HALSEY et al. v. CHENEY.

(Circuit Court of Appeals, Seventh Circuit. July 9, 1895.)

No. 168.

PRINCIPAL AND AGENT—TRUSTS—LACHES.

The executors of one D. filed a bill for an accounting against C., alleging that he had obtained control of the affairs of D., an inexperienced woman, and had misappropriated her property, and failed to account. C. denied the charges, and, on the hearing, there was a failure to prove that D. was under C.'s control; and it appeared that while she had had full opportunity for 10 years, while free from C.'s influence, to object to his management, she had never done so, and that C. held vouchers for his most important transactions. *Held*, that any right to relief which D. or her executors might have had was barred by laches.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This was a suit for an accounting by Edmund D. Halsey and Ann Caroline Teese, executors of Mary D'Arcy, deceased, against Prentiss D. Cheney. The circuit court dismissed the bill. Complainants appeal.

Samuel P. Wheeler and Charles H. Aldrich, for appellants.

John G. Drennan, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. Dr. Edward A. D'Arcy, a resident of Jerseyville, Jersey county, Ill., died April 25, 1863, possessed of a large estate, which he devised equally to his surviving wife, Mary D'Arcy, who was made executrix of his will, and two daughters, Ann Caroline Teese, one of the appellants, and Catherine Cheney, wife of the appellee, Prentiss D. Cheney, except that the homestead and a tract of land, worth together about $5,000, were given to Mrs. Cheney, because the testator anticipated that Mrs. Teese would benefit by inheritance or bequests from relatives in the East with whom she had lived from infancy. From the death of her husband until after the death of Mrs. Cheney, in 1877, Mrs. D'Arcy was a member of the family of the appellee. She then removed to New Jersey, where, until her death, which occurred August 12, 1887, she lived with her sister Matilda Fairchild, during the winters at Morristown, and in the summers at Mendham; the residence of Mrs. Teese being at Newark. The appellants, Edmund D. Halsey and Mrs. Teese, were named as executors of the will of Mrs. D'Arcy, and, having received letters testamentary, on the 17th of February, 1888, instituted this suit against the appellee, charging and alleging, besides the facts stated and other formal matters: That the estate of Edward A. D'Arcy consisted of both real and personal property; that the devisees, by divers quitclaim deeds, made an amicable partition of the portions of the real estate devised to them in common, and the residue, excepting lands in Missouri which they continued to hold in common, they proceeded to sell, and to divide the proceeds; that Mrs. D'Arcy at the death of her husband was

advanced in years, unaccustomed to business, and ignorant of her duties as executrix; that Cheney was a plausible man, of good character, and of winning address and manners, and by means thereof obtained her confidence, and induced her to commit to him the care and custody of her estate; that he assumed the active management of the estate of Edward A. D'Arcy, acting therein as the agent, attorney, and trustee of the executrix, and personally received into his hands the entire proceeds of the estate, but that the particulars of his service cannot be stated, because the papers relating to the estate are not on file in the office of the county clerk, and, according to the statement of the clerk, had been removed; that the interest of Mary D'Arcy in the estate and the amount received by Cheney as and for her share was a large sum, to wit, $20,000; that, in the year 1871, Mrs. D'Arcy received from the estate of her brother, Alexander McEowen, notes, bonds, and money to the amount of $10,000, which, together with the proceeds of the estate of her husband belonging to her, were, from time to time as they came to her, received by Cheney, upon his undertaking and agreement to act as her trustee in loaning the same, and were by him loaned, whereby her estate was largely increased; that, by reason of his influence over her, Cheney was able to postpone any full accounting with Mrs. D'Arcy, although he did long prior to her death render partial accounts, "which your orators now have," but which do not bring the account to the time of her death; that he retained the whole of said money in his hands as trustee, excepting small payments made as stated in the bill; that he never rendered to her a full and fair account of said trust, or of the income and profits, nor to the complainants, as executors, since her death, although requested in a friendly way to do so, but, on the contrary, refused to give to complainants any information on the subject; that in 1877, when Mrs. D'Arcy went to reside in New Jersey, there was in Cheney's hands, held in trust for her, of principal and accumulations, the sum of $25,000, of which he paid her occasional small sums, aggregating not more than $500; that, at sundry times after the death of her husband, Mrs. D'Arcy became seised of divers lots, lands, and real estate in Illinois and elsewhere, and that, while holding towards her the confidential relation of trustee, and availing himself of the influence he had over her, Cheney, for the purpose of his own gain, and without adequate consideration, procured from her, either to himself or to others for his benefit, deeds of conveyance for every square foot of real estate she owned; that this was systematically carried on for years, your orators charge, fraudulently, and Cheney should in equity establish the fairness of the several transactions; that Cheney sold timber from lands in Missouri, and received therefor $8,000, of which he never accounted to Mrs. Cheney for her share; that by reason of frequent changes of investment made by Cheney, sometimes taking securities in his own name, and intermingling the moneys of Mrs. D'Arcy with his own, an intelligent account cannot be stated, except by Cheney; that, disregarding his duty as trustee, he has refused to make any statement whatever. The bill prays that Cheney be

