

under no obligations to make known the truth. He had entered into a combination to obtain the money or property of Young by becoming an active party in the suit against Young, and in equity he must be deemed to be a co-plaintiff with Lee, and equally chargeable with him with the fraud perpetrated upon the court and the defendant in that action, when a judgment was taken for a large sum upon a claim which the plaintiffs knew had been already fully paid.

If the *gravamen* of the bill was the charge that the judgment had been obtained by perjury committed on the trial of an action at law, the objection urged to the failure to set forth specifically in what the perjury consisted, and by whom it was committed, would be well taken. Such does not seem to be the purpose, however, of these allegations. They are doubtless made in support of the general allegations that in fact the complainant does not now, and never did, owe any sum as damages for the alleged assault, which again is made to negative the idea that might otherwise be urged, that complainant ought to pay the sum actually due before asking relief against the judgment in question. Many of the points urged in argument by counsel for defendant may have weight when the cause is heard upon the evidence, because the facts may then make the propositions advocated by counsel pertinent and proper to be considered; but as the case is now submitted upon demurrer it cannot be said that ground for relief in equity against the judgment and the sale of property based thereon is not shown. The demurrer is therefore overruled, with leave to defendant to answer the bill by next rule-day.

WOOLSON, J. I concur in the foregoing opinion.

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WHITE v. BOWER.

(*Circuit Court, S. D. Georgia, E. D. October 17, 1891.*)

**EQUITY PLEADING—ANSWER AND CROSS-BILL—AFFIRMATIVE RELIEF—STATE PRACTICE.**

Equity procedure in the United States courts is not affected by the laws of the states in which the courts are held; and therefore, in a suit for accounting, discovery, and other relief, the defendant cannot obtain affirmative relief by an "answer in the nature of a cross-bill," drawn in accordance with the state practice. Under equity rule 90, affirmative relief must be sought by cross-bill, as in the English high court of chancery.

In Equity. Bill for accounting, discovery, and other relief. On exceptions to answer.

*R. R. Richards* and *Jos. A. Cronk*, for complainant.

*Denmark, Adams & Adams* and *W. M. Hammond*, for respondent.

SPEER, J. The plaintiff filed his bill against the respondent on the 3d of July, 1889. The prayers are for accounting, discovery, and other

relief, with reference to disputed matters growing out of the management of what is known as the "Piney Woods Hotel," in Thomasville, in this state. It is not necessary at this stage of the proceedings to state more at large the nature of the plaintiff's suit. The respondent at September rules, 1889, filed an "answer in the nature of a cross-bill." In this affirmative relief against the plaintiff is sought.

This proceeding appears to have been adopted to accord with the practice of the state courts as defined by section 4181 of the Code of Georgia, the language of that rule being as follows :

"A cross-bill need not be filed in this state. The defendant in every case may set up any matter in his answer which under the English practice should be the subject of a cross-bill, and may require therein any discovery from the complainant he may desire."

The respondent has excepted to that part of the answer which purports to be a cross-bill against the complainant, "upon the ground that such matter constitutes no answer to said bill, or to any part thereof, and, if appropriate subject-matter of a cross-bill, the same should be propounded separately from said answer in and by suitable allegations and prayers, according to the rules and practice in equity." The exceptions were set down for argument, and the argument had, and, having taken time to consider the same, the court has concluded that the exceptions must be sustained, and all portions of defendant's answer by which the affirmative action of the court in her behalf is sought must be stricken.

In *Ford v. Douglas*, 5 How. 166, 167, where an answer in the nature of a cross-bill had been filed, Mr. Justice NELSON, in rendering the decision, observed :

"It is said that in some of the western states an answer like the one in question would be regarded in the nature of the cross-bill, upon which to found proceedings for the purpose of setting aside the fraudulent conveyance. But the practice in this court is otherwise, and more in conformity with the established course of equity. We are of the opinion, therefore, that the appellant mistook his rights in attempting to raise the question of fraud in the probate sales in his answer to the injunction bill, and that instead thereof he should have filed a cross-bill, and have thus instituted a direct proceeding for the purpose of setting aside the sales."

See, also, 2 Daniell's Ch. Pr. 1647.

This is unquestionably the rule of the English high court of chancery, and equity rule 90 of this court provides :

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same can reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rule, but as furnishing just analogies to regulate the practice."

The state statute upon this subject does not help the answer.

In *Noonan v. Lee*, 2 Black, 499-509, it is held that—

"The equity jurisdiction of the courts of the United States is derived from the constitution and laws of the United States. Their powers and rules of decision are the same in all the states. Their practice is regulated by them—

selves, and by the rules established by the supreme court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by state legislation." *Neces v. Scott*, 13 How. 270; *Boyle v. Turner*, 6 Pet. 658; *Robinson v. Campbell*, 3 Wheat. 223.

It follows, therefore, that to obtain the benefit of her averments, and of the prayers set out in the answer seeking affirmative action against the plaintiff, the respondent should have filed a cross-bill in accordance with the rule. *Railroad Co. v. Bradleys*, 10 Wall. 299.

Let order be taken in accordance with this holding.

### FINANCE CO. OF PENNSYLVANIA v. CHARLESTON, C. & C. R. Co.

(Circuit Court, D. South Carolina. November 19, 1891.)

#### RAILROAD COMPANIES—FORECLOSURE OF MORTGAGE—LIENS FOR SUPPLIES—PRIORITIES.

Persons who furnish labor, supplies, and materials to a railroad, in order to keep it a going concern, are entitled to payment out of the earnings thereof before the payment of any interest on the mortgage bonds; and if, in a suit to foreclose, it appears that money due upon claims of this nature has been paid out as interest on the bonds, or for permanent improvements, whereby the bondholders have been benefited, the court will order an amount equal to the sum so diverted to be paid upon such claims out of any earnings in the hands of the receiver, or, failing these, out of the proceeds of the sale.

#### In Equity.

Suit by the Finance Company of Pennsylvania against the Charleston, Cincinnati & Chicago Railroad Company to foreclose a mortgage. Mr. D. H. Chamberlain was appointed permanent receiver of the road February 25, 1891. See 45 Fed. Rep. 436. The hearing is now upon interventions by the Pocahontas Canal Company, Atlanta Rubber Company, Westinghouse Air-Brake Company, Fairbanks, Morse & Co., Smith & Courtney, Hermann Baruch, the Mecklenburg Ice Company, Wm. Bird & Co., and others, claiming superior liens for supplies, etc., furnished prior to the receivership.

*B. A. Hugood, A. M. Lee, Huger G. Sinkler, and Buist & Buist*, for claimant.

*Samuel Lord*, for defendant.

**SIMONTON, J.** These are all interventions in the main case. Each of them is for supplies and materials, necessary for the maintenance of a railroad. With very few exceptions, the supplies and materials were furnished within the six months preceding the appointment of the receiver. They pray payment out of the income of the road while it is in the hands of the receiver, and, failing this, that they may be paid out of the proceeds of the sale when it is made, in priority to the mortgage debt, or that receiver's certificates may now be issued to them in payment.