

CANDIDO PASCUAL, PLAINTIFF AND APPELLANT, VS. EUGENIO DEL SAZ OROZCO ET AL, DEFENDANTS AND APPELLEES.

G.R. No. 5174. March 17, 1911

Ponente: TRENT, J.

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TRENT, J.:

This is an appeal by the plaintiff from a judgment sustaining a demurrer to the first and second causes of action set forth in the amended complaint. The demurrer as to both causes of action was based upon the following grounds:

- (a) Lack of legal capacity to sue on part of plaintiff;
- (b) Failure to state facts constituting a cause of action;
- (c) Defect of parties plaintiff; and,
- (d) Uncertainty.

The lower court sustained the demurrer as to both causes of action upon the second ground above-mentioned.

The following errors have been assigned:

The court a quo erred in sustaining the demurrer to the first cause of action and dismissing the same because (a) the facts alleged constitute a cause of action, and (b) the remedy sought by the plaintiff is the only one available.

The same errors are assigned as to the second cause of action.

The gist of the first and second causes of action is as follows:

That during the years 1903, 1904, 1905, 1906, and 1907 the defendants and appellees, without the knowledge, consent, or acquiescence of the stockholders, deducted their respective compensation from the gross income instead of from the net profits of the bank, thereby defrauding the bank and its stockholders of approximately P20,000 per annum; that though due demand has been made upon them therefor, defendants refuse to refund to the bank the sums so misappropriated, or any part thereof; that defendants constitute a majority of the present board of directors of the bank, who alone can authorize an action against them in the name of the corporation, and that prior to the filing of the present suit plaintiff exhausted every remedy in the premises within this banking corporation.

The second cause of action sets forth that defendants' and appellees' immediate predecessors in office in this bank during the years 1899, 1900, 1901, and 1902, committed the same illegality as to their compensation as is charged against the defendants themselves; that in the four years immediately following the year 1902, the defendants and appellees were the only officials or representatives of the bank who could and should investigate and take action in regard to the sums of money thus fraudulently appropriated by their predecessors; that they were the only persons interested in the bank who knew of the fraudulent appropriation by their predecessors; that they wholly neglected to take any action in the premises or inform the stockholders thereof; that due demand has been made upon defendants to reimburse the bank for this loss; that the bank itself can not bring an action in its own name

against the defendants and appellees, for the reason already stated, and that there remains no remedy within the corporation itself.

The questions raised in the third cause of action are hot before us at this time as the demurrer to that cause of action was overruled.

The court below sustained the demurrer as to the first and second causes of action on the ground that in actions of this character the plaintiff must aver in his complaint that he was the owner of stock in the corporation at the time of the occurrences complained of, or else that the stock has since devolved upon him by operation of law.

This action was brought by the plaintiff Pascual, in his own right as a stockholder of the bank, for the benefit of the bank, and all the other stockholders thereof. The plaintiff sues on behalf of the corporation, which, even though nominally a defendant, is to all intents and purposes the real plaintiff in this case. That such is the case is shown by the prayer of the complaint which is that judgment be entered in favor of the bank.

According to the pleadings, the Banco Espanol-Filipino is a banking corporation, constituted as such by royal decree of the Crown of Spain in the year 1854, the original grant having been subsequently extended and modified by royal decree of July 14, 1897, and by Act No. 1790 of the Philippine Commission. From the first it has been a bank of issue, and under the Spanish regime was regarded as a quasi-public institution, its full title having been originally "Banco Espanol-Filipino de Isabel II." The Captain-General of the Philippine Islands was its protector and supreme head. To him belonged the power to appoint its directors and other managing officers, remove them from office for cause, fix the rate of interest demandable by the bank, resolve all doubts and controversies relating to its management, "and finally, exercise, as representative of Her Majesty's Government, the powers that the laws give him respecting public establishments protected and privileged."

