IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

LEE LONG

v.

A. L. HAWSE

BRIEF ON BEHALF OF APPELLEE

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THE WILLIAM BYRD PRESS, INC., RICHMOND, VA.

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STATEMENT OF FACTS AND ISSUES

This is a pure bill of discovery filed by Lee Long against A. L. Hawse.

Hawse has brought an action at law against Long on twelve negotiable promissory notes executed by Long and held by Hawse. (R. p. 2.) Long admits that he executed the notes (R. p. 3.)

Long's defense is that the notes sued on were renewals of original notes obtained fraudulently by S. M. Newton with the knowledge of Hawse. (R. pp. 3, 17, 26, et seq.)

It is important to bear in mind that there were two series of notes, referred to throughout the record as the

original notes and the renewal notes. The renewal notes are also referred to as the notes sued on or the notes mentioned in the notice of motion for judgment.

The fraud complained of by Long is alleged by him to invalidate the *original* notes. The discovery he demands does not concern the original notes, but only the *renewal* notes.

In his petition for appeal, Long alleges (R. pp. 3, 4.):

> "(c) That the notes in the notice aforesaid mentioned were renewals of the original notes dated May 18, 1923, (which had been discounted) which renewals were given at the express instance and request of said Hawse (and later taken up by him) with the express agreement at the time of such renewals that said renewals in the hands of said Hawse would be subject to the same defenses and off-sets to which the originals would have been subject to in the hands of said Newton."

And in his plea filed in the action at law, Long alleged, (R. p. 30):

> "Thereupon, the said A. L. Hawse, upon whose endorsement the said notes had been discounted, approached the said defendant and requested him, as an accommodation to him and to the said Peerless Oil Company of which he was a director and stockholder, and to save him and the said Peerless Oil Company from great loss and injury and to prevent the holders of said notes of the defendant from then and there insisting upon the payment of said notes and taking steps to enforce the payment thereof against said Hawse, to renew the same, and this the said defendant at the special instance and request of the said A. L. Hawse agreed to do, with the dis-

> tinct understanding and agreement with the said A. L. Hawse and upon the condition that as between this defendant, the said A. L. Hawse, and the Peerless Oil Company, there would be no liability upon this defendant, and this defendant would have the right to set up and avail himself of all the defences which he theretofore had or might be entitled to against the payment of said notes should the same be thereafter taken up by the said A. L. Hawse, the said S. M. Newton, or the said Peerless Oil Company."

It thus appears that the notes sued on were handed directly by Long to Hawse. Long must therefore know who Hawse got the notes from and the circumstances attending their delivery. The discovery sought is contained in three interrogatories, (R. p. 19):

> "1. What connection, if any, did he and the said S. M. Newton have with the organization and conduct of the Peerless Oil Company of Kansas, Inc.?
> "2. When and under what circumstances did he become the holder of the notes and each of them set forth and referred to in the notice of the motion for judgment herein?
> "3. From whom did he receive the said notes and each of them, and what was the consideration for the transfer and delivery of said notes and each of them to him, the said Hawse?"

These interrogatories say nothing whatever about the *original* notes, but ask only about the *renewal* notes, the notes referred to in the notice of motion for judgment. Long's defense is based on the allegation that the original notes were obtained from him fraudulently and his interrogatories refer only to the renewal notes, and his plead-

ings show that he gave the renewal notes directly to Hawse and that the consideration was the surrender of the original notes. Consequently the claims made by Long on this appeal that a discovery of the fraud practiced on him in obtaining the original notes is essential to his defense are beside the point. Even if Long were entitled to a discovery of the circumstances under which the *original* notes were obtained, it would be immaterial on this appeal, because his bill does not ask for discovery of those circumstances.

Before bringing this bill for discovery, Long made two previous efforts to obtain the same relief, first, by asking for a bill of particulars (R. pp. 35, 36) and, second, by filing interrogatories in the law suit, (R. pp. 33, 34, 35).

That the discovery sought in the law suit was the same as that prayed in the equity suit appears by comparing the interrogatories in the law suit (R. p. 34) with those in the equity suit (R. p. 19), and is conceded by appellant (R. p. 5).

There are only three issues presented by this appeal:

1. Is a party entitled to discovery of facts which he swears he knows? (R. pp. 30, 31, 32. The transcript fails to show execution of the affidavit but since the statute requires the plea to be sworn to it can be assumed that this was done).

2. Will a bill of discovery lie in Virginia in cases where the remedy at law is adequate?

3. After filing interrogatories in the law suit, may the party withdraw the interrogatories and have a bill in equity for discovery?

ARGUMENT.

Point I.

