IN THE SUPREME COURT OF FLORIDA.

Neill G. Wade and Neill G. Wade,Jr., as surviving partners of the late firm of Wade, Clower & Wade, heretofore composed of Neill G. Wade, M. D. Clower and Neill.G. Wade,Jr., APPELLANTS, -vs- Eugene Clower, as Administrator of the Estate of M. D. Clower, Deceased, APPELLEE.	Appeal from Alachua Circuit Court. IN EQUITY.

BRIEF OF ATTORNEYS FOR APPELLEE.

Statement.

Neill G. Wade, M. D. Clower and Neill G. Wade,Jr. had conducted a partnership business, a part of which was known as the "Piedmont Farm" in Alachua County and a part railroad construction. M. D. Clower died and Neill G. Wade and Neill G. Wade,Jr. arranged with Eugene Clower to move from Cairo, Georgia, and to come into the business and represent the interest of his brother's estate without having administration. The business was carried on until the railroad contracts were completed, Dr. Clower performing the duties that had been assigned to him. It is unnecessary to go into details. Suffice to say that in the latter part of 1919 the parties failing to agree upon a settlement, the Wades instituted UNLAWFUL DETENTION proceedings and ejected Eugene Clower from the farm. The Clowers claiming that it was a continuing co-partnership, the heirs of M. D. Clower instituted proceedings looking to the dissolution of the partnership and an accounting. The Circuit Judge ruled adversely to the Clowers and dismissed the Bill without prejudice July 13, 1920.

Dr. Eugene Clower, the brother of M. D. Clower, was duly appointed Administrator of the Estate of M. D. Clower, deceased, the 9th of October, 1919. After the dismissal of the Bill for

an Accounting, negotiations were begun between the parties looking to a settlement. An offer was made by the Wades dated November 2, 1920. (Tr. 22) Dr. Clower replied to this offer November 3, 1920 (Tr. 23 & 24), objecting to the charge of interest on withdrawals and insisting that the Wades should pay interest on the moneys needlessly withheld by them; objecting to the claim of Don Wade Estate, and declining to take in lieu of A.C.L. Bonds a large number of worthless notes; offering to accept $25,000.00 in full settlement, including their proportionate part of the Railroad Bonds and of the notes of Sikes, Allen & Sikes and of the other properties. To this Mr. Anderson replied (Tr. 25) refusing to make a settlement and giving notice of sale at public outcry of the notes of Sikes, Allen & Sikes and the Atlantic Coast Line Railroad Bonds, and also claiming that the surviving partners had no authority in law or in morals to make a settlement for an arbitrary amount, and threatening to bring suit against Eugene Clower, as Administrator,- letter dated November 5, 1920.

Recognizing this as a refusal to make settlement, Eugene Clower as Administrator on the 17th of November, 1920, filed the Bill in this case praying the Court to require the surviving partners to pay the debts of the partnership and to render an accounting and settlement with the Administrator of the deceased partner. Notice was given of an application to enjoin the sale at public outcry of the Atlantic Coast Line R. R. Company Bonds. Complainant also filed an Amendment to the Bill (Tr. 29). Notice of the proposed public sale will be found Tr. 30 & 31.

The Defendants did not plead to Complainant's Bill, but immediately applied for a removal of the case to the Federal Court. (Notice, Tr. 32) Petition for Removal, Tr.33 to 35) (Order of Removal, Tr. 36) (Bond, Tr. 37 & 38).

On December 2, 1920, Judge Call remanded the case to the State Court (Tr. 38-39). Immediately application was made by Complainant's counsel for Injunction to prevent the sacrifice of the A.C.L. Bonds at public outcry (Tr. 40-41). The matter came on to

be heard December 4, 1920, and counsel for the Defendants assuring Complainant's counsel that the Bonds would not be sold for less than the market value, the Court made an Order denying the Injunction. (Tr. 42 to 44 inc.)

As will be shown from the record, Defendants demurred to the Bill, Demurrer was overruled, Answer was filed and excepted to, all the Exceptions were sustained, an Appeal taken by the Defendants to the Supreme Court, and the Supreme Court affirmed the rulings of of the Circuit Court.

After receiving the Mandate, defendants applied for an extension of time to plead, extension was granted, Answer filed with reservation of Demurrer, Answer stricken because not properly signed; afterwards the Court allowed the Defendants to re-file the Answer, motion made to strike the reservation of demurrer, Exceptions filed, but the Court declined to strike the Demurrer and held that the matter should be deferred until final hearing. As the Bill waived the oath to the Answer and the Answer not sworn to, upon Motion of Defendants the Exceptions were stricken. On April 20, 1923, in due course, an Order of Reference was made to a Special Master to take testimony and make an account and findings. By agreement of counsel the taking of testimony was deferred from time to time, as appears in the record.

