave to make a copy of the deed at his own expense. One important point, however, was omitted,—that is, the payment of the interest. The interest was actually in arrear; and in that state of things the bill was filed. Was not that proceeding perfectly right? I think the mortgagee was not bound to allow the mortgagor or his representatives to take a copy of the mortgage-deed. With regard to giving the mortgagee six months' notice before paying off the mortgage money, I apprehend there is no law requiring that to be done, except that which has arisen out of the usual practice of conveyancers, it being reasonable to give the mortgagee the opportunity of finding another investment for his money.

The decision in *Latimer* v. *Neate* has no application to this case. There the defendant had not refused to give the discovery sought by the bill, but in fact gave some discovery. He put in his first answer, to which exceptions were taken and were allowed; and then he put in a second answer, which purported to give some further discovery, but did not differ from the discovery given in his first answer; and in a schedule to the second answer, the defendant set out an abstract of the deeds. The mode in which the defendant stated his title, did not, however, correspond with the statement he

gave of the deeds. *The information given by the answer was not in fact consistent with itself;* and then, on the application of the plaintiff to have the deeds produced, the production was ordered. These circumstances are stated at some length by the Lord Chancellor in his judgment, and appear to me to be a very good reason for the order.

The case reported in Mosely is not an authority which can be much relied on. After the decree for foreclosure *nisi*, the defendant is stated to have moved that the mortgagee might lay the deeds before counsel, that the mortgage might be assigned to another person; and upon this motion, the Court ordered that the plaintiff should give the defendant a copy of the mortgage-deed at his charge. Such an order is not likely to be now made on a motion of that nature.

There is a right in the mortgagee to keep the mortgage-deed until the moment of time when the mortgagor appears with the principal and interest in his hand; and then the mortgagee cannot be required to part with the deed until the money is actually paid to him. If the defendant felt so much anxiety to pay off the mortgage, why did he not at an earlier stage of the cause apply for a reference under the statute? but instead of making such an application, he allows the suit to go on to a hearing, and complains that he is subjected to costs. The decree must be in the usual form.

Westminster, 31*st January*, 1840.

CORPORATION OF DARTMOUTH *v.* HOLDSWORTH.

THE bill, in this case, was filed to set aside a bond in which the plaintiffs were obligors and the defendant was obligee. The obligee had brought an action upon the bond, and recovered a judgment upon it. In answer to charges in the bill, in the common form, that the defendant had in his possession documents relating to the matters alleged in the bill, and requiring a schedule of such documents, the defendant, admitting the possession of documents set forth in a schedule to one of his answers, said:—"And this defendant saith, that he, this defendant, hath in his possession or power, the several documents and particulars mentioned and set forth in the schedule to this defendant's answer to the plaintiffs' original bill, and also the additional briefs and papers, letters and writings, made, written, and prepared, since the institution of this suit, relating to and connected with the conduct, management, and carrying on of the said action and of the said original suit in Equity. All of which last-mentioned documents have been made or written since the filing of this defendant's answer to the said original bill." In a subsequent answer, the defendant, with reference to the documents in the schedule to his answer, said:—"And this defendant saith, that the papers enumerated in the schedule hereto, are in his possession or power, and that they all relate to and are connected with the matters in question in this suit and in the original suit now subsisting in this Court between the parties to this suit to which this suit is supplemental, and were prepared and written for the purpose of this defendant's defence in such suits, and for the purpose of the action to which such suits

relate, and which is mentioned or referred to in his former answer to the said supplemental bill." The schedule contained amongst other documents copies of letters, described as follows:—" Copies of letters from Messrs. Karslake and Crealock, this defendant's attornies, to Mr. John Elliott Fox, one of the persons examined as a witness for this defendant on the trial of the said action, bearing date respectively as follows: viz. 7th February, 9th February, 20th February, 23rd February, 5th March, and 11th August, in the year 1838."

Mr. *Knight Bruce*, Mr. *Wigram* and Mr. *Wright* for the defendant.

Mr. *Jacob* for the plaintiff.

The Vice-Chancellor ordered the copies of the letters to be produced, saying the description of them in the schedule did not necessarily bring them within the limits of professional privilege (*a*).

(*a*) The author presumes to question the correctness of this decision.

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