A PARTY IS NOT ENTITLED TO DISCOVERY OF FACTS HE ALREADY KNOWS

We have shown in the foregoing statement that Long handed the notes sued on to Hawse as renewals of the notes previously given and that, according to Long's own plea and petition for appeal, he was an eye-witness of the principal facts which he asks Hawse to discover. That a bill of discovery was never meant for such a purpose is recognized by the allegations of the bill filed in this case. The bill alleges (R. p. 19) that Long cannot safely go to trial without the discovery and that the things referred to "are peculiarly within the knowledge of the said Hawse."

The first requisite of any bill in equity is that the complainant needs relief. In the case of a bill of discovery, the complainant must show that he needs information. In the case of a mixed bill of discovery he must show that the information is indispensible to him. But even in the case of a pure bill of discovery, such as we have here, he must show that he stands in some need of the information.

In 18 C. J. 1067, speaking of a bill of discovery, it is said:

> "It cannot be maintained to discover matter whereof complainant has the same means of information as defendant . . . Where the bill and the exhibits show that the complainant already has the information he pretends to seek, discovery will be denied."

In *McFarland* v. *Hunter*, 8 Leigh 489, the court points out that in a mixed bill of discovery the plaintiff must show that he has no other means of proving his case. The rule in regard to a pure bill is not so stringent. But even in a pure bill, the complainant must at least "think some of the links defective and that the discovery may be *material* and *necessary* to make them perfect." (8 Leigh at page 493, quoted in petition for appeal, page 14. In the original report only the word "material" is italicized).

There is nothing inconsistent with our theory of the law in the *dictum* from *Larkey* v. *Gardner*, 105 Va. 718, quoted from and italicized on page 13 of the petition for appeal. The *dictum* is to the effect that in a pure bill of discovery, the complainant need only show that he seeks the aid of the court of equity *"to make the applicant stronger in a court of law."* If the applicant already knows the facts, the discovery will not make him any stronger.

A case on all fours with the case at bar is *Durant* v. *Goss*, 12 F. (2d) 682, (C. C. A., 6th C., 1926).

That was a pure bill of discovery. Durant had sued Goss at law for converting 1900 shares of Chevrolet stock, which he had loaned to Goss. In denying Durant's right to have a bill of discovery in aid of his action at law, the court said, (p. 683):

> "Plaintiff has equal knowledge with defendant whether these shares of stock were or were not loaned by him to defendant, nor does plaintiff require any disclosure from the defendant to prepare his pleadings."

Point II.

APPELLANT IS NOT ENTITLED TO THE AID OF A COURT OF EQUITY, BECAUSE THE REMEDY AT LAW IS ADEQUATE

Sections 6236 and 6237 of the Code of Virginia give the appellent a complete and adequate remedy at law and a much speedier remedy than was ever obtainable in equity. They give him the right to have answers given and papers produced in advance of the trial at law in all cases where he could have had such relief in a court of equity.

Section 6238 of the Code provides:

> "The two preceding sections shall not preclude a person, who does not file such interrogatories or affidavit, from exhibiting his bill in chancery for a discovery, as he might have done if the said sections had not been enacted."

If the said sections had not been enacted, the party could exhibit his bill in chancery for a discovery, if the remedy at law was not adequate. The statute saves him the right to a bill of discovery when the remedy at law is not adequate. But in considering whether the remedy at law is adequate, it must be borne in mind that the party is to-day entitled to examine the adverse party in a law suit as a witness and is entitled to file interrogatories before trial. In other words, our position is that the purpose of Section 6238 is to preserve the old equity jurisdiction subject to the same principles that have always governed the equity jurisdiction. If, for any reason, it should turn out that sections 6236 and 6237 did not give as full and complete relief as a bill in equity,

then, and only then, a bill in equity could be exhibited. Those sections, for example, do not permit discovery of a chattel. In such case the remedy at law would still be inadequate.

In *French* v. *Stange Mining Co.*, 133 Va. 602, the court refused to entertain a *mixed* bill of discovery on the ground that the remedy at law was adequate, saying, (pp. 616, 617, 618):

> "All the information here demanded would be readily available in an action at law. The defendant shippers themselves are competent witnesses and may be compelled to testify for complainants; and sections 6236 and 6237 of the Code of 1919 (sections 3370 and 3371, Code of 1887) provide a simple and adequate method whereby, upon proper affidavit or interrogatories, these defendant shippers may be required to furnish in detail all such information, and all their books and writings relevant thereto.
>
> "In Lile's Equity Pleading & Practice (2d ed.), section 152, the author says: 'Bills of discovery are now, with us, in large measure, superseded in practice by two statutory provisions, one allowing *a court of law* to compel a discovery on oath, in answer to interrogatories filed, where it would be compelled upon a bill of discovery, if the interrogatories have not been unreasonably delayed; and the other declaring *parties to suits competent to give evidence* on their own behalf, and to be competent and compellable to attend and give evidence on behalf of any other party to the proceeding.'
>
> "And, to like effect, in Burks' Notes on Equity Procedure, page 39, it is said: 'Now that the defendants are competent witnesses and may be examined by the complainant on any matter involved in the litigation, it is very rare that a defendant is called upon for relief of this kind, as the complainant

has ample remedy by sections 3370 and 3371 of the Code.' (Sections 6236 and 6237, Code 1919.)