made party, and required to answer, but not under oath; that, on the hearing, an account may be taken of his doings in connection with Mrs. D'Arcy's estate; that an account may be stated, under the direction of the court, of all moneys received by the defendant or properly chargeable to him on account of the trust; that the complainants may have a decree against him for the balance due them as executors, also a decree that the several conveyances of Mrs. D'Arcy to the defendant or to others in his interest were fraudulent; that the defendant be required to show that the transactions were in good faith; and that, in all cases where the consideration was not adequate, the defendant be decreed to hold the estate in trust, if he has not parted with the title; and, if he has parted with the title, that he may be charged with the value and compound interest.

The defendant answered, denying many of the essential averments of the bill; particularly that he had been the agent, attorney, or trustee of Mrs. D'Arcy, as executrix, in respect to the management of the D'Arcy estate; that the property or proceeds thereof had come into his hands; that he had been her agent, attorney, or trustee in respect to her individual property derived from that estate, or from the estate of her brother, or that her property or money had come into his hands upon his agreement to act as trustee in loaning the same; and alleging that all his acts and doings for her had been done by him as her son-in-law, in order to conserve her interests, and without compensation, and that he had made to her full and fair accounts and statements, to her satisfaction, and paid over to her what was due.

Issue having been joined by a replication in denial, a reference was made to a special master to take an account, "and, for the better discovery of the matters aforesaid," it was ordered that the defendant within 30 days submit to the master a full, true, and accurate account, with dates and amounts, etc., and that the master examine witnesses, and embody the testimony in his report. In obedience to that order, the defendant, on March 18, 1891, made to the master a statement, showing, that on February 5, 1866, Mrs. D'Arcy had with D'Arcy & Cheney, bankers, of which firm the defendant was a member, the sum of $1,040.89; that on April 25, 1872, there were in his hands, belonging to her, promissory notes, which are described, amounting, principal and interest, to $14,666.66; that on April 21, 1874, a settlement was made with her which left in his hands specified notes to the amount of $5,066.66, for which, in a settlement made September 9, 1879, she was allowed a credit on her note then held by him, given for Nebraska lands, as shown by a written assignment of which a copy is set out. This the defendant presented as a full, true, and accurate account to date so far as it was in his power to state the same, alleging that he had no record or account of any other transaction, and that, if there were others, they were unknown to him. Upon this, the master, on January 24, 1891, made to the court a report of his efforts and inability to obtain a more satisfactory accounting; and on July 18, 1891, upon the petition of the complainants, the court ordered the defendant, by the ensuing 1st (afterwards changed to

