

ROBINSON v. PHILADELPHIA & R. R. Co. and others.¹*(Circuit Court, E. D. Pennsylvania. September 2, 1886.)*

EQUITY—EVIDENCE—ADMISSION IN ANSWER.

An offer of evidence touching a fact which is admitted to be true by the answer will be refused.

In Equity.

Richard C. Dale, for complainants.

Franklin B. Gowen, for defendants.

MCKENNAN, J. This is only a renewal of an application made to the court, with somewhat greater formality and expansion, and is properly disposed of by the result of that application, and the reasons given for its refusal by the judge who decided it. I do not propose to repeat those reasons, or to reargue the question there decided. It is sufficient to say that, in my judgment, the fundamental issues in the case were properly defined, and that the contested evidence is impertinent to those issues, and is therefore inadmissible. The second offer made by the defendant was not before the court on the former occasion, and the competency of the evidence stated in it was not, therefore, considered. I am unable now to see how the facts proposed to be proved can condone the fault of the mortgagor, or are responsive in any way to the allegation of such default in the bill, which is explicitly admitted in the answer, without qualification. Hence I cannot regard as admissible an offer of evidence touching a fact which is admitted to be true, and to which the answer in no other way refers than to admit its truth. This offer must therefore be rejected.

HOP BITTERS MANUF'G CO. v. WARNER.

(Circuit Court, E. D. Michigan. September 7, 1886.)

EQUITY—AMENDING INTERLOCUTORY DECREE.

A motion to amend an interlocutory decree by striking out a material portion, upon affidavits of facts not put in evidence, will not be entertained.

In Equity. On motion to amend interlocutory decree in a trade-mark case.

In this case an interlocutory decree was entered on the fourth day of February, 1886, adjudging defendant guilty of infringing plaintiff's trade-mark, awarding an injunction, and referring the case to a mas-

¹ Reported by C. B. Taylor, Esq., of the Philadelphia bar.
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ter to assess and report the damages sustained by plaintiff. On the twenty-third day of August defendant moved to strike out the clause in the decree awarding damages, and referring it to a master, upon affidavits showing gross laches on the part of the plaintiff in prosecuting its claim, and also that the manager of the plaintiff company had connived at defendant's infringements.

George H. Lothrop, for the motion.

Alfred Russell, for plaintiff.

BROWN, J. A motion to amend an interlocutory decree by striking out the award of damages, upon affidavits tending to show that if all the facts in the case had been put in evidence, and called to the attention of the court, a different decree would have been rendered, is a novelty in equity practice which we are not disposed to sanction. Errors in judgments or decrees are divided into errors clerical and errors judicial. The former may be amended even after term, provided the existence of such error is shown by the record, and not otherwise. *Hudson v. Hudson*, 20 Ala. 364; *Thompson v. Miller*, 2 Stew. 470; *Dixon v. Mason*, 68 Ga. 478; *Russell v. McDougall*, 3 Smedes & M. 234; *Atkinson v. Railroad Co.*, 81 Mo. 50; *Selz v. First Nat. Bank*, 60 Wis. 246; S. C. 19 N. W. Rep. 43. Errors judicial can only be amended upon rehearing or appeal. *Forquer v. Forquer*, 19 Ill. 68; *Stringer v. Anderson*, 23 W. Va. 482.

We have found no case which would justify us in altering this decree, upon motion, in a material particular, upon the evidence then before the court. Much less can it be done upon evidence sought to be injected into the case by affidavits. Defendant's only remedy, if at this late day he has any remedy at all, is to have the decree set aside, and move for leave to introduce the new testimony, and for a rehearing.

GRISWOLD *v.* HAZARD and others.

(Circuit Court, D. Rhode Island. September 10, 1886.)

INJUNCTION—DECREE OF COURT OF GENERAL EQUITY JURISDICTION,

The decree of a court of general equity jurisdiction, in a case where the defendant therein was personally served with process within the jurisdiction of the court, and where the court appears to have had jurisdiction of the subject-matter of the bill, will not be impeached upon a bill denying only the existence of the facts required to justify the plaintiff therein in invoking the exercise of that jurisdiction. See *Hazard v. Griswold*, 21 Fed. Rep. 178.

Demurrer to Bill.

The opinion states the facts.

A. Green and *S. R. Honey*, for complainant.

E. Metcalf and *E. Merwin*, for respondents.