

testimony, the names of the witnesses, and the character of any documentary evidence; that it has come to light since the hearing, and was not known, and could not by reasonable diligence have been ascertained for use at the hearing; that it is not cumulative. *Dexter v. Arnold*, 5 Mason, 303, Fed. Cas. No. 3,856; *Daniel v. Mitchell*, 1 Story, 198, Fed. Cas. No. 3,563. Within these principles, the application was properly denied. It failed in every essential to come within the rule. The record does not contain the evidence before the master, and the application does not show that the proposed new evidence was not cumulative. No diligence to obtain the evidence at the hearing is exhibited. Indeed, so far as the application presents the matter, there is confession of negligence. The most ordinary diligence in the preparation of the case for the hearing would have suggested the ascertainment of the basis of assessment of the property, and, if in such assessment there was included property situate without the limits of the state, it must have been matter easily determined. Neither the facts nor the witnesses by whom the facts are to be proven, are set forth in the application. Nor does it appear that the facts have come to the knowledge of the receivers since the hearing. It is merely asserted that they have only since the hearing fully come to their knowledge. If, without objection to the imputation of negligence, they were only partially informed of the facts at or before the hearing, it became their duty to apply for a postponement of the hearing until the facts could be fully ascertained. Proceeding with the hearing without objection or request for time to fully ascertain and produce the evidence, they cannot now equitably ask for a rehearing merely because they were not then fully advised of the facts; especially so when neither the facts they expected to prove, nor the extent of their previous knowledge of them, are disclosed to the court. The evidence was not newly discovered, within the meaning of the law. The application is presented upon the mere belief of the affiant, and is wanting in compliance in every particular with the settled rule governing such matters. But, were the case otherwise, such an application is not founded in matter of right, but is addressed to the sound discretion of the court. The exercise of that discretion cannot be assigned for error or reviewed in an appellate court. *Steines v. Franklin Co.*, 14 Wall. 15, 22; *Buffington v. Harvey*, 95 U. S. 99; *Railway Co. v. Heck*, 102 U. S. 120; *Boesch v. Graff*, 133 U. S. 697, 10 Sup. Ct. 378; *Bondholders & Purchasers of Iron R. R. v. Toledo, D. & B. R. Co.*, 18 U. S. App. 479, 10 C. C. A. 319, 62 Fed. 166. Affirmed.

GUNN v. BRINKLEY CAR WORKS & MANUF'G CO.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1895.)

No. 348.

EQUITY—JURISDICTION—ACCOUNT.

G., as surviving partner of the firm of G. & B., filed a bill for an accounting against the B. Manuf'g Co. It appeared that the transactions between the firm and the B. Manuf'g Co. involved a running account of

more than 500 items, extending over more than six years, and further complicated by fraudulent entries and omissions by the deceased partner of the firm, who had been its business manager, and also the manager of the B. Manuf'g Co. *Held*, that an action at law for the balance due, in a federal court having no power to order a reference, would be an inadequate remedy, and that the case was within the jurisdiction of a court of equity.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

This was a bill by John Gunn, surviving partner of the firm of Gunn & Black, against the Brinkley Car Works & Manufacturing Company for an accounting. A demurrer to the bill was interposed and sustained, and the bill dismissed. The complainant appeals.

George Gillham filed brief for appellant.

M. L. Stephenson, Jacob Trieber, John J. Hornor, and E. C. Hornor filed brief for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree dismissing the amended bill of the appellant, John Gunn, for an accounting between himself, as surviving partner of the firm of Gunn & Black, and the Brinkley Car Works & Manufacturing Company, a corporation. According to the allegations of this bill, the appellant and William Black composed the partnership of Gunn & Black from 1881 until 1889, when Black died. During this time Black was the business manager of this firm, and the appellant, who could read but little and from lack of education could not understand bookkeeping, intrusted to him the entire management of the business of the partnership. During all this time Black was also the president and general manager of the Brinkley Car Works & Manufacturing Company, a corporation of the state of Arkansas. He had a much larger pecuniary interest in this corporation than in the partnership, while the appellant, Gunn, had a much larger interest in the partnership than in the corporation. From February 14, 1882, to November, 1888, the partnership and corporation were engaged in business as merchants, and were continually dealing with each other. These dealings were evidenced by a mutual running account, which has never been settled. A copy of the items of this account, as it appears on the account books of Gunn & Black, discloses more than 400 items charged, and more than 100 items credited, by that firm to the corporation, and shows a balance of more than \$20,000 due from the corporation to the partnership. But the corporation denies any indebtedness, and maintains that the partnership is indebted to it. Black, as manager of both the partnership and the corporation, superintended the bookkeeping of both concerns, and perpetrated gross frauds on the partnership by withholding from the account books of the firm proper debits to the corporation, and by placing thereon false and improper credits in favor of the corporation, amounting in the aggregate to many thousand dollars, so that the corporation is justly indebted to the partnership in an amount far in excess of the balance shown

by the books of the latter. Many of the items that should have been, but were not, charged to this corporation on these books are set forth in the bill. The corporation, after repeated demands, refuses to permit the appellant to examine its account books, or to furnish him with any statement of the account between it and the partnership. The prayer of the bill is for a true account between the appellant, as surviving member of this partnership, and the corporation, for the recovery of the balance that shall be found due, and for other relief. To this bill a demurrer was interposed. The court below sustained the demurrer, and dismissed the bill.