the 23d) of September, to show cause why he should not be attached for contempt of court. On the last-named day, the defendant filed his answer to the rule to show cause, and at the same time presented to the special master an additional and supplementary account, wherein it is stated that the firm of D'Arcy & Cheney consisted of himself and Mrs. D'Arcy, the interest of the latter being nominal only; that on January 1, 1866, the business was sold to Cross & Swallow, and her deposit of $1,040.89 paid to her February 5, 1866, as shown by Exhibit C; that, after the banking business was closed, he kept no account with her; that she kept a book in which was an account of her notes and money affairs, which book was taken by her in 1877 to New Jersey, and was never under his control; that while she lived with him she kept her valuable papers in his fireproof safe, to which she had access at her pleasure, this practice continuing until April 25, 1872, when he gave her a receipt (Exhibit E) for her papers; that no account was kept or made of collections except by her in her own book, she receiving the money; that on January 4, 1873, he sold and conveyed to her lands in Nebraska, in Johnson county for $7,200, in Pawnee county for $6,600, and in Lancaster county for $2,000, in payment for which she delivered to him, April 25, 1871, notes amounting to $5,800, and for the remainder of the price ($10,000) gave him her promissory note, drawing six per cent. interest, which he held until May 9, 1885, when, upon a settlement made, she gave him in lieu her note for $5,600, payable five years after date, with six per cent. interest, which note he had transferred to A. W. Goss, of the First National Bank of Jerseyville, who is now the holder thereof; that on April 21, 1874, a settlement was made between them, at which time there were in his hands (in his safe in an envelope marked "Mary D'Arcy") the notes set forth in Exhibit F; that the Samuel Doud note ($400) and Silas Bates note ($666.66) were paid to her; that he had no memorandum of dates and amounts; that the claims against Joel Cory ($3,000) and W. A. Potts ($1,000) were paid, and the proceeds invested in Nebraska loans; that, having been compelled to bring suits for foreclosure, she transferred her Nebraska claims to him upon his agreement to credit upon her note the amounts received; that in the settlement of May 9, 1885, the credit was allowed upon the $10,000 note, leaving her indebted thereon in the sum of $5,600, for which she then gave the note above mentioned; that in that settlement he accounted to her for $600 received for timber from lands in Missouri, for which she gave the receipt marked "Exhibit G" filed with the master. Thereupon the court ordered that the rule to show cause be discharged and that the special master be relieved from further duty, it appearing that an account could not be stated from the data furnished, and that all matters involved in the suit be brought before the court without the intervention of a master's report. Upon the final hearing the bill was dismissed for want of equity.

The bill, it is to be observed, is one for relief, and not for discovery. Though it alleges that in certain particulars an intelligent account cannot be stated except by the respondent, it submits no

interrogatories, asks no discovery, waives verification of the answer, and prays that an account may be stated under the direction of the court. The case comes, therefore, within the general rule that every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill, and that relief will not be granted "for matters not charged, although they may be apparent from other parts of the pleadings and evidence." Story, Eq. Pl. § 257; 1 Daniell, Ch. Pl. & Prac. 325, 326; Stearns v. Page, 7 How. 819, 829.

The evidence in the record is voluminous, but we deem it necessary to notice only some of the more salient features, in connection with the allegations of the bill to which they are pertinent. The evidence does not support the averment to the effect that, by reason of advanced years, inexperience in business, and ignorance of her duties as executrix, Mrs. D'Arcy came under the domination of Cheney, and was induced by him to commit her estate to his custody and management. On the contrary, it is apparent that she was a woman of more than the average intelligence, accustomed to think for herself, and to give attention to her own affairs. Besides, it is shown that for some months after the death of her husband, and until a division had been made of the estate, she had the assistance and advice of F. M. Teese, a lawyer of large experience, and the husband of her daughter Caroline, whose interest in the estate was equal to her own. At the same time it is evident that Mrs. D'Arcy reposed confidence in Cheney, and, while she lived with him, received his assistance in the management of her affairs; but upon the death of Mrs. Cheney, in 1877, she went to live with her people in New Jersey, and if in the transactions in Nebraska lands, or in other respects, she had been wronged by Cheney, it is not probable that she would or could have concealed the fact from her daughter, with whom and with whose husband she was on friendly terms; and if the fact of such wrongs as are charged became known to Mr. and Mrs. Teese, it is both incredible and inexcusable that suit was not brought during Mrs. D'Arcy's life, when she and Cheney would both have been competent to testify, instead of waiting 10 years, and until after her death, before suing, and then insisting, under a disqualifying statute, which might have been waived, that the one witness who, it is conceded, could give "an intelligent account," should not be heard. The bill admits that, long prior to Mrs. D'Arcy's death, Cheney rendered to her partial accounts, which, though in the possession of the complainants, are not set out. It is alleged that they are not fair and full, and do not bring the account to the time of her death. Rendered to her, they, of course, did not come to the time of her death, but it should have been alleged to what time they did come, what they contained, and in what respect they were false or erroneous. There are vouchers in evidence, attested by the signature of Mrs. D'Arcy, which cover the most important, if not all, of the matters in dispute; but the body of the instruments in each instance is in the handwriting of Mr. Cheney, and might have been written after the signature was obtained, and on that account it is insisted they should be

