

discovered, leaves the transaction shrouded in more or less doubt. The presumptions arising from the genuineness of Dunlavy's signature and his unimpeached character were not overthrown by the mystery as to where Mays obtained the money to make such a loan. The new evidence, when the most that can be said for it is said, only serves to increase the doubt that must always exist as to the real truth of the matter. If we decide against the bill, as we feel constrained to do, it may result in fastening on the defendants an unjust debt. On the other hand, we are not persuaded that this new evidence, including that admissible for lack of due diligence in making it, is of such controlling weight as should under the rules of evidence operate to reverse the decree. So, too, we should not be unmindful of the evil of reopening a litigation once terminated. Lord Eldon, upon a petition of this kind, said of this consideration:

"It is most incumbent on the court to take care that the same subject shall not be put in a course of repeated litigation, and that, with a view to the termination of suit, the necessity of using reasonably active diligence in the first instance should be imposed upon parties. The court must not, therefore, be induced by any persuasion as to the fact that the plaintiff had originally a demand, which he could clearly have sustained, to break down rules established to prevent general mischief at the expense even of particular injury." *Young v. Keighly*, 16 Ves. 348, 349.

Upon a consideration of the whole case we are constrained to refuse our consent to the filing of this bill of review, though we do so with some misgivings as to the bona fides of the transaction as between the defendants and M. M. Mays. We have not meant, either in this or the former opinion, to intimate any opinion as to whether or not the complainants would be affected by a defense good as against M. M. Mays. That question was left undecided, and is still reserved. The costs incurred by this application will be paid by petitioners.

WEATHERSBEE et al. v. AMERICAN FREEHOLD LAND MORTG. CO.

(Circuit Court, D. South Carolina. December 19, 1896.)

EQUITY—CROSS BILL—USURY.

Where the defendant in a bill to foreclose a mortgage given to secure a note pleads usury as a defense, he may set up, by cross bill, a claim, under Rev. St. § 1391, for double the amount of interest he has paid complainant.

Robert Aldrich, for cross complainant.
Sloan & Green, for defendants.

SIMONTON, Circuit Judge. This case comes up on demurrer to the cross bill. The original bill was filed to obtain foreclosure of a mortgage of real estate given to secure a note with interest coupons. In the answer the defendant set up, as a defense, usury in the loan, and added, by way of counterclaim, a demand for double the amount which complainants had received as interest from defendant, to which demand defendant laid claim under section 1391, Rev. St. S. C. A demurrer to the counterclaim was sustained, and leave was granted to defendant to file a cross bill.

The cross bill sets up, in substance, the same matter. Complainants demur.

The grounds of demurrer are, in substance, that the cross bill sets up a legal demand, and seeks, at the hands of the court, relief for which there is a plain, adequate, and complete remedy at law; and also that the relief demanded cannot be given, or the prayer entertained, until the defendant (complainant in the cross bill) offers to pay the sum admitted to be due. In equity a defendant can pray nothing in his answer except to be dismissed the court. If he has any relief to pray, he must do so by cross bill. The cross bill is not a new suit. It is merely auxiliary,—a dependency upon, a part of, the original suit. It is brought in order to obtain full relief to all parties; and it is specially a mode of defense in the cause. *Field v. Schieffelin*, 7 Johns. Ch. 252. The defendant may rely on matters purely legal, provided they be connected with the matters of the bill, for his defense, and by his cross bill require the plaintiff to answer thereto. 2 Daniel, Ch. Prac. (Perkins' 3d Am. Ed.) 1650. This author, a recognized authority, at page 1653 says:

"But a cross bill is considered a mode of defense or a proceeding to obtain a complete determination of a matter already in litigation in the court. The plaintiff in the cross bill is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court."

