

DREXEL AND OTHERS V. BERNEY, EX'R, ETC.

Circuit Court, S. D. New York. November 17, 1882.

EQUITY—RESTRAINING ACTION AT
LAW—DEFENSE AT LAW.

Where the facts disclosed by a bill in equity would avail as a defense to an action at law, which is sought to be restrained, and complainant is not entitled to a discovery, the bill is demurrable.

Tracy, Olmstead & Tracy, for complainants.

Lord, Day & Lord, for defendants.

WALLACE, C. J. The facts disclosed by the bill will avail the complainant as a defense at law to the action which is sought to be restrained by the bill. They do not show a defense of an equitable character distinctively. Even if formerly the complainant might have been entitled to a discovery, now that parties can be examined in the same manner as other witnesses, at the instance of the adverse party, there is no necessity for such relief. *Heater v. Erie R. Co.* 9 Blatchf. 316; *Markey v. Mut. Benefit L. Ins. Co.* 3 Law & Eq. Rep. (1st Cir.) 647. The jurisdiction of a court of equity in this regard rests upon the inability of the common-law courts to obtain or compel the testimony sought, and when it can be obtained by the process of the latter it is an abuse of the powers of chancery to interfere. *Brown v. Swan*, 10 Pet. 497.

The demurrer is allowed.