It is alleged in the amended complaint that the only compensation contemplated or provided for the managing officers of the bank was a certain per cent of the net profits resulting from the bank's operations, as set forth in article 30 of its reformed charter or statutes, which article is as follows:

"Of the profits or gains which may result from the bank's operations, after deducting all the expenses of its administration and the part, if any, which corresponds to the legal reserve fund, there shall be set apart ten per cent for the directors and five per cent for the board of government,' the distribution of which shall be made as provided in the regulations. The eighty-five per cent remaining shall belong integrally to the shareholders pro rata the number of shares owned by each."

Before proceeding to the determination of the real questions involved in this case it might be well to note briefly the origin and history of the right of a stockholder in a corporation to maintain a suit of this kind.

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." (Chief Justice Marshall in *Trustees of Dartmouth College vs. Woodward*, 4 Wheat., 636.)

"The word 'corporation' is but a collective name for the corporators or members who compose an incorporated association ; and where it is said that a corporation is itself a person, or being, or creature, this must be understood in a figurative sense only." (Morawetz on *Private Corporations*, 2d ed., sec. 1.)

"A corporation is 'an artificial person created by the sovereign from natural persons and in which artificial person the natural persons of which it is composed become merged and nonexistent.' " (Quoted with approval in case of *The People, ex. rel Winchester, etc., respondent, vs. Coleman, et al., commissioners of taxes etc., appellants*, 133 N. Y. Appls., 279.)

In suits of this character the corporation itself and not the plaintiff stockholder is the real party in interest. The rights of the individual stockholder are merged into that of the corporation. It is a universally recognized doctrine

that a stockholder in a corporation has no title legal or equitable to the corporate property; that both of these are in the corporation itself for the benefit of all the stockholders. Text writers illustrate this rule by the familiar example of one person or entity owning all the stock and still having no greater or essentially different title than if he owned but one single share. Since, therefore, the stockholder has no title, it is evident that what he does have, with respect to the corporation and his fellow stockholders, are certain rights *sui generis*. These rights are generally enumerated as being, first, to have a certificate or other evidence of his status as stockholder issued to him; second, to vote at meetings of the corporation; third, to receive his proportionate share of the profits of the corporation; and lastly, to participate proportionately in the distribution of the corporate assets upon the dissolution or winding up, (Purdy's *Beach on Private Corporations*, sec. 554.)

The right of individual stockholders to maintain suits for and on behalf of the corporation was denied until within a comparatively short time, but this right is now no longer doubted. On this point Cook on Corporations, 5th ed. (1903), sees. 644, 646, and 646, says:

"Notwithstanding this fact, however, that it was the duty and right of the corporation to bring suit to remedy these wrongs, it gradually became apparent that frequently the corporation was helpless and unable to institute the suit. It was found, where the guilty parties themselves controlled the directors and also a majority of the stock, that the corporation was in their power, was unable to institute suit, and that the minority of the stockholders were being defrauded of their rights and were without remedy. The time came when the minority of the stockholders of the defrauded corporation - the corporation itself being controlled by the guilty parties - were given a standing in court for the purpose of taking up the cause of the corporation, and, in its name and stead, of bringing the guilty parties to an account. Accordingly, in 1843, in the leading case of *Foss vs. Harbottle*, a stockholder brought suit in the name of himself and other defrauded stockholders, and for the benefit of the corporation, against the directors, for a breach of their duty to the corporation. This case was decided against the complaining stockholder, on the ground that the complainant had not proved that the corporation itself was under the control of the guilty parties, and had not proved that it was unable to institute suit. The court, however, broadly intimated that a case might arise when a suit instituted by defrauded stockholders would be entertained by the court and redress given. Acting upon this suggestion, and impelled by the utter inadequacy of suits instituted by the corporation, defrauded stockholders continued to institute these suits and to urge the courts of equity to grant relief. These efforts were unsuccessful in clearly establishing the right of stockholders herein until the cases of *Atwool against Merriwether*, in England, 1867, and of *Dodge vs. Woolsey*, in this country, in 1855. These two great and leading cases have firmly established the law for England and America, that where corporate directors have committed a breach of trust either by their frauds, ultra vires acts, or negligence, and the corporation is unable or unwilling to institute suit to remedy the wrong, a single stockholder may institute that suit, suing on behalf of himself and other stockholders and for the benefit of the corporation, to bring about a redress of the wrong done directly to the corporation and indirectly to the stockholders.

