Per Curiam (b). It is clear that when a party files a bill of discovery, and states he cannot go safely to trial without it, the injunction to stay trial should go until answer, when the other side can move to dissolve; and affidavits cannot be read in opposition.

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[112] *IN EQUITY.*

BEHARRYRAM AND ANOTHER *v.* SEWEMBERAM AND KISSENPERSAUD.

(1847. *July 1st. Thursday).*

Practice—Pleading 28th Eq. rule Amendment of bill after plea allowed.

After plea allowed, the complainant will not be allowed to amend his bill, without stating fully the proposed amendments in his notice of motion.

MOTION, for an order "that the complainants have leave to amend their bill of complaint generally; and specially as against the defendant Kissenpersaud, upon payment of taxed costs of his plea, &c. and that so much of the order of this Court, whereby it was ordered that the bill of complaint should stand dismissed with costs as against the defendant Kissenpersaud without further order, unless the complainants should reply to the said plea within a fortnight from the date of the order, be discharged" (a).

The affidavit in support of the motion stated "that the amendments necessary, were statements to the effect that the defendant Kissenpersaud had personally taken part in the transactions and matters in the bill stated, to such an extent, or in such a manner, as to make himself personally liable in respect thereof to the complainants, whether as partner or agent."

Mr. *Colvile* (Adv. G.) and Mr. *Taylor* shewed cause. This motion is quite contrary to the practice. The plea in this case must be treated as if it had been argued and allowed on argument and comes clearly within the scope of the 28th equity rule (b).

The practice as to amendment of bills after plea filed, and after argument of plea is very different. In the former case amendments may be made upon payment of certain costs, but in the latter special grounds must always be stated. Treating this, then, as a plea allowed upon argument, the amendments required to be made **[113]** must be before the Court, in order that they may be enabled to ascertain whether the proposed amendments do or not involve the same facts as those disposed of in the plea. *Taylor* v. *Shaw* (a), *Barnett* v. *Grafton* (b) *Carleton* v. *Strange* (c).

The authorities cited also show that after plea allowed, the complainant cannot by amendment set up an entirely new case in his bill, for the purpose of avoiding the effect of the plea. In this instance, the attempt to do so is obvious. The proposed amendment seeks to charge Kissenpersaud either as

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[111] (b) Sir L. Peel, Sir H. Seton, and Sir J. Grant.

[112] (a) *Vide ante*, p. 83. (b) Sup. C. Eq. Orders, 8.

[113] (a) 2 Sim. & St. 12. (b) 8 Sim. 72.
(c) I Turner, 23.

agent *or* partner. The latter liability has been disposed of by the plea which denied the existence of any partnership between Kissenpersaud and the other defendants; and as to the former, that creates a species of liability very different from what was originally contemplated or charged.

Mr. *Prinsep* and Mr. *Morton* in support of the motion. All the cases cited are instances where the plea was actually argued and allowed. In the present instance the complainants simply submitted to the plea as it stood without argument. What is contended for on the other side is admitted to be of force, so far as the statement as to partnership is concerned. We complain of a fraud having been practised on us by the firm in Calcutta, who are our agents; the defendant Kissenpersaud is the gomastah of that firm, and we contend, that he is particeps criminis and equally liable. Taking it however as a plea after argument it is not uncommon to allow a party to amend the grounds.

SIR L. PEEL, C.J. The cases cited govern this. The plea must be considered as allowed after argument. It is contended that the sub-agent of the agent is liable. If **[114]** so, they would be partners in the agency, and that would involve the question of partnership. But the liabilities of an agent and those of a partner are quite different. This is precisely a case in which the Court ought to have the circumstances specially stated, in order to enable them to ascertain whether this defendant's liability was merely a civil one, incurred within the scope of his authority; or whether arising out of a fraudulent combination.

Application refused without costs.

IN EQUITY.

RUSSELL *v.* ASHBURNER, AND ASHBURNER *v.* RUSSELL.

(1847. *July* 2. *Thursday*).

Partnership deed—Construction of.

By the 7th clause of a partnership deed it was provided "that the partnership should continue for five years two months and seven days, during which term no partner should retire without the consent of his co-partners, but that the senior partner should have the power of making any new arrangements annually which he might deem requisite for the interest of the new partnership, and its constituents, either in regard to the retirement or administration of partners, or the extent of their shares." The 22d clause provided, "that in case of the retirement or *removal* of any of the partners during the co-partnership term, his interest in the concern and profits should continue six months, to be calculated from the date of such retirement or *removal*." The 23d clause also contained provisions "in case of the interest of any partner ceasing or determining, by reason of death, retirement, *or removal* under any preceding article."

Held—that neither in the 7th clause alone, nor within the four corners of the deed, was any power conferred on the senior partner to remove a co-partner, or dissolve the partnership until the expiration of the time limited by the deed.

Held also—that if such power was to be implied, it should be by *necessary* implication.