"It is true that section 6238 of the Code (section 3372, Code of 1887) provides that 'the two preceding sections shall not preclude a person, who does not file such interrogatories or affidavit, from exhibiting his bill in chancery for a discovery, as he might have done if the said sections had not been enacted.' But this provision has no effect upon the rule already pointed out that where, as here, the disclosure is sought for the enforcement of a purely legal demand the discovery must be essential to the plaintiff's case. The statutes referred to do not abolish the relief in pure bills of discovery, or in bills for discovery in aid of the enforcement of an equitable right; but it would seem that they do have the effect of eliminating this remedy 'in mixed bills of discovery, when the jurisdiction at law is sought to be transferred to a court of equity, on the sole ground that discovery in equity is necessary.' *Johnson* v. *Mundy*, 123 Va. 730, 744, 97 S. E. 564, 569. At any rate, if the statutes in question do not go to the full extent here suggested, it is clear that they reduce to a minimum the cases in which a discovery in equity may be availed of in transferring to that forum jurisdiction of a legal cause of action. The cases must be rare indeed, if any, in which, under the broad provisions of our present statutes, a plaintiff may not obtain as full disclosure in aid of his legal cause of action as he could obtain by a bill of discovery. If there be such exceptional cases, this is not one of them."

We submit that the reasoning which the court applied to a *mixed* bill applies equally to a *pure* bill. What the court did was to place the right of complainant to exhibit his bill on the same grounds as before the statute was passed; but in considering whether the discovery in

equity was *essential* to complainant the court did not shut its eyes to the existing statutory, legal remedies. So, in passing on the right to file a *pure* bill of discovery, the court should also consider the existing statutory remedies in deciding whether the complainant has any need or use whatever for the interposition of the extraordinary powers of a court of equity.

It has always been the practice of courts of equity to refuse discovery in aid of another suit, if the court where the other suit was pending had power to compel the discovery. Mr. Justice Story, writing long before parties were compellable to testify at law, said, (Equity Juris., 14th ed., sec. 1943):

> "In the next place Courts of Equity will not entertain a bill for a discovery to assist a suit in another court if the latter is of itself competent to grant the same relief; for in such a case the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending."

We submit that this well known principle of equity jurisprudence was not meant to be abolished by the section of the Code preserving the right to a bill of discovery.

Analogies from other jurisdictions lead to the same result. Under the New York practice, the adverse party may be examined orally before the trial of a law suit. In *Fur & Wool Trading Co.* v. *George I. Fox,* 245 N. Y. 215, 156 N. E. 670, (1927), the court said:

> ". . . the action may not be sustained as a bill of discovery, brought as such a bill was, not as an end in itself but as an aid to an independent proceeding.

> A complete remedy of this character being otherwise provided, such an action no longer survives."

United States Revised Statutes sec. 724 (U. S. C. A. Title 28, sec. 636) empowers the law court to compel the adverse party to produce documents material to the case. The production is compellable only at the trial and not before the trial (*Carpenter* v. *Winn,* 221 U. S. 533) and to that extent is less valuable than a bill of discovery. Nevertheless, the federal courts hold that if production at the trial is all a party needs it is all he can have and a bill of discovery will not lie.

In *Durant* v. *Goss,* 12 F. (2d) 682, previously cited above, the court said:

> "Section 724, R. S., has so enlarged the powers of courts of law to order and require the production of books or writings in the possession or control of either plaintiff or defendant as to make the equitable remedy practically unnecessary, but it does not affect the jurisdiction of a court of equity to entertain a bill of discovery in aid of an action at law, where the bill presents a case calling for the exercise of such power. *Carpenter* v. *Winn,* supra; *General Film Co.* v. *Sampliner* (C. C. A. 6) 232 F. 95, 146 C. C. A. 287. If the legal remedies are sufficient, the jurisdiction will not be exercised. Like any other equitable remedy, it is exceptional, and the plaintiff must bring himself within the exception."
>
> * * * * *
>
> "The plaintiff has filed in the law action, in aid of which this bill of discovery is filed, a petition and motion for an order requiring defendant to produce books and writings in his possession. Under the provisions of section 724, R. S., the court in which

> the law action is pending has authority to grant him all the relief in this respect to which he is entitled. His bill of complaint in this case, read in connection with his petition in the law action, presents no such state of facts as would require the intervention of a court of equity by the exercise of its power to compel disclosures."