In the meantime, on the 17th of January, 1921, the Defendants brought suit in the Federal Court against the Complainant, as Administrator, involving the same subject matter. Complainant's counsel made a motion before the Federal Judge to stay proceedings, setting up the pendency of the prior suit in the State Court between the same parties and involving the same subject matter. The Federal Judge denied the Motion to stay and assumed jurisdiction to adjudicate the cause. The case was pressed in the Federal Court; and pending the numerous delays occasioned by the dilatory pleadings, the Appeal etc. in the State Court, an accounting was had in the Federal Court. The Master made his Report and Findings and the Federal Court finally

adjudicated the accounting. This adjudication appears in the records of this cause. But the Federal Judge in his Decree (Tr. 214) says: "On November 17th 1920, when the parties were so far apart that it was apparent that no amicable settlement of the partnership affairs could be had, a suit was brought by the administrator of the deceased partner for a settlement of the estate of the co-partnership in the State Court. On January 18th 1921, this suit was commenced by the surviving partners. I am somewhat at a loss to know why the estate could not have been settled in the suit by the administrator of the deceased partner, which would have made the present suit unnecessary." This Decree is dated March 17, 1923.

Thereafter the Master in the Federal Court made his Report and subsequently, on the 16th of April, 1924, the Federal Judge entered his Final Decree. (Tr. 160-164)

On May 19, 1924, the Defendants filed an Amended and Supplemental Answer in the instant case (Tr. 108-110). On May 23, 1924, a motion was made by Complainant's solicitors to strike certain parts of the Amended and Supplemental Answer (Tr. 111-116 inc.) Complainant's solicitors then proceeded in regular order to make proof of the costs and Attorneys' Fees incurred by the Complainant in the instant suit, in each instance giving due notice to counsel for the Defendants. The Defendants offered no testimony, and the time expiring for taking testimony, the Master made his Report but made no Findings, stating in his Report that "Under the existing conditions I have deemed it wise not to make a finding, but to report the testimony to the Court and ask for instructions as to whether the Court authorizes the finding as to Attorney's Fees and costs which is insisted upon by counsel for the Complainant". (Tr. 117-118) Notices, testimony and exhibits attached thereto, Tr. 119 to 216 inc.

On May 24, 1924, the Complainant gave notice of final hearing and argument of the cause upon the pleadings, proofs and Special Master's Report, and that they would apply for a Decree requiring the Defendants to pay solicitor's fees and costs incurred in this case (Tr. 316-317). This Notice was duly served upon Mr. H. L. Anderson, Attorney of record for the Defendants. (Tr. 217) On June 23, 1924, the Circuit Judge rendered his Final Decree (Tr.218-219). On July 12, 1924, after the rendition and record of the Final Decree, Defendants filed their Motion to remove from the files the Report of the Special Master and to open the Final Decree. (Tr. 220-222) There also appears the same Motion sworn to, (Tr.223-225) with Exhibits (Tr. 226-253 inc.)

Although the Complainant gave notice to Mr. Anderson of every step taken in the case, he did not appear nor did he make any effort to obtain an extension of time by agreement or otherwise. It will be seen from the letters filed by Mr. Anderson (Tr. 244-245) that counsel for the Complainant expressed a willingness for him to take his testimony, but he made no offer or effort to take any testimony. On the contrary, on the 22nd. of May, 1924, he notified Complainant's solicitors that he was instructed by his clients to file a Bill in the Federal Court to enjoin further proceedings in the State Court. (Tr. 245-246) Complainant's solicitors replied to this on May 24, 1924; and the time expiring for the taking of testimony, the Master filed his Report.

The Federal Judge denied the Injunction and dismissed the Bill. (Tr. 249-250)

Due notice was given of the Motion to strike the Supplemental Answer. We find no record of Mr. Anderson calling up his Motion to take the Master's Report from the files, nor was any notice of the motion given to counsel for the Complainant.

On July 18, 1924, Defendants' solicitors filed Petition for Re-Hearing. (Tr. 254) The Circuit Judge granted a re-hearing. (Tr. 258-259) No further steps were taken in the case, no effort

made by Defendants' counsel to remand the case or take any proceedings, and on March 2, 1925 counsel for the Complainant gave counsel for the Defendants notice, which was served on him March 3, 1925 by the Sheriff of Duval County, that an application would be made on the 9th of March, 1925, for a final hearing and argument of the case upon the pleadings, proofs and Master's Report, upon the Rehearing which had been allowed. (Tr. 259-260) On March 9, 1925 the Circuit Judge granted the Final Decree in this case. (Tr.260-262) From this Decree this Appeal is taken. (Entry of Appeal, Tr. 264)

ARGUMENT AND CITATION OF AUTHORITIES.

The Attorney for the Appellants has abandoned the first and second Assignments of Error. In his Brief he claims that this is done out of regard for the dignity of the Court. Doubtless counsel discovered that under the rules of this Court the adjudication of the interlocutory orders to which these Assignments relate, in the former Appeal became the law of this case. It was not permissible to assign as error the rulings of the Circuit Judge upon the Demurrer and the Exceptions after Defendants had appealed from those Orders and this Court had affirmed the rulings of the Circuit Judge.

