

defendant. The present bill does not come within this class of cases. I am of the opinion that it is not demurrable for the want of such an affidavit.

5. In such a case as the one now before the court no previous assessment against the defendants as stockholders need be shown. They are liable to the full amount of their unpaid subscriptions to the capital stock of the corporation, if so much is necessary to pay the claims represented by the complainants in this suit. If there are other stockholders not within the jurisdiction, or not made parties defendant herein, these defendants must look to them for contribution; and it is not necessary that all such stockholders be made defendants. *Ogilvie v. Ins. Co.* 22 How. 380; *Marsh v. Burroughs*, 1 Woods, 463. If an assessment has been made in the state of Illinois, either by the board of directors or by the court, such assessment cannot conclude or affect the stockholders in this state, and who are defendants in this case, because they were not parties to it or in anywise bound by it.

The court is competent to ascertain the amount of the liability of each of the respondents, and to make a decree based thereon. If the complainants see fit to dismiss as to the receiver, the demurrer will be overruled. If they do not see fit to do this, the demurrer will be sustained, so far as that matter is concerned.

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ROWEN, Receiver, etc., v. CHRISTIAN and others.

(Circuit Court, E. D. Michigan. April 23, 1883.)

SUBSTITUTED SERVICE—NEW PARTIES—ORDER VACATED.

A receiver, appointed in a suit to wind up a partnership, filed a bill to set aside certain mortgages upon the partnership property as fraudulent, and obtained an order for substituted service upon the attorney in fact of the mortgagees. *Held*, that as this suit included new parties, not connected in any way with the plaintiff in the original suit, they could not be brought into court in this way, and the order for substituted service must be vacated.

In Equity. On motion to vacate an order for substituted service. The facts are substantially as follows:

Patrick McNichol having purchased, upon execution sale, the interest of one Geiger in the partnership of Geiger & Phelps, filed a bill in this court to obtain a dissolution of the partnership, a sale of the assets, and a distribution of the proceeds. *McNichol v. Phelps*, 16 FED. REP. 8. These assets were incumbered by certain chattel mortgages given to creditors by Geiger individu-

ally, and by the firm, which were placed in the hands of Mr. Wilcox, an attorney of this court, for collection, as trustee for all these creditors. In the course of this suit the complainant, Bowen, was appointed receiver of the partnership assets, and under the authority of this court sold these assets, and holds the proceeds to await the further order of the court. For the purpose of determining the validity of these mortgages, which is in dispute, he filed this bill against the several mortgagees, who were all, except Christian, non-residents, praying that the same may be set aside and held to be null and void. An order for substituted service upon Mr. Wilcox, the agent and trustee of the mortgagees, was granted. This order the defendants, appearing especially for that purpose, move to vacate.

The affidavit of Mr. Wilcox set forth that he was not the solicitor for these defendants, except for the purpose of presenting this motion, and beyond this had no direction in the matter, and was not, and never had been, authorized to enter an appearance for them, or either of them, in this or any other suit brought in this court. In the original suit of *McNichol v. Geiger & Phelps* he was cited to show cause why he should not surrender to the receiver, the complainant in this cause, the partnership property in question. He answered that citation in his own behalf, without authority from any of the defendants to act for them in any matter relating to that suit.

*George W. Bates*, for complainant.

*A. F. Wilcox*, for defendants.

BROWN, J. Orders for substituted service are frequently granted when the defendant, in an action at law, seeks to enjoin the further prosecution of the action, or to set up some defense which is not available in a court of law, or when a defendant in a bill in equity proposes to file a cross-bill to obtain relief not afforded by an answer. In such case, if the original plaintiff be a non-resident, an order for a substituted service upon his attorney of record is almost a matter of course. I am not aware that new parties, who are not connected in any way with the plaintiff in the original suit, can be brought into court in this way. Thus, in *Dunn v. Clark*, 8 Pet. 1, it is said that the defendant in a judgment at law may file a bill in the circuit court to enjoin the judgment against the representative of the plaintiff in the judgment, and that this is but a continuation, in substance, of the original suit; but if other parties are made by the bill, and different interests are involved, it is, as to them, an original suit, and the jurisdiction of the court must depend upon their liability to be sued by the plaintiff, as in other cases. In this case, as there appeared to be equities, the court merely stayed proceedings upon the judgment, to enable the complainants to seek relief from a state court. So, in *Sawyer v. Gill*, 3 Wood. & M. 97, it is said that if the service relates to a new and independent action, in which the attor-

