

ROGERS V. RIESSNER AND ANOTHER.

*Circuit Court, S. D. New York.*

July 23, 1887.

EQUITY—CROSS-BILL—LEAVE TO SERVE.

After a decree had been rendered in a cause on proofs taken, the defendants' obtained an order from another judge allowing them to serve a crossbill: Afterwards a motion by Complainant to set aside this order was sent for hearing to the judge who granted it, and returned by him to the judge who made the decree, when it appeared that the order was signed on formal proofs only, without knowledge of any hearing in the cause; the petition for leave to serve the cross-bill merely disclosing that an answer to the original bill had been served. *Held*, that the motion to set aside the order might be considered as a motion by defendants for leave to serve a cross-bill, and, as this involved the taking of additional testimony, the application was too late, and the order giving leave to serve the cross-bill should be set aside.

ROGERS v. RIESSNER and another.

In Equity. On motion to set aside order allowing service of crossbill.

*Geo. G. Lay*, for complainant.

*Turner, Lee & McClure*, for defendants.

LACOMBE, J. This is a motion to set aside an order made by Judge BROWN allowing defendants to serve a cross-bill. The motion, coming on for hearing before Judge WHEELER, was by him sent to Judge BROWN, who indorsed this memorandum on the papers:

“The order was signed on a formal statement only, without knowledge of any hearing in the cause. The propriety of the application depends so largely upon the merits which were determined at the hearing that this motion should come before judge WHEELER, who is familiar with the merits of the case.

“A. B.”

In view of the first clause of this memorandum, and of the fact that the petition for leave to serve cross-bill sets forth the fact that an answer to the original bill has been served, but does not disclose the fact that the case had been heard on proofs taken, and a decree rendered, the present application may be considered as a motion by defendants for leave to serve a cross-bill. Inasmuch as the defendants propose to take additional testimony under this cross-bill when served, the application is made too late. *Field v. Schieffelin*, 7 Johns. Ch. 255; *White v. Buloid*, 2 Paige, 164.

The order giving leave to serve the cross-bill should therefore be set aside. Order accordingly.