The second Appeal brings up only the proceedings in the Circuit Court subsequent to the Mandate upon the first Appeal. The prior decision is the law of the case.

Wilson vs. Friedenburg, 21 Fla. 386;
Anderson vs. Northrop, 44 Fla. 472;
Valdosta Mercantile Co. vs. White, 56 Fla.704;
McKinnon vs. Johnson, 57 Fla. 120.

Hence it is needless to discuss these Assignments, even though they had not been abandoned.

II.

The third, fourth and fifth Assignments of Error are as follows:

3- The court erred in overruling and denying defendant's motion to open the decree of June 23rd, 1924, and let in proofs

on behalf of defendants in support of the matters alleged in defendant's several answers.

4. The court erred in denying the motion of the defendants filed July 12, 1924, to open the final decree entered the 23rd day of June, 1924.

5. The court erred in its decree of date 23rd day of June, 1924, in striking parts of the amended and supplemental answer of the defendants filed on the 19th day of May, 1924.

The Court cannot consider any Assignment in relation to the Decree of June 23, 1924. The Decree of June 23, 1924, as shown by the record, was vacated and a re-hearing granted upon the Petition of Defendants filed July 16, 1924. The Decree granting the re-hearing is dated July 16, 1924, and was filed for record October 24, 1924. (Tr. 258-259)

Secondly: The Court cannot consider the said Motions referred to and assigned as error in the third and fourth Assignments of Error because there is no evidence in the record that the said Motions were ever presented to, considered by, or ruled upon by the Court. We deem it unnecessary to cite any authorities to sustain these propositions. Certainly the Court cannot revive the Decree and consider a Motion in relation thereto, after the Decree has been set aside, vacated and annulled by the Circuit Judge at the instance and upon the application and Petition of the Defendants who made the motion, and now assign the same as error.

III.

The sixth Assignment of Error is as follows:

6- The court erred in its decree on re-hearing entered on the 9th day of March, 1925.

Assigning this Final Decree as error brings up for consideration by the Appellate Court all rulings of the Chancellor subsequent to the filing of the Mandate from this Court to the Circuit Court, and which rulings were made prior to the rendition of said Final Decree.

After the Complainant's Bill as amended had been tested by demurrer, and after the Supreme Court had affirmed the ruling of the Circuit Judge in sustaining the demurrer and in striking the greater part of the Defendants' Answer, Defendants filed another Answer with reservation of demurrer June 28, 1922. This Answer was stricken, and upon application of the Defendants the Court allowed the Answer to be re-filed November 2, 1922. (Tr. 77-84) Complainant moved to strike the reservation of demurrer because the Bill had been tested by Demurrer, the demurrer ruled upon by the Circuit and Appellate Court, and it is not permissible for the Defendants, after testing the Bill by demurrer, to repeat the same by incorporating a demurrer in the Answer.

We invite the consideration of the Court to the fact that there had been no subsequent alteration, modification, or amendment to the Bill after the ruling upon the Demurrer. Hence the reservation of demurrer was improper. But counsel for Defendants contending that this could only be considered on final hearing, the chancellor reserved ruling upon our Motion until final hearing, and in the Final Decree the Court granted the Motion to Strike. We deem it unnecessary to cite authorities to sustain the correctness of this ruling.

But we also call the attention of the Court to the fact that there is nothing in the record to show the argument of this Demurrer at the final hearing, or that the Defendants' counsel asked for any ruling upon the Demurrer at the final hearing. Such being the case, even if the Demurrer had not been stricken, this Court will not disturb the ruling of the Circuit Judge.

McRainey vs. Jarrell, et al., 59 Fla. 587;

Terra Ceia Estates vs. Taylor, 68 Fla. 272.

(a) Counsel for Appellants states in his Brief that "On the 19th of October, 1922, Solicitor for Defendants was served with notice of application of Complainant for an Order of Reference to a Special Master to take testimony and make report and findings,

and without any further notice or opportunity to the Defendants to object to an Order appointing a Master or the personel of the Master, on the 21st day of April, A. D. 1922, six months after the notice was served upon the Defendants, the Court (Tr. 100) made an Order referring the cause to Mr. C. R. Layton of Gainesville, Florida, as Special Master". As to the correctness of this statement, we invite the Court to examine the Order made by the Honorable Circuit Judge on page 101 of the Transcript, in which the Court says: "This cause coming on to be further heard and the case being at issue, and Complainant's solicitors moving for an Order of Reference to a Master to take testimony herein and to make an account and findings herein, counsel for the respective parties being present before the Court and no objection made hereto, etc." The language of this Order is sufficient refutation of the statement made by counsel.

But we call the Court's attention to the further fact that an Agreement was made in writing between counsel for the Complainant and Mr. H. L. Anderson, solicitor for the Defendants (Tr, 102) in which it was agreed by counsel that the taking of testimony under the reference heretofore made should be postponed until a definite date recited in this Agreement. This Agreement was made the 25th of June, 1923. The Order of Reference was made the 30th of April, 1923.