ney has not been specially retained, and is not the attorney of record, it becomes a question of power and authority, and not of convenience, how notice to appear and defend in it shall be given; and a court, no more than an individual, possesses a right to treat him as the attorney, in another disconnected suit. He is not the agent of the party in that separate suit. The case of *Hyslop v. Hoppock*, 5 Ben. 533, was a bill filed by an assignee in bankruptcy to set aside certain conveyances as fraudulent against the creditors of the bankrupt. The defendants could not be found, but it appeared that they had left their son in the receipt of rents of the property sought to be affected by the bill, and that he transmitted such receipts to them monthly. The court denied a motion for substituted service upon the son. In respect to this question the case is not unlike the one under consideration.

In this case defendants are not parties to the original suit. They are simply lienholders of the property in the possession of this court. This bill is clearly an original bill, since it relates to a matter not before litigated in this court by the same persons. As Mr. Justice STORY says: "Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are either in addition to, or in continuation of, an original bill, or both." Eq. Pl. § 16.

This bill is undoubtedly a continuation and carrying forward, to some extent, of the original suit, since, in order to fix the amount of McNichol's interest in the partnership assets, it is necessary to determine the validity of these mortgages. But none of the parties to this suit are parties to the other. The bill is not less an original one because it happens to be an outgrowth of the other. It is not unlike cases where assignees in bankruptcy are compelled to file bills of a similar nature to set aside conveyances made by the bankrupt. In such cases the authorities are nearly uniform that the assignee must proceed, not by petition in the court of bankruptcy, but by bill in equity in the circuit or district courts against the fraudulent vendees or mortgagees. *Smith v. Mason*, 14 Wall. 419; *In re Marter*, 12 N. B. R. 185; *Bradley v. Healey*, 1 Holmes, 451.

The order for substituted service must be vacated and set aside.

## DES MOINES &amp; M. R. Co. v. ALLEY and others.

*(Circuit Court, D. Iowa. February, 1882.)*

## 1. PLEADING IN EQUITY—FRAUDULENT CONVEYANCE—OFFER TO RETURN CONSIDERATION.

While a bill in equity to set aside a deed alleged to have been procured by fraud, that avers that no consideration was paid, will be sufficient, an averment or admission that a consideration was paid, will render an averment of an offer to return such consideration necessary.

## 2. SAME—DISCOVERY.

The bill in such a case should aver either (1) that the conveyance was wholly without consideration; or (2) that it was fraudulent, and there was a consideration, which the complainant has offered to return; or (3) that complainant is not informed, and has no means of ascertaining, whether there was a consideration, or what the value thereof was, if any,—and that these facts are peculiarly within the knowledge of defendant; and when the case is placed upon the latter ground, the bill should pray a discovery of the facts, and should offer to return any consideration actually paid by defendants as soon as it is ascertained and determined by the court.

## Demurrer to Amended Bill.

MCGARRY, J. This is a suit brought to set aside a deed executed by the complainant to the respondent John B. Alley on the twenty-third of May, 1879, conveying 2,362 acres of land. The amended bill charges that at the time of said conveyance the respondent John B. Alley was the owner of the majority of the stock of the corporation, and by reason of that ownership exercised a controlling influence over the officers and directors of the complainant corporation, whereby he induced the board of directors and the president of the corporation to consent to the said conveyance, and to execute a deed good and sufficient in form. It is further alleged that the said respondent John B. Alley fraudulently procured and caused said conveyance to be executed. With respect to the consideration paid by the said Alley for said conveyance there are two allegations in the amended bill, as follows: It is first alleged "that, in truth and in fact, the said defendant did not pay anything whatever for said lands; that the books of said company were then under his charge and control; and that he caused to be charged to himself on account of said lands and said conveyance the sum of \$4,600, and over against said charge on said book he caused to be credited certain fraudulent entries."

If the allegation stopped here it would amount to a charge that the conveyance was without any consideration whatever, and would be