In support of this decree counsel for appellee relies upon the legislative declaration of the judiciary act of 1789, that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law" (Rev. St. § 723), and upon such cases as *Hipp v. Babin*, 19 How. 271; *Root v. Railway Co.*, 105 U. S. 189, 212; *Parkersburg v. Brown*, 106 U. S. 487, 500, 1 Sup. Ct. 442; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249; and *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276,—which reiterate and rest upon that well-settled rule. None of these cases, however, involve a complicated mutual running account. In each of them the remedy at law was adequate and complete. But how can the appellant in this case obtain a correct and adequate accounting between this partnership and corporation in an action at law? In such an action for the balance due on this account the national courts have no power to order a reference to take and state the account, but the entire case must be tried to the jury. According to this bill there is here a mutual running account that extends over a period of more than six years; it involves more than 500 items; it has been complicated and confused by the fraudulent entries and omissions of a faithless trustee; and, in our opinion, it would be next to impossible for a jury to carefully examine this account and reach a just result. That can only be done by a reference to a master or a hearing before a chancellor in the method peculiar to a court of equity. In *Kirby v. Railroad Co.*, 120 U. S. 130, 134, 7 Sup. Ct. 430, a case involving an account aggregating about \$350,000, and running for a period of less than 10 months, Mr. Justice Harlan, in delivering the opinion of the supreme court, said:

"The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. 1 Story, Eq. Jur. § 451. Justice could not be done except by employing the methods peculiar to courts of equity."

To deprive a court of equity of jurisdiction, the remedy at law must be plain and adequate,—“as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.” *Boyce’s Ex’rs v. Grundy*, 3 Pet. 210, 215; *Oelrichs v. Spain*, 15 Wall. 211, 228; *Preteca v. Land-Grant Co.*, 4 U. S. App. 327, 330, 1 C. C.

A. 607, 50 Fed. 674; Foltz v. Railway Co., 8 C. C. A. 635, 641, 60 Fed. 316, 322. An action at law in a federal court does not furnish such an adequate and efficient remedy for the examination of a long, confused, and complicated mutual account like that disclosed in this bill. The decree below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.

PUTNEY et al. v. WHITMIRE et al.

(Circuit Court, D. South Carolina. March 15, 1895.)

1. CIRCUIT COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—CREDITORS' BILL.

A creditors' bill cannot be maintained, in the United States circuit court, by several complainants, each holding a separate and independent demand against the debtor less than \$2,000 in amount, though the aggregate of all the complainants' demands exceeds \$2,000.

2. EQUITY PRACTICE—SUPPLEMENTAL BILL.

A defective original bill, which affords no ground for proceeding upon it, cannot be sustained by filing a supplemental bill, founded upon matters taking place after the filing of the original bill.

3. CREDITORS' BILL—NECESSITY OF JUDGMENT.

One who claims to be a creditor of a defendant, but whose claim has not been reduced to judgment, and who has no lien and claims under no trust, cannot maintain a creditors' bill or a bill to set aside deeds alleged to be fraudulent.

This was a bill in equity by Stephen Putney & Co. and others against Bartow T. Whitmire and others to set aside certain mortgages as fraudulent, and for other relief. Each of the individual claims of the creditors was less than \$2,000, and none of them had been reduced to judgment. A supplemental bill was filed, alleging an assignment by certain of the complainants in the original bill to their co-complainants of all their claims, thus increasing the claim of said complainants to a sum much greater than the jurisdictional amount. The defendants demurred on the ground that the court had no jurisdiction of the original bill; that the filing of the supplemental bill could not affect the jurisdiction, and that the creditors, having failed to obtain judgment on their claims, could not maintain their bill in this court.

Perry & Heyward and Haynsworth & Parker, for complainants.
Cothran, Wells, Ansel & Cothran, for defendants.

SIMONTON, Circuit Judge. This is a creditors' bill, seeking to set aside certain mortgages of a stock of goods executed by the defendant Whitmire to his sister and brother. It is charged that the mortgages themselves are void because intended to delay, hinder, and defeat creditors; and that they are in effect an assignment with preference, and so void under the statute law of South Carolina. The complainants are merchants, each of whom sold and delivered goods to Whitmire, and hold his notes given to them severally, and open accounts due to them severally by him. These are set out in detail. None of the plaintiffs, when the bill was filed,