The Court will also find in the record numerous Agreements of extension in writing signed by counsel for Complainant and Defendants,- Mr. H. L. Anderson being the same counsel who signed all of these stipulations - and not at any time was any objection or exception made by Mr. Anderson to the Order of Reference to the Special Master or to the personel of the Special Master. It seems to us that he had ample time prior to the rendition of the Final Decree to have made objection if such was his desire. Further discussion of this question we deem unnecessary.

(b) Counsel for the Appellants in his Brief at page 19 says: "As is shown by the motion to open the decree and let in

proofs on behalf of the Defendants, the Complainant brought on a hearing before the Master at Gainesville at a time when the Defendants' Attorney was engaged in Court in Jacksonville, and notwithstanding the protest made by the Defendants and the promise that the time would be enlarged within which to take Defendants' proof, at the instigation of the Complainant the Master filed his Report, basing it wholly upon the proofs adduced by the Complainant and without opportunity to the Defendants even to object to any of these proofs."

Again at page 20 of his Brief he says: "The motion of the Defendants below to open the decree and let in Defendants' proofs will disclose that the Defendants never in fact had their day in court. Nor did they have an opportunity to defend upon merits the question of attorney's fees and costs. Their defenses were cut off by the refusal of the court to open the decree and let in their proofs."

And again at the bottom of page 20 and the top of page 21, he says: "It will be clear from an inspection of the record that the defendants were condemned without hearing, and we feel that this court will not lend its countenance to the methods employed by the complainant below in bringing on the hearing and procuring the entry of a final decree, which, on the face of the record, is clearly shown to have been inadvertently entered by the court."

Again we are compelled to invoke the record in refutation of this serious charge made against the complainant and, of course, his counsel and against the Master. Upon an inspection of the record the Court will find that on May 8, 1924, counsel for the complainant gave written notice to Mr. H. L. Anderson that on Thursday, the 15th of May, 1924, at 10:00 o'clock A.M. counsel for complainant would move before the Special Master to proceed with the taking of testimony. This Notice was sent by registered mail. (Note the record of the Master, Tr. 120). (Note the Notice received by Mr. H. L. Anderson, which he filed himself, Tr. 242). This Notice gave Mr. Anderson a full week's time. No reply was made to this Notice, but on the date set for the taking of the

testimony the Master received a telegram from Mr. Anderson (Tr.243). The Court will observe that in this telegram Mr. Anderson still relied upon the adjudication in the Federal Court and reserved the right to strike the testimony only.

On May 16, 1924, the day after the testimony was taken, Mr. Anderson addressed a letter to Hampton & Hampton (Tr.243-244). You will note that in this letter he did not ask for a postponement of the case; he merely asked that he have an opportunity to introduce other testimony. Note also Mr. Anderson's letter of May 16, 1924, to the Master. (Tr. 244). The Court will note letter of Hampton & Hampton dated May 16, 1924, (Tr. 244) advising Mr. Anderson that further testimony would be taken on Saturday, May 17, 1924, and that we had phoned him on the 16th to this effect. Note also letter of May 17, 1924, (Tr. 244-245) of Hampton & Hampton to Mr. Anderson in which we express surprise at his having filed a Supplemental Answer without notice to us, and that we could not consent to the taking of any testimony upon the issues that should be made in the Answer until we could have an opportunity of seeing the Answer. We stated, however, that "So far as the question of time is concerned, we will take no advantage of the time." No reply was made to this letter by Mr. Anderson, but in the record filed by him is a letter addressed to us of May 22, 1924, five days after our letter of the 17th of May, in which he says he has consulted his clients with reference to further prosecution of this case by Dr. Clower and "my instructions are to file an ancillary bill in the United States Court to effectuate the decree of that Court and for an injunction restraining the complainant in the State Court from proceeding further with that litigation." We beg of the Court to carefully read this letter (Tr. 245-246), as also our reply (Tr. 246-247).

Hence the Court will see that the gentleman was ignoring the State Court and proceeding in the Federal Court to do something unheard of, either in Federal or State practice, knowing full well

that neither the Federal or State Court had a right to enjoin the proceedings of the other Court of co-ordinate jurisdiction when the Court sought to be enjoined had first acquired jurisdiction of the parties and of the subject matter. No motion was made to procure an extension of time for taking testimony, no request was made of counsel for the complainant to agree to an extension of time for taking testimony. We could not allow the time to expire without some agreement or understanding with the counsel for the Defendants. We offered to extend the time; he would not have it, but disregarding the State Court proceedings sought in the Federal Court to enjoin the State Court from proceeding with the case. I defy counsel to show anything in the record where the Complainant's counsel have violated any rule or statute or any principle of ethics, but we offered to consent to further time if he wished it.

