IN THE SUPREME COURT OF THE STATE OF FLORIDA.

Neill G.Wade, and Neill G. Wade, Jr., as surviving partners of the late firm of Wade, Clower and Wade, heretofore composed of Neill G.Wade, M.D. Clower and Neill G.Wade, Jr.,

Appellants.

-vs-

Eugene Clower, as administrator of and for the Estate of M. D. Clower, deceased.

Appellee.

REPLY BRIEF OF APPELLANTS.

We deem it unnecessary to reply at great length to the brief filed by the appellee in this cause, and we shall refer only to certain matters raised by the appellee's brief.

The appellee's counsel (page 5 their brief) say that the appellants made no effort to take any testimony, nor asked for any extension of time.

On the 12th day of July, 1924, the defendants below moved the court for an order to open the decree in the cause signed and passed by the Judge on the 23rd day of June, 1924, and filed in the Clerk's office at Gainesville on the 24th of June, 1924, (page 220 Tr) and this motion shows on its face that on the 2nd day of July, 1924, the defendants had presented to the court a motion to remove from the files the report of the Special Master, and to enlarge the time for the taking of testimony by the defendants, and the court then and there informed counsel for the defendants that the defendants would be

allowed time to take testimony in this cause, and that counsel for the complainant then and there stated to the court that he would not interpose any objection to the enlargement of time within which the defendants might introduce proofs. The motion (Tr 220) is a renewal of the motion for a like order which was before the court for argument on the 2nd day of July, 1924. This motion has never been fuledon by the court, and in explanation of this feature of the case the appellants' counsel beg leave to state here that Judge Long remarked that there was nothing to take testimony upon excepting the matter of the amount of fees to be allowed to the complainant's solicitor and the costs. It is apparent that the Chancellor below was under the impression that there were no matters raised by the several answers of the defendant which had not been stricken out or exceptions sustained to by orders of the court, but the record here plainly shows that the answer filed by the defendants on the 28 of June, 1922, and re-filed November 2, 1922,not only denied all the equities set out in the bill of complaint, but that this answer remained in the record at the time of the final decree.

Replying further to the statement in appellee's brief that an extension of time would be consented to by the complainant's counsel, we respectfully invite the attention of the court to a letter of C. R. Layton dated the 27thday of May, 1924, and the other correspondence attached to the motion to open the decree (p. 242-246 Tr). Mr. Layton's letter states that he showed the letter of the defendants' counsel dated May 26, 1924 to Mr. W. W. Hampton; that Mr. Hampton advised him that the time for taking testimony would expire before another date could be set, but that he would write and offer to agree on a date and extend time for taking testimony. The writer presumed Mr. Hampton had done this. That after the time for taking proofs had expired

at the request of W. W. Hampton, Esq., he filed his report.

We do not think it is necessary to comment further on this matter. The motion to open the decree and the correspondence attached to said motion make it perfectly plain:

1- That Mr. W. W. Hampton offered to write to defendants' counsel and agree upon a date, which he did not do, and that by express direction of Mr. Hampton the Master closed the case and filed his report.

Appellee's counsel adverts to these matters and says that it is a serious charge. We respectfully suggest that the documents constitute the charge and fix the facts.

Referring to the demurrer reserved with the answer filed June 28, 1922. It will be perfectly obvious to the court that, whether this demurrer was properly or improperly filed, it was in the record when the complainant insisted that the court enter a final decree in the absence of the defendants' counsel, and had the decree entered, and is in the record yet and has never been disposed of.

We again contend that the processes by which the decree of June 24, 1924, was entered and the refusal of the court to open the decree and let in proofs in support of the defendants' answer, which remained in the record, have had the effect to cut off the defendants from any opportunity to prove their answer, and no amount of argument, however irrelevant, can wipe this fact out.

We do not think it necessary to refer to the familiar rule set forth in appellee's brief that between courts of concurrent jurisdiction, the court whose jurisdiction first attaches acquires exclusive control of the suit. In reply to this contention made by appellee's counsel we suggest there is no question of conflict of jurisdiction arising in this case. The vital matter which we suggest is that as soon as the State Court was

advised by a proper pleading, namely: the supplemental answer filed by the defendants in the case, which was filed by leave of court, that all matters involved in the instant suit had been fully adjudicated and determined by a decree of a court of concurrent jurisdiction, it was the duty of the State Court to dismiss the instant suit, not because the State Court did not retain jurisdiction, and not because there was any conflict in jurisdiction between the State Court and the Federal Court, but upon the very broad rule and principle that the complainant in this case was thenceforth estopped to assert any further claim of any nature or kind against the defendants in the instant suit, and whether the decree in the Federal Court is to be termed a "res judicata" or a "former recovery" its effect was to forever estop Clower, as administrator, from asserting any claim of any kind or nature arising out of the partnership affairs of Wade, Clower and Wade. The dignity of the State Court has never been assailed by us, but we do assert that the decree appealed from in this cause was entered upon the erroneous supposition that there was only a partial estoppel created by the decree in the Federal Court, and that the court had a right to award to the complainant below, in the absence of any opportunity on the part of the defendants to prove whose fault it was that the litigation was begun, fees to the counsel of the complainant below, and this under the guise of costs.