rejected. On the contrary, the genuineness of the signatures being undisputed, the documents constitute at least prima facie evidence of the settlements which they recite, and the burden was on the complainants to overthrow or discredit them. We do not overlook the circumstances in evidence which unexplained throw grave doubt upon some of the transactions for which we are asked to declare the respondent accountable; but they are not of a character which makes explanation impossible, and in view of the lapse of time, the long acquiescence of Mrs. D'Arcy, and of the fact that Cheney was not required nor permitted to give such explanation as he could, we are unable to see any safe ground upon which we can set aside the decree rendered, and award relief to the complainants. They have no better standing in court than would Mrs. D'Arcy have if she were living and the suit had been in her name, and without different proof from what has been made, if the suit were by her, we should be of opinion that her delay in bringing it was inexcusable and fatal to her standing in a court of equity. There is some proof, amounting to a degree of probability, that Mrs. D'Arcy understood and intended the disposition which was made of her property. It may be that in each instance Cheney was dealing with affairs in trust, but, if that be conceded, it results only that the transactions were voidable, and not void; and, after long acquiescence by the party interested, the courts should not interfere, unless upon a reasonable certainty that they would not be committing an injustice equal to or greater than that supposed to need correction. Stearns v. Page, supra; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418.

A pertinent discussion of the effect of laches upon the right to relief in equity is found in the recent case of Abraham v. Ordway, 15 Sup. Ct. 894, from which we quote the following:

"It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitations; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will in such cases decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law. Wagner v. Baird, 7 How. 234, 238; Harwood v. Railroad Co., 17 Wall. 78, 81; Sullivan v. Railroad Co., 94 U. S. 806, 811; Brown v. Buena Vista Co., 95 U. S. 157, 159; Hayward v. Bank, 96 U. S. 611, 617; Lansdale v. Smith, 106 U. S. 391, 392, 1 Sup. Ct. 350; Speidel v. Henrici, 120 U. S. 377, 387, 7 Sup. Ct. 610; Richards v. Mackall, 124 U. S. 183, 188, 8 Sup. Ct. 437."

The decree of the circuit court is affirmed.

WATSON v. UNITED STATES SUGAR REFINERY et al.

(Circuit Court of Appeals, Seventh Circuit. July 9, 1895.)

No. 223.

1. EQUITY PLEADING—MULTIFARIOUSNESS.
   A bill alleging that complainant had been induced, by false representations of certain individual stockholders and officers of a corporation, to purchase stock therein, which has proved worthless, and also alleging numerous grounds upon which a dissolution of the corporation and an accounting are sought, is multifarious in joining a cause of action against the individual defendants, for deceit, with one against the corporation for dissolution and accounting.
2. CORPORATIONS.
   A bill by a stockholder, seeking dissolution of a corporation and accounting, alleged that business had been suspended, "among other things," because of the worthlessness of a patent under which it had been carried on, but without stating that that was the controlling reason; that the officers were misapplying the funds, but without stating that any effort had been made to have the corporation bring suit; that the officers had tampered with the books, but without stating in what manner; that certain assets had not been entered in the books, but without charging concealment or intentional wrong. *Held*, that the allegations were too general and indefinite to justify granting relief.
3. EQUITY PRACTICE—PARTIES.
   Where a bill for dissolution of a corporation and accounting seeks to have full payment made to the complaining stockholder for his investment before any payment to the transferees of certain other stockholders, such transferees are necessary parties.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Henry M. Wolf, for appellant.
Homer Cooke, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This suit was brought by the appellant, William H. Watson, a citizen of New York, against the appellees, the United States Sugar Refinery, a corporation, and Thomas A. Jebb and William T. Jebb, citizens of Illinois. Error is assigned upon the action of the circuit court in sustaining the demurrers of the respondents to the amended and supplemental bill, and in dismissing the cause "for want of jurisdiction." The opinion of the court, which is in the record, shows that the demurrers were sustained upon each of the grounds alleged, namely,—that the complainant had not made a case entitling him to a discovery or other relief; that the bill was multifarious, exhibiting against the corporation and against the defendants Jebb several and distinct matters; and that there were other stockholders of the company who were necessary parties to the action. The averments of the original bill, which, like the supplemental bill, purports to be for the benefit of the complainant and other stockholders of the United States Sugar Refinery who may choose to join in the suit as parties complainant, are, in substance, that the United States Sugar Refinery, incorporated under the laws of Illinois about the 24th day of December, 1889, with a capital stock of $500,000, in shares of $100, was organ-