But after counsel for Defendants proceeded in the Federal Court to enjoin the State Court, when the time expired for taking testimony the Master made his Report, but made no Finding. The Defendants were not prejudiced thereby. They could have made an application to the Court to give them an opportunity to offer testimony. They made no such application, but waited until after the Final Decree of the 23rd of June, 1924, several weeks after the same had been filed and recorded, to-wit, on July 12, 1924, and made a Motion to take the Master's Report from the files and to allow him to offer testimony. No valid reason was assigned for this. On the contrary, upon examining the record further (Tr. 247), it will be found that counsel for the Complainant gave the Defendants full notice of application for Final Decree upon the testimony and Report of the Master, as also Notice of application to strike the Supplemental Answer. (Tr. 248)

The Court will find that Mr. Anderson did write the Master after he had filed his Report, May 26th, that he wanted an opportunity of taking his testimony; but the time had expired and the Master had no further control over the case.

The Court will also observe that this suit in the Federal Court was brought against counsel, as well as against Dr. Clower. Afterwards, upon Petition of the Defendants, the Court granted the re-hearing, to-wit, on the 16th of July. After the re-hearing was allowed the matter stood undisposed of until the 2nd of March, 1925. No effort was made by Mr. Anderson to get the Court to remand the case for testimony, no move of any kind made by him from July 6th, 1924 to March 2nd, 1925. And then it was that Complainant's solicitors gave notice of application for final hearing. (Tr. 259)

These records completely refute the charge of Mr. Anderson of improper conduct on the part of the complainant or his counsel, or the Master, or the refusal of the Master or of the Court to give him full opportunity to present his defenses. On the contrary, the record shows conclusively that the Defendants (Appellants) were given full and fair opportunity to offer any evidence, should they have desired to do so; but instead of giving attention to the defenses in the State Court, counsel showed further disrespect for the State Court and sought relief in the Federal Court. Further comment is unnecessary.

(c) At page 21 of the Brief of counsel for the Appellant he contends that because he wrote a letter to counsel for the Administrator of the Clower Estate that the Wades intended instituting a suit in the Federal Court, that it showed bad faith on the part of the Complainant and his counsel in bringing the instant suit. An analysis of all the pleadings that have been filed by the Wades in this case will show that counsel for the Wades has assumed great superiority in the right to elect the forum on the part of the Wades; but we cannot concede that the surviving partners of this partnership had any greater right to elect the forum for the adjudication of the rights of these parties than did this Administrator who is charged with the duty of enforcing the rights of the Estate of the deceased partner. The Decree made by the Federal Judge on the 17th of March,

1923 (Tr. 213-214) is complete refutation of any charge of bad faith on the part of this Complainant, but on the contrary shows the needlessness and almost impertinence of the Defendants in the instant suit in bringing the case in the Federal Court.

In his Opinion, Judge Call uses this language:

"On November 17th 1920, when the parties were so far apart that it was apparent that no amicable settlement of the partnership affairs could be had, a suit was brought by the administrator of the deceased partner for a settlement of the estate of the co-partnership in the State Court. On January 18th 1921, this suit was commenced by the surviving partners. I am somewhat at a loss to know why the estate could not have been settled in the suit by the administrator of the deceased partner, which would have made the present suit unnecessary."

Now, if this suit was properly brought - and this Court has so adjudicated in a former Appeal - then it is the duty of the State Court to retain jurisdiction without interference from the Federal Court.

> Williams vs. Benedict, 8 How. 107;
> 12 L.Ed. 1007.
>
> Digest U.S. Supreme Court Decisions,
> Lawyers Co-Op. Pub. Co. 1908, page 2312,
> and entire page of citations which are
> too extensive to copy in this Brief.

Service was made upon the Defendants herein, they appeared, the case was transferred to the Federal Court upon Petition of Defendants, the Federal Judge remanded the case to the State Court. Thereafter the Defendants tested the Bill by Demurrer, the Demurrer was overruled, Defendants filed an Answer, Exceptions were filed thereto, and almost the entire Answer was stricken by the Circuit Judge. After all of these dilatory pleadings the Defendants instituted their suit in the Federal Court.

Our theory of this case is, that the State Court having acquired jurisdiction of the parties and the subject matter, had full and complete jurisdiction; and therefore, it is the duty of the State

Court to fully adjudicate the cause.

"It is a familiar rule, often statedbroadly, that,as between a federal court and a state court having concurrent jurisdiction of any given matter or controversy, that court whose jurisdiction first attaches acquires exclusive control of the suit and of all controversies respecting the subject of it involving substantially the same interests, and will hold and exercise this right until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies to both civil and criminal cases; and the court thus acquiring prior jurisdiction will not be interfered with, or allow itself to be interfered with, by the other court."

