

progress of the trial was the last judgment, which had been affirmed by the court of appeals, and as a matter of right the defendants were entitled to have this judgment vacated, and a new trial ordered, upon the terms prescribed by the Code."

By reference to 44 Hun, 561, it appears that the first judgment in *Landon v. Townshend*, supra, was affirmed at the general May term, 1887, of the supreme court of the state of New York. On January 15, 1889, the first judgment was reversed by the court of appeals. See 19 N. E. Rep. 424. December 1, 1891, the second judgment was affirmed in the court of appeals. 29 N. E. Rep. 71. After December 1, 1891, application was made to vacate and set aside the second judgment within three years after the second judgment was rendered. It therefore appears that the application for a new trial as of right was made more than four years after the rendition of the first judgment; the statute of the state fixing three years as the limit. This case seems to be directly in point that the first judgment, being invalid and reversed, was not to be taken into consideration on the application for the vacation of the second judgment and a new trial under the statute, but that the party against whom the second judgment had been rendered had the right, within the statutory period after the rendition of a valid judgment, to a new trial, on complying with the statute respecting the requisite payment of costs, etc.

Under the Kentucky statute providing that "not more than two new trials shall be granted to the same party for the same cause," the supreme court held, in the case of *Burton v. Brashear*, 3 A. K. Marsh. 276, (marginal,) that "if a judgment is reversed on error in the court below, and remanded for further proceedings, it is not to be counted as a new trial, and thus restrict the inferior court to granting only one more new trial." See, also, *Beckman v. Richardson*, 28 Kan. 648, *Butterfield v. Walsh*, 25 Iowa, 263, and *Deery v. McClintock*, 31 Wis. 195, 204, as bearing to some extent upon the question herein involved. Had the first judgment in this case been affirmed by the United States supreme court, a different question would have been involved. No authorities have been cited on the argument in opposition to the views herein expressed. It follows that defendant's motion must be granted, and it is so ordered.

HIRSH v. JONES et al.

(Circuit Court, N. D. Texas. May 19, 1893.)

No. 469.

1. CORPORATIONS—MISCONDUCT OF OFFICERS—REMEDIES OF STOCKHOLDERS.

A stockholder in a corporation cannot maintain an action at law against the officers and directors thereof to recover damages for willful waste of the assets, whereby the value of his shares was decreased, and he became liable to an assessment thereon, and his remedy must be sought in equity.

2. FEDERAL COURTS—PRACTICE—REFORMATION OF PLEADINGS.

When a party brings an action at law in a federal circuit court upon a cause of action which is maintainable only in equity, the court, on sustaining a demurrer, cannot allow him to reform his pleadings so as to proceed in equity, but will dismiss the action.

At Law. Action by Jacob Hirsh, a shareholder in a national bank, against W. Goodrich Jones and others, officers of said bank, for damages for willful waste of the assets of the bank, by which his stock became liable to assessment, and decreased in value. On demurrer to the petition. Demurrer sustained, and case dismissed.

A. M. Monteith, for plaintiff.

Alexander & Campbell, for defendants.

Before McCORMICK, Circuit Judge, and RECTOR, District Judge.

McCORMICK, Circuit Judge. This is an action at law, by a shareholder in a national bank, against the officers and directors of the bank, claiming against them damages for willful waste of the assets of the bank, by which his stock became liable to assessment, and decreased in value, details of which are given in the petition. Defendants demur. The demurrer is general and special. We have, with some care, examined the authorities cited by each party. We do not deem it useful to review the authorities. We consider the general demurrer to the jurisdiction well taken. In our view, the authorities are uniform in support of the proposition that where the cause of action affects all the interests of the corporation, as such, the corporation is the proper party to sue, and on its refusal to sue, or falling under the control of those liable to the suit, and thus not to be trusted to bring and conduct the action, the injured stockholder has his remedy in equity, and must seek it in that jurisdiction. Cook, Stock, & S. 701, 734; Kendig v. Dean, 97 U. S. 423; Dewing v. Perdicaries, 96 U. S. 193; Dodge v. Woolsey, 18 How. 341; Conway v. Halsey, 44 N. J. Law, 462.

Plaintiff asks, in his petition, that, if the court should hold that his remedy is in equity, he have leave to replead, make the necessary parties, and proceed in equity. It may be conceded that he has shown such a case as would have been considered a compliance with rule 94, or excused compliance with it, (though we do not so construe his pleadings,) and yet correct practice, if not want of power, would forbid taking such action. Where suits have been properly brought in a court of a state wherein the two jurisdictions of law and chancery are blended, and these cases, or numerous such cases, affecting the same plaintiff and same subject-matter have been properly removed to the circuit court, this court will take such orders, and so adjust the parties and the pleadings, as to give all parties the adequate relief. When, however, a party brings an action at law in the circuit court on a cause of action which this court can consider only in equity, all that he can ask, on a demurrer being sustained on that ground to his petition, is

that it may be dismissed without prejudice. We therefore adjudge that the demurrer be sustained, and that the plaintiff's action be dismissed, without prejudice.

SIOUX NAT. BANK v. NORFOLK STATE BANK et al

(Circuit Court of Appeals, Eighth Circuit. May 15, 1893.)

No. 189.

DECEIT—FRAUDULENT REPRESENTATIONS—MATERIAL INDUCEMENT.

In an action to recover for false representations made by defendant as to the financial condition of a merchant, whereby, plaintiff alleges, he was induced to make loans to such merchant, resulting in losses, it is not a defense that plaintiff also made some other examination and inquiries, for the action may be maintained if the false representations were a material, though not the sole, inducement to making the loans.

In Error to the Circuit Court of the United States for the District of Nebraska. Reversed.

W. L. Joy, A. L. Hudson, A. F. Call, and C. L. Joy, for plaintiff in error.

W. M. Robertson, F. P. Wigton, and George L. Whitham, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This was a suit which was filed in the circuit court by the Sioux National Bank, doing business in the state of Iowa, against the Norfolk State Bank, a corporation of Nebraska, and R. A. Stewart and C. B. Burrows, wherein the plaintiff charged, in substance, that it had been induced, by false and fraudulent representations made by the defendants as to the means, commercial standing, and credit of one W. W. Marple, to loan to said Marple a large sum of money, to wit, \$15,000, which had eventually been lost in consequence of the loan.

The complaint alleged, in substance and in legal effect, that the representations complained of were contained in a letter that had been written by the president of the Norfolk State Bank to the Sioux National Bank on June 11, 1890, and that other representations of a similar nature had been made orally by the officers of the Norfolk State Bank, and that such representations, both oral and written, were false, and were made for the fraudulent purpose of giving to Marple a sufficient credit with the Sioux National Bank to enable him to borrow of that bank enough money to pay his indebtedness to the Norfolk State Bank, of which he was at the time a customer and debtor. The answer that was filed by the defendants denied all of the allegations of fraud. There was a trial before a jury, and a verdict in favor of the defendants.

In the course of the trial the plaintiff offered in evidence the let-