ized for the purpose of manufacturing rose malt, grape sugar, glucose, starch, syrups, feeds, corn meal, corn flour, and other products of corn, and that William T. Jebb is a stockholder, director, and president of the company; that the incorporators, original subscribers to the stock, and directors of the company for the first year, were Henry C. Hutchinson, Henry B. W. Browning, and J. A. Holzbauer, Browning having subscribed for 4,998 shares, and the others each for one share, but that the Jebbs, father and son, who were owners of a majority of the capital stock, and were then preparing to engage in the business of manufacturing glucose or grape sugar from maize, under certain letters patent for a process of making the same issued to William T. Jebb, as assignee of John C. Schuman, were practically the sole executive officers and managers of the company. From this point, the bill proceeds to show in detail and at great length that, by false representations in respect to the validity and value of their patents and the process covered thereby, the Messrs. Jebb procured the complainant in March, 1890, to purchase and pay for 50 shares of the capital stock of the company, of which shares, it is alleged, he ever since has been and is the legal owner and holder. It is further averred that the company completed and begun to operate its factory in May, 1890, but before the end of nine months, "by reason, among other things, of the utter worthlessness of said patents and processes," the works were shut down, and since February, 1891, have stood idle, and that for more than two and one-half years the company has wholly ceased doing business; that no stockholders' meeting has been held for more than two years; that, though often requested, no accounting has been rendered, and no report made by the officers of the company; that William T. Jebb, the president, and other officers, acting under his directions, have refused to allow stockholders or their agents to examine the books of the company, and that there is now pending a suit in the circuit court of Lake county, Ill., to compel the officers to permit a stockholder to examine the books. It is also alleged that the officers have illegally employed the assets of the company in speculations in real estate, and have squandered, given away, and sold a considerable part of the assets to parties known to be pecuniarily irresponsible; and, upon information and belief, it is averred that the treasury of the company is without money or funds of any kind, and is in debt to the amount of about $20,000, to recover which suits are pending on appeal, taken by the company, to the United States circuit court of appeals for the Seventh circuit; that the company is insolvent; that the Jebbs are without funds, and have put their stock in the names of their wives; that the plant of the company, its real estate and buildings, are worth more than $5,000, and in the neighborhood of $300,000; that the purposes of the company cannot be attained; that any use to which the property might now be put would involve, necessarily, a departure from the original corporate design, and that the stockholders ought to be protected against further loss or diminution of the capital stock or assets of the company, which cannot be done unless the company is wound up and dissolved; that this suit

is not a collusive one, designed to confer jurisdiction which the court otherwise would not have. This is the substance of the original bill, the prayer of which is, that the defendants be required to answer, but not under oath; that a receiver be appointed of the assets of the company; that the assets be sold, and the proceeds applied to the payment of debts, and that the remainder be distributed, giving to the complainant and other stockholders similarly situated the full amount of their investments, before paying anything to the Jebbs or to the transferees of their stock; that the company be dissolved, and that meanwhile the defendants Jebb be restrained from selling, incumbering, or interfering with the assets of the company or transferring their stock therein; and that other proper relief be given. The supplemental bill, reaffirming the original averments, alleges that, since the filing of the original bill, the complainant has been informed and believes, and therefore avers, that the total available cash assets of the company are only about $400, and are insufficient to continue the employment of suitable watchmen to protect the plant; that, during the period of operation before February, 1891, the company lost large sums, consuming its available cash capital; that for the last year or more the expenses of protecting the property have been paid out of funds taken by William T. Jebb from the assets of the United States Starch Works, a corporation owning adjoining property, of which said Jebb had been treasurer and manager, but that, by reason of his recent removal from control, that source of supply has been cut off; that William T. Jebb, the president, has tampered with and manipulated the books, papers, and accounts of the company, and has rewritten or caused to be rewritten one of the main books of account, falsifying the entries therein; that 1,000 shares of the stock of United States Starch Works which were issued to William P. Kennard, the secretary and treasurer of the United States Sugar Refinery, in trust for the latter company, and of which 930 shares have since been transferred out of the name of Kennard into the name of George R. Teller, and 50 shares into the name of Henry B. W. Browning, have not been entered upon the books of the company as an asset thereof, and that said Teller's note for about $93,000, given to William T. Jebb, in trust for the company, in consideration for the transfer mentioned, has not been turned over to the treasurer, nor any entry thereof made upon the books of account of the company; that, since the filing of the original bill, as complainant is informed, a pretended annual meeting of the company was held, about the 21st day of December, instant, of which neither the complainant nor any other stockholder in like interest received any notice or had any knowledge; that he is informed that certain persons, since that meeting, have visited and examined the works and plant, with a view to purchasing the same; and he charges that, unless restrained, the Messrs. Jebb, as officers in control, will sell the property, "and appropriate such portion of the proceeds of such sale as they may be able to do." The prayer, in so far as it differs from the prayer of the original bill, is that the respondents be prohibited from selling, leasing, mortgaging, or