Peck vs. Jenness, 7 How. 612;

French vs. Hay, 22 Wall. 250;

Union Trust Co. vs. Rockford, R.I.& St.L. R.Co., Fed.Cas. No. 14,401;

Gaylord vs. Railroad Co., Id.5,284;

The Celestine, Id. 2,541;

Bell vs. Trust Co., Id. 1,260;

Shoemaker vs. French, Id. 12,800;

Mallett vs. Dexter, Id. 8,988;

Haines vs. Carpenter, Id. 5,905;

Wilmer vs. Railroad Co., Id. 17.775;

Ex parte Robinson, Id. 11,935;

Hubbard vs. Bellew, 3 Fed. 447;

Parkes vs. Aldridge, 8 Fed. 220;

Davis vs. Association, 11 Fed. 781;

In re James, 18 Fed. 853;

Bruce vs. Railroad Co. 19 Fed. 342;

Owens vs. Railroad Co., 20 Fed. 10;

Howlett vs. Improvement Co., 56 Fed. 161;

Cohen vs. Solomon, 66 Fed. 411;

Hatch vs. Bancroft-Thompson Co., 67 Fed. 802;

Ice Co. vs. Meader, 18 C.C.A. 451, 72 Fed. 115;

Foley vs. Hartley, 72 Fed. 570;

Avery vs. Trust Co., Id. 700;

Storm vs. Waddell, 2 Sandf. Ch. 494;

Schuehle vs. Reiman, 86 N.Y. 270;

Louden Irrigating Canal Co. vs. Handy Ditch Co. (Colo.Sup.) 43 Pac. 535;

Barnum Wire & Iron Works vs. Speed, 59 Mich. 272, 26 N.W. 802, 805;

Insurance Co. vs. Corbett, 62 Ill.App.236;

Sharon vs. Sharon, 84 Cal. 424, 23 Pac.1100.

22 C.C.A.Rep., page 358, Note 3.

"A State or Federal Court of concurrent jurisdiction first acquiring jurisdiction, obtains it to the exclusion of the other until its duty is fully performed."

Wiswall vs. Sampson, 14 How. 52; 14 L.Ed. 322; and numerous authorities cited in Digest of U.S.Supreme Court Reports, Vol. 2, pg. 2319.

"Where the jurisdiction of a Federal Court has once attached, it has a right to decide every question which occurs in the cause, and that right cannot be arrested or taken away by proceedings in the State Court."

Freeman vs. Howe, 24 How. 450; 16 L.Ed. 749; and numerous authorities cited in Digest of U.S.Supreme Court Reports, Vol. 2, page 2319.

In the case of Baltimore & Ohio R.R. vs. Wabash Railroad Co., reported in 57 C.C.A.Rep., page 323, the Court says:

> "It is settled that when a State Court and a Court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted."

Citing several decisions of the Supreme Court of the United States.

The Court further says:

> "We have followed this rule declaring that the Court

which first obtains possession of the res or of the controversy by priority in the service of its process, acquires exclusive jurisdiction for all the purposes of a complete adjudication."

Citing numerous authorities.

And further the Court says:

"The rule is not only one of comity to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and person, but between State courts and those of the United States it is something more. It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience."

Citing:
Covell vs. Heyman, 111 U.S. 176.
28 L.Ed. 390.

In the case of New Orleans vs. New York Mail Steamship Co., 87 U.S. 387-403, Mr. Justice Swain in delivering the opinion of the Court at page 357 of Book 22 L.Ed., uses this language:

"The Circuit Court having first acquired possession of the original case was entitled to hold it exclusively until the case was finally disposed of."

Taylor vs. Taintor, 16 Wall. 307;
(83 U.S. XXI, 280)

Hagen vs. Lucas, 10 Pet. 200;

Taylor vs. Carryl, 20 How. 584;
(61 U.S. XV, 1028)

"Any relief to which the City was entitled should have been sought there, and that Court was competent to give it, either in the original or in an auxiliary case. As to any other Court the matter was ultra vires." Citing several authorities.

The Court further says: "It was unnecessary, unwarranted in law, and grossly disrespectful to the Circuit Court to invoke the interposition of the State Court as to anything within the scope of the litigation already pending in the Federal Court."

By analogy: If it was unnecessary, unwarranted in law, and grossly disrespectful to the Federal Court to invoke the inter-

position of the State Court in the cited case, was it not equally unnecessary, unwarranted, and grossly disrespectful to the State Court in the instant case for the Defendants to have invoked the interposition of the Federal Court? Especially so when counsel first transferred to the Federal Court, the Federal Court remanded the case to the State Court, and subsequently counsel undertook to stay proceedings in the State Court on account of the pendency of the subsequent suit in the Federal Court; and then afterwards undertook to obtain an injunction to be issued out of the Federal Court to enjoin the proceedings in the State Court.

In view of the authorities cited and the uniform principle of law announced by these authorities that it is the duty of the Court first acquiring jurisdiction to retain jurisdiction until it has fully performed its duties and adjudicated the cause, it seems clear to us that it is the duty of this Court to retain jurisdiction of this cause and to protect the Complainant in his rights.

