If the demurrer and the plea be entirely overruled, still the defendant may, in general, advance and rely upon the same matter in his answer; and have the benefit of it at the hearing. (z) But it seems to be settled, that the same matter cannot be so relied upon to protect the defendant from the disclosures prayed by a bill of discovery. (a)

How far such an answer can be made available against the discovery sought by a bill praying relief, is a matter which I shall now inquire into and determine.

We have considered the several ancient modes of defence which a defendant may avail himself of; either for the purpose of intercepting the litigation at an early stage of its progress, or of protecting himself from discovery, or of meeting his opponent upon the merits at the final hearing; and we have seen, with what liberality some of them may be amended so as to answer the purposes for which they were intended. The difficulty, now before us, is one which occurs in a case anterior to the final hearing; and may, after that, re-appear, accompanied with additional embarrassment. It is produced by a *new use* which a defendant attempts to make of one of the ancient modes of defence. A positive negation, or matter of avoidance, embodied in an answer, is admitted to be one of the ancient established modes of defence; and the point is, whether a defendant who has omitted or failed, by a demurrer, or plea, to protect himself from making the discovery required by the bill, shall, in any or what case, be allowed to do so by means of this defence of a negation or matter in avoidance relied upon only by way of answer. Consequently, the question now to be decided is, whether this *new use* can, before the hearing, be made of this ancient mode of defence.

Where the bill sets forth various facts as the constituent parts of that case, which entitles the plaintiff to the relief he asks, it is obvious that if the defendant, by plea, denies and invalidates any material one of them, he breaks up the plaintiff's whole case, and destroys his right to recover. Thus, if the plaintiff avers his right to a share in a certain trade as a partner; and, as such, calls for a discovery and account. The fact of his being a partner is an essentially constituent part of his case; it is the first or principal

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(z) Stephens v. Gaule, 2 Vern. 701; Suffolk v. Green, 1 Atk. 450; Brownsword v. Edwards, 2 Ves. 246; Finch v. Finch, 2 Ves. 491; Baker v. Mellish, 11 Ves. 68.—
(a) Hoare v. Parker, 1 Cox, 224.