conveying any of the property of the company until authorized thereto by the stockholders, at a meeting duly called and held.

If the appellant was induced by false representations to make a losing investment in the corporate stock, his remedy is at law against those who deceived him, and not against the corporation. It may be, as was suggested in West v. Huiskamp, 11 C. C. A. 401, 63 Fed. 749, 755, that one who is induced to join others in the organization of a corporation, by false representations which affect the solvency of the enterprise from the beginning, may be entitled, upon discovery of the fraud, to a decree in equity for the winding up of the affairs of the company; but that is not the case presented. The appellant was not an original corporator, but simply the purchaser and assignee of shares in an organization already complete. Unless, therefore, the averments in respect to the deceit practiced upon him be rejected as meaningless or superfluous, the bill is clearly multifarious, not only because it joins distinct and independent matters, but because it seeks to enforce different remedies against distinct parties not jointly liable or interested. In other respects, moreover, the allegations of the bill are too general and indefinite, or otherwise defective, to justify relief in a suit by a stockholder. The appellant, owning but 1 per cent. of the stock of the company, professes to sue for the benefit of himself and other stockholders in like situation, but fails to show or to raise a fair inference that there are others who desire or who would be benefited by the relief sought. The bill may, therefore, be regarded as if brought in his own interest alone. Without repeating in detail the different allegations, we note some of the particulars in which they are defective: The works of the company, it is stated, after being kept in operation at a loss for nine months, were shut down, for the reason, "among other things," that the patents and patent processes which they had proposed to use had proved worthless; but whether that was the main or controlling reason is not explained, and, as against the pleader, the contrary is inferable. No stockholders' meeting has been held for more than two years, and no report of officers has been made; but that any interest had suffered or was likely to suffer on that account is not shown, nor affirmed; and the supplemental bill admits a recent meeting of the board,—held, it is alleged, without notice, but it may have been at the time fixed by a rule or by-law of the company, of which, without formal notice, stockholders were bound to take cognizance. Stockholders and their agents, it is charged, were not permitted to examine the books of the company; but under what circumstances, and for what reason, the examination was sought and refused, is not disclosed. If wrong was done in that respect, it is to be presumed that it will be righted in the suit brought for that purpose in the state court. It is alleged that the assets of the company have been employed in speculations in real estate; but, besides the total failure to allege tangible particulars, the remedy should be sought in the name of the corporation. The rule is well settled that a stockholder cannot maintain a suit for a wrong to the corporate body without showing either an effort to set the corporation in motion to redress the wrong, an application