It will be observed by the Court that the Complainant in this case is not claiming an accounting, since the same has been adjudicated by the Federal Court, but is only claiming that the costs and fees unnecessarily, needlessly and wrongfully caused by the Defendants in this suit should be paid by the Defendants, and not by the Complainant.

The authorities cited by counsel for the Appellant are not applicable to the instant case, since we are not seeking to re-open any question decided by the Federal Judge in his Final Decree.

(d) The testimony offered by the Complainant in this case is full, and clearly proved the Complainant's case. We especially ask the Court to read the testimony of Mr. W. W. Hampton as to the services performed in connection with the testimony of W. S. Broome as to the amount of fee. No testimony being offered by the Defendants, the Complainant was entitled to recover the amount of Attorney's Fees proved.

We also invite the attention of the Court to the fact that counsel for the Appellant does not raise any question in his Brief as to the value of the services rendered. He claims that he had no opportunity of offering testimony, which is not sustained by the record. Not in any proceeding that we have been able to find has he questioned the amount of Fees allowed. He only contends that we are not entitled to any Fees.

We also submit that the record in the case shows the services performed by counsel for the Complainant and that counsel were diligent in prosecuting this suit and did all that they possibly could to bring the matter to an issue and a final determination until the accounting had been had and the matter was ready for Final Decree in the Federal Court.

We are satisfied, therefore, that the Circuit Judge committed no error and that this Assignment is not well taken.

IV.

The seventh Assignment of Error is as follows:

7. The court erred in its conception of the force and effect of defendant's supplemental answer filed May 19th, 1924, setting up a former recovery upon the same cause of action between the same parties by the final decree of the Federal Court and the acceptance by complainant below of the benefits of said decree in said Federal Court.

Instead of the Court having a wrong conception of the Final Decree of the Federal Court, we think that the Appellant's counsel has entirely misconceived the force of that decree. Had the Federal Court undertaken to adjudicate the costs and fees in the instant case it would have exceeded its jurisdiction and such judgment would have been a nullity.

The authorities which we have cited in presenting our views as to the preceding Assignment of Error are clear that the Federal Court had no power to interfere with, or to arrest, or to take away the right of the State Court to adjudicate this cause.

In Freeman on Judgments, 5 Ed., Vol. 2, page 1327, the author says:

"Where, for instance, the State and National Courts have concurrent jurisdiction of a controversy and the latter are resorted to first, they have the right to continue to exercise their jurisdiction to final judgment, and such judgment when recovered is probably paramount to any judgment subsequently recovered in a State Court determining the same controversy."

Sharon vs. Sharon, 84 Cal. 424;
23 Pac. 1100.

This Assignment is therefore not well taken and the Decree of the Circuit Court appealed from should be affirmed.

As to Motion to Strike parts of Record.

Touching the question of the Motion to Strike certain parts of the Record included in the Transcript under the Additional Directions of the Attorneys for the Appellee. We beg to state that under our theory of this case there was a partnership existing between the Wades and M. D. Clower. M. D. Clower died. Under the law of partnerships the partnership was thereby dissolved. It then became the duty of the surviving partners who had the custody and control of the property to close the partnership, pay the partnership debts, and make distribution of the assets if there were any. The surviving partners did not close the partnership, but decided to continue the business and did continue the business for several years, and induced Eugene Clower, brother of M. D. Clower, to remove from Georgia to Florida and take certain management and charge of the business in the place of his deceased brother. Eugene Clower did so, and after completing certain Railroad Contracts, there were negotiations between the parties looking to a disposition of the partnership property and a distribution of the assets. A large amount of money was received from the Railroad Company in the nature of A.C.L. Railroad Bonds. These Bonds and what is known as the "Piedmont Farm" and the Stock upon the Farm constitutedthe chief assets of the partnership. The partnership owed no debts

at the time of these negotiations except to the Wade Investment Company, which was composed of the Wade family. These consisted of something over $81,500.00 of notes, according to the proof. The books had been audited and the Court will see from statements appearing in the record that hundreds of dollars were charged for auditing the books. Differences arose between the Wades and Eugene Clower and there was litigation between them in the State Court, which litigation was decided adversely to Clower and the Bills dismissed without prejudice. The Unlawful Detention suit was decided adversely to Clower in the County Judge's Court, but afterwards reversed and set aside by the Circuit Court.

On the 15th of November, 1919, the "Piedmont Farm" was sold, yielding $107,500.00. After this time, of course, the assets of the partnership consisted of money, marketable railroad bonds, and some minor assets that amounted to but little. And yet the Administrator could get no settlement from the surviving partners, claiming that they had to have the books audited and that they were being audited; but the Court will see that they had already charged $1500.00 for auditing the books and that the Federal Court afterwards allowed this $1500.00 and an additional amount for auditing.

The Court will also find upon examining the record that these surviving partners had charged and were demanding enormous interest on withdrawals, but were not allowing any interest to the Estate of Clower for all of this money which they held in their hands for several years; that this policy if long continued would have exhausted the entire interest of the Clower Estate in the assets of the partnership.