"It is now no longer doubted, - said Mr. Justice Wayne, in the case of *Dodge vs. Woolsey*, 18 How. (U. S.), 331 - either in England or the United States, that courts of equity; in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law."

So it is clear that the plaintiff, by reason of the fact that he is a stockholder in the bank (corporation) has a right to

maintain a suit for and on behalf of the bank, but the extent of such a right must depend upon when, how, and for what purpose he acquired the shares which he now owns. In the determination of these questions we can not see how, if it be true that the bank is a quasi-public institution, it can affect in any way the final result.

It is alleged that the plaintiff became a stockholder on the 13th of November, 1903; that the defendants, as members of the board of directors and board of government, respectively, during each and all the years 1903, 1904, 1905, 1906, and 1907, did fraudulently, and to the great prejudice Of the bank and its stockholders, appropriate to their own use from the profits of the bank sums of money amounting approximately to P20,000 per annum.

Article 31 of the bank's charter provides that dividends shall be declared each semestre. The stockholders meet once a year, in February, to receive and consider the report of the bank's operations contained in the annual balance and memorial. Beyond this they have no direct voice in the affairs of the bank, but all who are then stockholders and have a right to vote must clearly have a right to vote upon all the business proceedings of the year, irrespective of the date upon which they may have become stockholders. They are entitled to all the dividends that have been, earned by their stock during the year which has not been already declared and paid, regardless of the precise period of the year in which it may have accrued. So, in the general meeting of the stockholders on February 3, 1904, the plaintiff had a right to participate.

Neither the charter, the by-laws, nor the regulations prescribe when, within the semestre, the dividends shall be declared; but it may be presumed that such dividends are declared at the end of the semestre and that the first semestre begins with the first day of January of each year. On this basis the owner of stock from whom the plaintiff purchased h's ten shares might have received the dividends corresponding to these ten shares for the first semestre (six months) of the year 1903. The dividends were declared twice a year, every six months. The times for declaring the dividends are specifically and distinctly pointed out - one period is separated from the other. Every six months forms a period. So if the plaintiff was not entitled to the dividends for the first period (from January to July, 1903), he having become a stockholder in September of that year, he would have been entitled to the dividends on his stock for the second period, or semestre. The plaintiff was, therefore, a stockholder during all the time for which he seeks recovery in his first cause of action, except the first six months of the year 1903. Then, again, as a matter of fact (which we do not now decide), if the defendants had taken their salaries for the year 1903 at the close of that year or at any time after September 13, the plaintiff would then have had an interest and, on the theory that he was a stockholder, could have questioned the legality of the defendants' right to take such salary, inasmuch as his dividends would be directly affected, in that, if the defendants took 10 per cent of the gross instead of the net earnings of the bank, his dividend on his ten shares for the second period (from July to December, 1903) would be less.

Conceding that this cause of action is demurrable on the grounds that the plaintiff was not a stockholder during the first six months of the year 1903, should the demurrer have been sustained as to the whole cause of action when the time for which recovery is sought is clearly divisible?

Section 90 of the Code of Civil Procedure in force in the Philippine Islands provides, in part, as follows:

"2. * * * If the complaint contains more than one cause of action, each distinct cause of action must be set forth in a separate paragraph containing all the facts constituting the particular cause of action.

"Where the matter in a single count is divisible in its nature the demurrer should be confined to those parts which are defective, as the same general rule which applies to different counts applies also to divisible matter in the same count constituting different causes of action; and where one count, containing distinct averments, discloses a good cause of action in one of such averments, as when several breaches are assigned, some well

and others ill, a general demurrer will be overruled." (6 Ency. Plead. & Prac, 303, 304.)

The complaint contains three causes of action, each set forth in a separate paragraph. The matter in the first cause is, as we have said, divisible in its nature. The rule above quoted is, therefore, perfectly applicable.

The most important question to be decided is, did the lower court err in sustaining the demurrer to the second cause of action? If this question be decided in the negative, then it will not be necessary to determine whether or not the allegations in this part of the complaint are sufficient to hold the defendants liable for the acts of their predecessors.

