

A. H. Wintersteen, J. S. Runnells, Robt. T. Lincoln, and Edw. S. Isham, for Pullman's Palace-Car Co.

John G. Johnson and Frank P. Prichard, for Central Transp. Co.
Before DALLAS, Circuit Judge, and BUTLER, District Judge.

DALLAS, Circuit Judge. The Pullman's Palace-Car Company has presented a petition for the allowance by this court of an appeal direct to the supreme court. The counsel of the petitioner insist that it is entitled to take such appeal under section 5 of the act to establish circuit courts of appeals, etc., approved March 3, 1891, because, as is claimed on its behalf, the case is one "that involves the construction or application of the constitution of the United States." The counsel of the transportation company denies that any such question is involved, but admits that the alleged right of appeal, if such question existed, would be absolute, and not dependent upon the assent of this court. This view of the law is, in our opinion, correct. The act gives a right of appeal direct to the supreme court in certain enumerated cases. It does not confer upon the circuit court authority to allow or to disallow such appeals, or to adjudge whether any particular case is one in which such appeal lies. We are aware that the practice has to some extent prevailed of obtaining the allocatur of the circuit court before taking the appeal, but there is nothing in the statute which requires it; and where, as here, the application is resisted, we think it should not be given. In our opinion, the appeal, if warranted by the statute, is of right; and whether or not it is in fact so warranted is not for this court, but for the supreme court, to determine. Upon this ground alone, a special allocatur is denied.

YOUNG v. ALHAMBRA MIN. CO.

(Circuit Court, N. D. Illinois. December 16, 1895.)

CORPORATIONS—SUIT BY STOCKHOLDER—EQUITY PLEADING—RULE 94.

A bill by a stockholder against a corporation and its directors, alleging that a majority of the directors, in conspiracy with others, are attempting, through execution sale on an unauthorized judgment note, fraudulently to obtain title to the property of the corporation, and that the complainant learned of these transactions only a few days before the time for redemption expired, need not allege that complainant has demanded that the directors bring suit to set aside such sale, since such demand would be useless.

In Equity.

P. A. Hurd and W. P. Black, for complainant.

Lyman & Jackson and George P. Merrick, for defendant.

GROSSCUP, District Judge. The bill is by Young, a citizen of Indiana, against the Alhambra Mining Company, a corporation under the laws of Illinois, and Morse, Burchard, Flersheim, Thorne, and Cadwell, officers and directors of such corporation, each a citizen of Illinois, and Montgomery Ward and James B. Wilbor, citizens of Illinois. The bill shows that, at the time of the transaction com-

plained of, complainant was the owner of 150 shares of the capital stock of the Alhambra Company; that the suit is not brought by him collusively, or for the purpose of conferring jurisdiction upon a court of the United States in a case of which such court otherwise would not have cognizance; and sets up with some particularity the efforts made by complainant to have the suit brought by the directors of the company. Three of the five directors of the company are charged, in the bill, with having conspired with Ward and Wilbor to defraud the company of its property and assets, and, in execution thereof, to have fraudulently and falsely executed to Wilbor a note for something upward of \$12,000, without having received any return to the company therefrom, upon which note a judgment was subsequently entered by confession, and execution thereafter taken out, and the property of said company under said execution sold for the sum of \$500 to the defendant Wilbor, although it was worth very many times that sum of money. The bill further shows that, under the laws of New Mexico, a period for redemption of one year is allowed, and that such period had but a few days yet to run when complainant's bill was filed. Complainant avers that neither he, nor any of the other stockholders, nor the two directors other than those in the conspiracy, had knowledge of these doings until but a few days before the period of redemption would have expired. The allegations of the bill, in short, make out a case where a majority of directors of a corporation, in conspiracy with others, attempt, through an unauthorized note of the company, and the processes of the court thereon, to fraudulently transfer the ownership of the property from the stockholders to themselves. They also disclose a case where such a scheme will be successful unless the stockholder discovering the fraud is permitted to sustain his action against them, without first going through a formal demand upon the directors to bring an action against themselves. To the bill a demurrer is filed, based upon that clause of the ninety-fourth rule which requires that the efforts made by a stockholder to have the directors or company bring the suit should be particularly set forth. The argument is that no such effort is distinctly shown.

The ninety-fourth rule is nothing more than a means to an end. Its purpose was simply to bring to the knowledge of the court, at the inception of the suit, all the facts upon which an opinion might be formed, whether such suit did really and substantially involve a dispute or controversy properly within the jurisdiction of the court, and whether the parties thereto had, or had not, been collusively joined, for the purpose of creating a case cognizable in such court. The statute of 1875 enabled the court, of its own motion, to dismiss all suits where the arrangement of the parties was collusive, or the controversy was not substantially between citizens of different states. But for the ninety-fourth rule, such collusion or improperly acquired jurisdiction might not appear until the case had greatly imposed upon the time of the court. The effect of the ninety-fourth rule was to make the question of collusion or improper juris-

diction a preliminary one. But, where the bill, in all of its averments, shows that the controversy is substantially between citizens of different states, and that there is no collusion, all of the ends of the rule are already met. To require more would be to exalt the means above the end. The bill here discloses such a case. If a stockholder, who has been shorn of his interest by his trustees, cannot bring suit to arrest their fraudulent doings, there is no justice in laws. If entitled to bring such suit at all, it is a substantial right, which opens to him such a forum as any other substantial right can invoke. It would be a parody upon the statute and the rule to hold that this substantial right must be lost unless the victimized stockholder can, within the time left, get together the guilty parties, and demand of them a suit against themselves,—a suit implying their own business and moral turpitude. Such a proceeding every sensible man, out of a court of justice, knows would never be complied with. For the foregoing reasons, the demurrer will be overruled.

DE BEAUMONT v. WILLIAMES.

(Circuit Court, E. D. Pennsylvania. January 13, 1896.)

ASSIGNMENT OF PATENTS—PROOF OF TITLE—BURDEN OF PROOF.

Where the owner of an interest in a patent agreed to assign the same to another, the assignment to go into effect when the other party had performed certain agreements on his part, and afterwards the assignor sued upon the patent for infringement, *held* that, in order to establish his title, the burden was upon him to prove that the other party to the contract had not performed his agreements, and that the title had, consequently, never passed to him.

This was a suit in equity by Delia De Beaumont, administratrix, against Napoleon W. Williams, for alleged infringement of a patent for an improvement in heaters and feeders for steam boilers.

Carrie B. Kilgore and David C. Harrington, for complainant.
Ernest Howard Hunter, for defendant.

DALLAS, Circuit Judge. This suit was brought upon three patents, but has been, by amendment, confined to patent No. 187,825, dated February 27, 1877, granted to Alexandre De Beaumont, assignor of one-half his right to William H. Palmer, for improvement in heater and feeder for steam boilers. The allegations of the bill with respect to the title to this patent are substantially as follows: February 27, 1877, patent issued to De Beaumont and Palmer, jointly. November 10, 1885, assignment from Palmer to Garratt of all Palmer's right, title, and interest. March 9, 1887, assignment from Garratt to Warren Webster of all Garratt's right, title, and interest. March 21, 1887, contract of Alexandre De Beaumont with Warren Webster and Elwood S. Webster for the introduction, *inter alia*, of this patent. July 27, 1887, assignment by Alexandre De Beaumont to his wife, Delia De Beaumont, in trust, of all Alexandre De Beaumont's right, title, and interest. The bill