The Court will see also that notwithstanding the fact that the Wade Investment Company during all of this time was in the possession of all of the moneys of Wade, Clower & Wade that were in the hands of the surviving partners, yet these notes were not satisfied and in all of the statements the surviving partners were charging against the partnership interest on these notes.

That on August 1st, 1920, a Statement was furnished to Eugene Clower, Administrator, by the surviving partners, showing a deficit of $22,444.74; that taking into consideration the A.C.L. Bonds at the market value and notes of Sikes, Allen & Sikes and the personal property, that there would be left only $12,510.00 to be divided between the three partners. (Tr. 20 to 22 inc.) And they added the following words: "The above liabilities do not include unpaid amount as audit of Wade, Clower & Wade's books, or attorney's fees." (Tr. 22) The Wades then made a proposition to the Administrator that if the Administrator would take the worthless notes of Sikes, Allen & Sikes and pay the Attorney's Fees of the Wades and dismiss all proceedings and make conveyance and release of the real property, and if the matter could be settled by the figures shown on the books, which now show a deficit etc., that they would make an adjustment. This proposition was dated November 2, 1920. (Tr. 22 & 23)

On November 3, 1920, Clower replied, offering to make a compromise, protesting against the interest charged upon the notes of Wade Investment Company, objecting to interest on advances, offering to take his proportionate part of the notes of Sikes, Allen & Sikes and to take his proportionate part of the A.C.L. Bonds, and in the spirit of compromise offered to accept $25,000.00 in full settlement. (Tr. 23-24)

On November 5, 1920, Mr. Anderson replied to this offer with a great deal of indignation because Clower offered to accept a definite amount, notified Clower that he would sell the A.C.L. Bonds at public outcry, and this was the communication in which Mr. Anderson stated: "The surviving partners have no authority in law, nor have they any moral right to make settlement with you for any arbitrary amount. They can only settle on the actual state of the account. I might also add that as soon as moneys are in hand sufficient to pay the debts and equalize withdrawals, it is the purpose of Mr. Wade and his son to file a bill in equity praying an accounting by you of the moneys spent by you at "Piedmont Farm" and in other transactions, etc. (Tr. 25-26)

The Court will understand that since the 15th of November, 1919, all the property of the partnership had been converted into money except the Atlantic Coast Line Railroad Bonds, some worthless notes of Sikes, Allen & Sikes, and two or three hundred dollars worth of personal property, and two Liberty Bonds,- all except the notes and the personal property being available and all of this money being in the hands of, and being used by the Wade Investment Company, the only creditor of the partnership (as shown by the records). The only other item that they claimed to be due was the amount due the Auditors. And Mr. Anderson was insisting upon a settlement by the books, which showed a deficit, and showed as the Court will see that Mr. Anderson demanded that the partnership should pay interest on the notes held by Wade Investment Company, but should not receive any interest from the Wade Investment Company or the surviving partners for the use of this large amount of money; and that the Clower Estate should also pay interest on withdrawals.(Tr. 25 & 26) It was by reason of these unlawful demands and by reason of the fact that the surviving partners were studiously and systematically, according to the correspondence recited, absorbing the assets with unlawful charges of interest, that the Bill in the instant case was filed on November 17, 1920. Then began a system of technical and unwarranted defenses without any merit. Therefore, in filing the Additional Directions to the Clerk counsel for the Complainant desired to have before the Court the papers and proceedings that were before the Circuit Judge when he passed upon the merits of this case.

The Court will see from the attitude of counsel for the Appellants claiming that he did not receive proper notices, that it was necessary - certainly it was wise and proper - that all of these proceedings should be before the Court, not by way of recital, but as evidence before the Court of the filing of these dilatory proceedings. We could not argue the Petition and proceedings for removal to the Federal Court without having the papers before the

Court. We could not argue intelligently and show to this Court the delay occasioned by these proceedings without having the proceedings before the Court because the theory of counsel for the Complainant in this case (Appellee) is that the Complainant is entitled to recover the Attorney's Fees which he should legitimately pay to his counsel for conducting these proceedings and is entitled to recover the costs incurred in these proceedings from the Defendants (Appellants), and that it could not be intelligently and properly presented to this Court without controversy between counsel unless the proceedings themselves were put in the record and were present before the Appellate Court for its consideration and adjudication.

We confess that this defense has been conducted most skillfully and [redacted] scientifically, and that the Defendants succeeded in keeping the Complainant from having an accounting in the State Court, the court of first jurisdiction of the parties and subject matter.

We confidently believe that the Court will deny this Motion and will affirm the Decree of the lower Court.

All of which is respectfully submitted.

Hamilton & Hamilton
Attorneys for Appellee.

REQUEST FOR ORAL ARGUMENT.

Come now the Attorneys for the Appellee and request the Court to permit oral argument of this cause, including the Motion made by counsel for the Appellants to strike a part of the Record.

Respectfully submitted.

Hamilton & Hamilton
Attorneys for Appellee.