In *Equitable Life Ass. Soc.* v. *Brown*, 213 U. S. 25, 50, the court said:

> "Equity does not now take jurisdiction in cases of fraud where the relief properly obtained on that ground can be obtained in a court of law, and where, so far as necessary, discovery may be obtained as well as in equity."

In considering the probable meaning of Code Section 6238, we may advert to the probable policy of the legislature in providing for discovery at law. That policy must have been not merely to allow discovery, because that was already obtainable in equity. The main policy must have been to avoid the expense and delay of separate and ancillary proceedings in a different court. Indeed the very reason why the appellant in this case resorted to the legal remedy in the first instance was "in the hope of avoiding the delay that would be involved in a resort to a court of chancery," (R. p. 5). The record in the case at bar demonstrates that the policy of preventing delay will be defeated unless this court applies the rule foreshadowed in *French* v. *Stange Mining Co., supra,* that the equitable remedy is available only when the legal remedy is inadequate. The notice of motion was originally returnable on December 19, 1928. (R. p. 20). It was not until April 16, 1929, that appellant filed his interrogatories in the

clerk's office. (R. p. 34). By that time the case had been set for trial by order of the court. (R. p. 34). The appellant then obtained a continuance over the objection of appellee until June 18, 1929, on the ground of an absent witness. (R. p. 34). Pending this continuance, and on April 24, 1929, the bill for discovery was filed. (R. p. 16). On May 24, 1929, the Chancery Court dismissed the bill. (R. p. 36). On June 14, 1929, four days before the date set for the trial of the action at law, the petition for appeal was filed. The record of course does not show when the action at law will be tried, but it shows that the delay will be considerable, in spite of the fact that two eminent judges, those presiding respectively over the Law & Equity Court and the Chancery Court of the City of Richmond, have decided, quite apart from matters of procedure, that appellant is not entitled to any discovery at all.

Point III.

BY FILING INTERROGATORIES IN THE LAW SUIT, APPELLANT IS PRECLUDED FROM SEEKING THE SAME RELIEF IN EQUITY

The learned chancellor in the court below, in addition to holding, by sustaining the demurrer, that appellant was not entitled to relief by way of discovery, also held, by sustaining plea number one, that even if appellant would have been entitled to relief in equity, he abandoned that remedy by first applying for the same relief to the law court.

Plea in bar number one (R. p. 33) alleged that Long had filed interrogatories in the law court and was therefore precluded from coming into equity. What happened in the law court is shown by the order of the Law & Equity Court copied on pages 34 and 35 of the record.

Long filed his interrogatories seeking the same relief he now asks and Hawse, by motion to quash the summons, objected that the interrogatories were not such as he was required to answer. After argument, the court announced that in its opinion the position taken by Hawse was correct and should be sustained. Long then, by leave of the court, and over the objection of Hawse, withdrew the interrogatories.

Code section 6238 says:

> "But a person filing such interrogatories or affidavit, shall not afterwards exhibit a bill in equity against the same party for the discovery or production of the same matters."

The interrogatories were filed in the law court, not only by filing in the clerk's office, but also by order of the court. The language of the order is (R. p. 34):

> ". . . the summons containing said interrogatories being now filed and made a part of the record . . ."

It is true that the interrogatories were then stricken from the record, but the statute expressly bars a bill in equity if the interrogatories have been once filed and contains no exception if they are afterwards withdrawn. The manifest purpose of this part of the statute is to keep the party seeking discovery from harrassing his adversary by repeated applications for the same relief. If appellant's position be correct, the party seeking discovery would always have two chances of getting it, once at law and once again in equity.

We submit that section 6238 should not be construed

with reference to the technicalities defining what papers have been "filed" so as to constitute part of the record. It should be so construed as to produce equality of right between both parties and not leave it to the option of the party filing interrogatories to withdraw them if the decision of the court is about to go against him. The purpose of the statute is visible on its face. It was to substitute a simple and expeditious remedy for the former procedure in equity; it was not to substitute two proceedings for the previously existing single proceeding.

CONCLUSION

Appellant is not entitled to discovery either at law or equity. That is the decision of two courts. Appellant already knows the facts, or claims to know the facts of which he seeks discovery. Of course appellee's demurrer does not admit the pleader's conclusions of law.

The statutory legal discovery preserves the bill in equity only in cases when it would lie at common law, namely when complainant could not get the same relief in the law court. Any relief to which appellant is entitled, he can obtain in the law court.

Independently of the correctness of our first two propositions, section 6238 forbids application to a court of equity, after interrogatories have been filed in the law court.

Respectfully submitted,

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