It affirmatively appears from the complaint that the plaintiff was not a stockholder during any of the time in question in this second cause of action. Upon the question whether or not a stockholder can maintain a suit of this character upon a cause of action pertaining to the corporation when it appears that he was not a stockholder at the time of the occurrence of the acts complained of and upon which the action is based, the authorities do not agree.

In the case of *Hawes vs. Oakland* (14 Otto [104 U. S.], 450, 456), the plaintiff, a shareholder in the Contra Costa Waterworks Company, brought a bill in equity against the company and the city of Oakland, in the Circuit Court of the United States for California, on the ground that he was a citizen of New York and the defendants citizens of California, alleging that the company was furnishing the city of Oakland with water free of charge beyond what the law required it to do, and that, although he had required them to desist, the directors had failed to heed his protest and that unless enjoined they would continue to furnish water to the city in excess of their legal obligations in this particular, to the damage of plaintiff and the shareholders.

To this complaint the city of Oakland demurred upon the ground that the appellant had shown no capacity in himself to maintain the suit, the injury, if any, being to the corporation, and the right to sue pertaining to it solely. The demurrer was sustained and the bill dismissed, whereupon the plaintiff carried the case to the Supreme Court of the United States.

The decision of the court, which was written by Mr. Justice Miller and concurred in by all the other justices, contains a review of the earlier decisions of the English and American courts with respect to the right of stockholders of corporations to maintain suits of this character. In concluding, the court, after enumerating a number of circumstances in which a stockholder might be permitted to sue upon a cause of action pertaining to the corporation, said:

"But in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted, in his own name to institute and conduct a litigation which usually belongs to the corporation he should show to the satisfaction of the court that he has exhausted all the means within his reach to attain within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

"The efforts to induce such action as plaintiff desires on the part of the directors, or of the stockholders when that is necessary, and the cause of failure in these efforts, and all allegation that plaintiff was a shareholder at the time of the transactions of which he complains, or that the shares have devolved on him since by operation of law and that the suit is not a collusive one to confer on a court, of the United States jurisdiction in a case in which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

This case was decided January 16, 1882. More than a year afterward the Supreme Court embodied the procedural part of this decision in the 94th Equity Rule, adopted January 23, 1883. The rule reads as follows:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his shares had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

January 21, 1884, the Supreme Court decided the case of *Dimpfel vs. Ohio, etc., R. R. Co.* (110 U. S., 212; 28 Law Ed., 121, 122), which was similar to the *Hawes* case, above cited. Mr. Justice Field, by whom the opinion of the court was written, says (p. 122):

"The suit was brought to set aside a contract by which the Ohio and Mississippi Railway Company became the owner of a portion of its road known as the Springfield Division, and to obtain a decree from the court declaring that the bonds, issued by the company and secured by a mortgage upon that division, are null and void. It was commenced by Dimpfel, an individual stockholder in the company, who stated in his bill, that it was filed on behalf of himself and such other stockholders as might join him in the suit. Callaghan, another stockholder, is the only one who joined him. The two claim to be owners of fifteen hundred shares of the stock of the company. The whole number of shares is 240,000. The owners of the balance of this large number make no complaint of the transactions which the complainants seek to annul. And it does not appear that the complainant owned their shares when these transactions took place. For aught we can see to the contrary, they may have purchased the shares long afterwards, expressly to annoy and vex the company, in the hope that they might thereby extort, from its fears, a larger benefit than the other stockholders have received or may reasonably expect from the purchase, or compel the company to buy their shares at prices above the market value. Unfortunately, litigation against large companies is often instituted by individual stockholders from no higher motive."

The bill in this case was also open to the objection that the plaintiff had not exhausted the means of redress available within the corporation. The court next proceeds to consider this point, but prefaces its remarks with the following significant phrase:

"But assuming that the complainants were the owners of the shares held by them when the transactions of which they complain took place, it does not appear that they made any attempt, etc."