But the subject-matter of the cross bill must be essentially connected with that of the original bill, and not extraneous thereto. The distinction is clearly shown by Judge Wallace in *Lautz v. Gordon*, 28 Fed. 264. If these principles are applied to the present case, it will appear that it comes within the rule permitting cross bills. The cause of action is based on certain promises in writing. The defense is usury. If this defense be sustained, necessarily there arises the right of the defendant under the South Carolina statute. It is inseparable from the original controversy,—a part of it, dependent for its solution upon the same testimony and law. If the defendant cannot set up this right in this case, it then may happen that the defense of usury may be sustained, and a decree for a specific amount rendered against the defendant, with an existing right in him, by some new proceeding, to reduce this amount,—a right necessarily resulting from the decision in the main case. But when equity takes jurisdiction it proceeds to administer full relief in every particular, and to close the whole litigation.

There is another view to take of this matter, which leads to the same conclusion. The original bill proceeds upon a legal demand, and obtains the aid of the court because of the mortgage lien. But, before this lien can be enforced, the validity of, and the amount due upon, the legal demand (the notes in this case), are ascertained. The matters set up in the cross bill are directed to this issue. Virtually admitting the execution of the promises to pay, it denies their obligation according to their tenor by reason of the taint of usury, and insists that, under the provisions of the stat-

ute, the amount claimed is not due. And that issue should be determined before the mortgage lien is enforced.

The second ground of demurrer is based on a misapprehension. The cross bill does not admit any balance due. It claims more than complete satisfaction under the statute.

The demurrer is overruled. Let the defendant in the cross bill (complainant in the original bill) answer over.

NEW YORK SECURITY & TRUST CO. v. LINCOLN ST. RY. CO. et al.

(Circuit Court, D. Nebraska. November 24, 1896.)

No. 84.

1. STREET-RAILWAY MORTGAGE—FORECLOSURE—RIGHTS OF TRUSTEE AND BOND HOLDERS.

A provision in a street-railway mortgage, that no foreclosure proceedings shall be instituted, except by the trustee, unless he shall refuse to do so on the reasonable request of the bondholders, is not a limitation upon the trustee's right to foreclose, but upon the right of the individual bondholders to foreclose in their own names. 74 Fed. 67, affirmed.

2. MORTGAGE TO SECURE BONDS—POWERS OF TRUSTEES—FORECLOSURE.

By agreement between a street-railway company and a majority of its bondholders, interest coupons for 1894 and 1895 were exchanged for interest-bearing scrip. By the provisions of the mortgage the right of individual bondholders to institute proceedings for foreclosure was limited to cases wherein the trustee, after due demand by holders of \$300,000 of the bonds, should fail to act. *Held*, that this agreement and provision did not deprive the trustee of the power to institute proceedings on behalf of the bondholders not parties to the agreement, although the bonds held by them amounted to only \$100,000.

3. SAME—AUXILIARY PROCEEDINGS—RECEIVERS.

Upon the petition of a judgment creditor of a street-railway company, a receiver was appointed to take charge of its property. The trustee of the bondholder filed a bill for the protection of their rights, and prayed for a decree of foreclosure. *Held*, that the foreclosure suit was but an outgrowth of the pending proceedings, and auxiliary thereto, and if, at the time of its institution, there was no default to sustain the foreclosure bill, a supplemental bill could be filed when default should occur, and the court might treat the supplemental bill as the sole pleading.

This was a suit in equity by the New York Security & Trust Company against the Lincoln Street-Railway Company and others for the foreclosure of a mortgage. A supplemental bill was filed, and defendant's demurrer thereto was overruled. 74 Fed. 67. Subsequently a plea and answer were filed, and the complainant then obtained leave to file an amended supplemental bill, to which the defendant has also demurred.

Hornblower, Byrne, Taylor & Miller and Harwood, Ames & Pettis, for complainant.

Charles A. Clark, Sawyer, Snell & Frost, and Cobb & Harvey, for defendants.

SHIRAS, District Judge. This case has already been before the court upon demurrers to the bill, and it was then ruled that the original bill upon its face appeared to be well founded, in that it prayed for the foreclosure of the mortgage executed by the Lincoln Street-