We insist that the estoppel created by the final decree in the Federal Court was complete and final and that it included not only all matters involved in the instant suit, but also costs and attorney's fees. An inspection of the final decree rendered by Judge Call will show conclusively that as to all matters involved in the instant suit the appellee was fully concluded, including attorney's fees and costs. If the appellee

could be permitted to re-litigate the allowance of attorney's fees he could as well be permitted to re-litigate, whether or not a partnership ever existed between his decedent and the appellantss, or any other matter in the accounting in the Federal Court.

We again call the court's attention to the fact that the appellee did not take an appeal from the decree of the Federal Court but on the contrary accepted this decree as a final adjudication of all his rights and satisfied the decree after he was paid the moneys awarded by Judge Call's decree and had had delivery of the choses in action awarded to him by that decree, and instead of then dismissing the instant action brought it on in the manner and under the circumstances, which we have fully detailed to the court, and procured the entry of the decree appealed from. We insist that this is not only bad law but bad ethics.

When may a court of equity award counsel fees to a complainant? In the absence of an express contract for attorney's fees the court is without power to award counsel fees to a complainant in equity, excepting only in partnership cases, in which the rule is that where there are honest differences between parties, or their personal representatives, and litigation is necessary in order to settle the partnership estate, courts may and usually do make counsel fees a charge against or upon partnership assets. The case presented here is one in which the court has in effect awarded a common law judgment against the surviving partner after all of the co-partnership assets had been distributed under a decree of the Federal Court. How could such decree be satisfied? The surviving partners have parted with their title to and lien upon all of the partnership assets, and when this decree was rendered

there were no assets in the hands of the surviving partners out of which this decree could be satisfied. It will be observed that the court below went so far as to order that execution issue to be levied upon the partnership assets in the hands of the survivors. This can mean nothing else than that the appellee deliberately waited until after all the partnership assets had been distributed by the terms of the decree in the Federal Court , and then procured the entry of a decree, in effect a common law judgment, with execution, expecting to levy upon a portion of the assets which had been awarded by the Federal court to N. G.Wade and his son, in order to satisfy the decree for atterney's fees, awarded to his counsel in the prosecution of this suit. Upon the whole record who was at fault? Who brought on all this litigation? The Federal Court has condemned the appellee for litigous conduct in three of the suits in the State Court in Alachua County, and the record here by the admission of the appellee's counsel clearly shows that the instant suit was unnecessary, because on the 5th day of November, 1920, appellee had been given notice in writing that in order to procure an orderly and just settlement of the partnership affairs that the appellants here intended to file a bill in the Federal Court praying leave to account, and for an acquittance of their liability as surviving partners. We insist that this suit, as well as the three former suits in the State Court, instituted by the appellee against the appellants, was purely vexatious and not otherwise, and the appellee's conduct since acquiescing in the decree of the Federal Court and accepting the benefits of that decree fully sustains our contention that the appellee has exhibited at all times since the summer of 1919 a high degree of litigous conduct resulting in a series of vexatious suits.

Upon this appeal, we conceive that the court here, irrespective of the fact that the cause was not ripe for decree when the decree of June, 1924, was entered, and irrespective of the fact that the defendants below had no opportunity to prove their answer which remained in the record, will determine that the vital and important question to be decided on this appeal is whether or not there can be any end to litigation between the same parties and concerning the same subject matter. The supplemental answer of the defendants below and the final decree of the Federal Court were before the Chancellor below when the decrees complained of in this cause were entered, and it will be apparent from an examination of the record that the Chancellor before whom this cause was heard was of the opinion that attorney's fees were part of the costs properly allowable to the complainant below, and that an execution should issue to be levied upon the proportionate share of Wade and his son, although these assets had been distributed under the Federal Court decree and were held and owned at that time by the appellants in their individual capacities, and that the Chancellor misconceived the force and effect of the former recovery in the Federal Court between the same parties and concerning exactly the same subject matter.

Both of these propositions are erroneous. Attorney's fees are not costs.

Crawford v. Bradford, 23 Fla. 404, 2 So. 782.

As a rule costs of a suit for partnership accounting, including fees of experts and attorneys, are paid out of the partnership estate, or if this is insufficient they are to be borne by the parties in their respective partnership shares, and it is only when one of the partners, or his personal representative has been guilty of misconduct or because he has needlessly forced or prolonged the litigation and as a sort of punishment, the court may in its discretion charge the entire

cost to one or some of the partners. This is the general rule. The statement of this rule forcibly illustrates the fact that the appellants have been penalized without any opportunity to be heard as to defenses raised by their answer which denied all of the equities of the bill, and set forth that the contentious, litigous and vexatious conduct of the appellee was responsible for all of the differences and difficulties arising in the settlement of the partnership estate.

The former recovery in this cause was an absolute bar to the further prosecution of the instant cause.

Johnson v. McKinnon, 54 Fla. 221, and other cases cited in appellants' brief in this case.

For these reason, and if no for no other, we respectfully contend that the decrees appealed from should be reversed.

Respectfully submitted,

H L Anderson

Solicitor for appellants.