made to the board of directors to that end, or that such effort or application would be useless. And this requirement is not satisfied by an allegation that the directors or a majority of them are acting in the interest or under the control of others who are charged with the fraud. Brewer v. Proprietors, 104 Mass. 378; Dodge v. Woolsey, 18 How. 331. While it is alleged that the Jebbs were practically the sole executive officers and managers of the company, it does not appear that Hutchinson, Browning, and Holzbauer, who were directors, were for any reason unable, or, with information of the facts, unwilling, to bring proper suits to correct the harm done, or to prevent that threatened. It is alleged that the company is without available cash capital, and without means to employ watchmen; but it is admitted that money for that purpose had been supplied from another source. Instead of being insolvent, it appears that the company, while indebted to the amount of $20,000, is owner, in addition to its plant, worth $300,000, of a promissory note for $93,000, the maker of which is presumably solvent and responsible. It is alleged that entries have not been made upon the books of the company of certain transfers of stock and of the Teller note; but it is not charged that the omission was intentional or wrongful, or that there had been any concealment of the nature of the transactions or of the company's interests therein. In what respect, and for what purpose, the entries were falsified in the book which is alleged to have been rewritten, is not shown, and whatever wrongs there may have been in that respect were, under the rule already stated, matters for complaint or suit by the company, and not by the appellant as a stockholder. If it be true, as asserted in the bill, that any use to which the property might now be put would involve a departure from the original design, then a sale of the property and a division of the proceeds between stockholders was the proper course, and no ground for an injunction is disclosed in the averment that the Messrs. Jebb, as officers in control, will make a sale "and appropriate such portion of the proceeds of such sale as they may be able to." This does not show a purpose to appropriate more than their just share; nor is it alleged that they are insolvent and irresponsible for what should come into their hands.

Even upon the appellant's own theory of the case, there is a lack of necessary parties. The prayer of the bill is that the property of the company be sold, and the proceeds, after payment of debts, given to the appellant and others in like situation, to the full amount of their investment, before payment of anything to the Jebbs or to their wives, to whom it is alleged they had transferred their shares of stock; but it is evident, on elementary principles, that such an order, if otherwise justifiable, could not be made in a case to which the legal holders of the shares were not parties.

Objection is made, in a supplemental brief, that the bill was dismissed without leave to amend, and that the proper practice, when a bill is dismissed without a consideration of its merits, is to decree a dismissal without prejudice. Durant v. Essex Co., 7 Wall. 107, 110; Kendig v. Dean, 97 U. S. 423, 426. The assignment of errors presents no such question. Besides, the first ground

of demurrer went to the merits of the bill, and the opinion of the court, as already stated, shows that all the grounds advanced were deemed good. The final order was that the bill be dismissed "for want of jurisdiction,"—meaning, doubtless, that a case of equitable cognizance was not shown. If it means that the merits were not decided, then the decree is equivalent to a dismissal without prejudice. In any view, we do not perceive that the decree upon this bill, which, as we agree with the circuit court in holding, presents no ground for relief, can be a bar to another bill which shall show different and good ground. Leave to amend, if desired, should have been asked at the time the decree was announced, or seasonably thereafter. Equity rule 35. The decree of the circuit court is affirmed.

FORSYTHE v. CITY OF HAMMOND et al.

(Circuit Court, D. Indiana. July 3, 1895.)

No. 9,215.

1. CONSTITUTIONAL LAW—LEGISLATIVE AND JUDICIAL POWERS.
   It is within the power of the legislature of a state, whose constitution denies to the legislature the power of creating municipal bodies or enlarging or contracting their boundaries by special act, and requires such changes to be provided for by general laws, to confer upon the courts the power to determine whether the conditions exist prescribed by law for the creation, enlargement, or contraction of a municipal body.
2. SAME—UNDERLYING PRINCIPLE OF RIGHT.
   A court cannot declare void an act of the legislature of a state which violates no provision of the state or federal constitution on the ground that it is wrong, unjust, or oppressive, or that it violates the genius and spirit of our institutions.
3. SAME—DUE PROCESS OF LAW—TAKING PRIVATE PROPERTY—TAXATION.
   A court cannot say that the levy of a tax, however great the hardship or unjust the burden, is a taking of property without due process of law, or without just compensation; nor that a tax is unconstitutional because its proceeds may be applied to the payment of a debt incurred in excess of a constitutional limit.

This was a suit by Caroline M. Forsythe against the city of Hammond, Ind., to enjoin the collection of a tax.

Miller, Winter & Elam, for complainant.
Peter Crumpacker, for defendants.

BAKER, District Judge. This is a suit to enjoin the collection of taxes levied for city purposes by the defendant city on the lands of the complainant. The question for decision is the sufficiency of the bill to entitle the complainant to the equitable relief for which she prays. The sufficiency of the bill depends upon the answers to be given to two questions:

First. Were the proceedings and judgment of the circuit court of Porter county, Ind., which adjudged the annexation of certain lands, including the complainant's, to the city of Hammond, illegal and void, or were they valid? It is contended that the judgment annexing the lands of the complainant and others to the city of Ham-