Counsel for the plaintiff, in a very able and exhaustive brief sought to show that the doctrine laid down in these two cases is not applicable to the case at bar, first, because the Supreme Court in these cases merely established a rule of practice, designed to prevent collusive suits in the Federal courts; and, second, that if such rule is to be regarded as a declaration of substantive law, it is wrong on principle and should be disregarded. Many of the authorities cited by the plaintiff to the effect that the rule is merely one of practice, peculiar to the Federal courts, base that conclusion upon the fact that the requirement of the inclusion of the averments in question in the bill is to be found in the 94th Equity Rule. Some of the authorities cited, which hold this view, are: *Pomeroy, Eq. Jur.*, sec. 1096; *Thompson, Corporations*, sec. 4570; *Cook, Corporations* vol. 3, sees. 736, 737; *Morawetz, Corporations*, sec. 209; *Forrester vs. Mining Co.*, 55 Pac. Rep., 229.

In the first place the doctrine was announced in *Hawes vs. Oakland*, *supra*, more than a year before the 94th Equity Rule was promulgated, so that it can admit of no dispute that in the opinion of the Supreme Court, at least, the ownership of stock at the time of the transaction complained of was essential to the right to maintain such an

action as a matter of substantive law, prior to and independent of the Equity Rule.

It is true that the court in writing the decision in the Hawes case, had in mind the prevalence of the practice of bringing suits in the Federal courts, by collusion between the parties, which should properly be tried in the State court. It is equally true that the court was desirous of preventing a continuance of these fraudulent practices, by establishing a test which should prevent them. The basis of the right to sue in the Federal courts being diversity of citizenship, the usual method employed to enable parties to suits of this kind to invoke the jurisdiction of these courts was to have a few shares of stock transferred to some person who was a citizen of a State other than that of which the proposed defendants were citizens. In a case of this kind the transfer of the stock would be, of necessity, merely nominal, and the plaintiff, under such circumstances, would not be a bona fide stockholder, and would not be entitled to maintain the suit. Of necessity, in cases of this kind, of genuine collusion to create a fictitious diversity of citizenship the nominal transfer of the stock is made at a date sequent to that of the occurrence of the acts or omissions complained of. Although the court was lawfully entitled to protect itself against such frauds as those of which it complains in this case, and to refuse to take cognizance of cases, in which, owing to the purely fictitious nature of the simulated diversity of citizenship, the proper tribunals were the State courts, on the other hand, in cases of genuine diversity of citizenship, it could not lawfully refuse to exercise the jurisdiction vested in it. No citation of authority is needed to support the proposition that it is the duty of courts to exercise the jurisdiction properly conferred upon them. It is elementary that where there is a higher tribunal authorized to issue the writ, mandamus will lie to put the judicial machinery in motion. (Spelling, Extraordinary Relief, sec. 1394.) This being the case, the conclusion is obvious that the mere fact that in some cases persons suing as stockholders for the redress of grievances anterior to the transfer of the stock held by the plaintiff are not acting in good faith would not justify or authorize a refusal to take jurisdiction in any case in which the plaintiff's stock was acquired after the occurrence of the facts supposed to constitute the cause of action, unless the court were of the opinion, as a matter of substantive law, that in no event would a stockholder so situated be entitled to maintain such an action.

It is only upon this assumption that the correctness of the decision in Hawes vs. Oakland and the legality of the 94th Equity Rule can be maintained. The court had no authority to change the substantive law either by its decision or the rule, and it is not to be presumed that it intended to do so. A careful examination of the Hawes case and of the rule will show that no such change was in fact made. The decision is merely declaratory of the preexisting law, as the court understood it to be, and the rule merely provides a rule of pleading.

The decision in the Hawes case is that among other necessary averments, the bill should contain "an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains * * * and that the suit is not a collusive one to confer jurisdiction on a court of the United States in a case in which it would otherwise have no cognizance * * *." The language of the 94th Equity Rule is practically identical with this. It provides, in terms, that a stockholder's bill in cases of this character "must contain an allegation that the plaintiff was a stockholder at the time of the transaction of which he complains * * * and that the suit is not a collusive one to confer jurisdiction * * *."

This is, obviously, a mere rule of pleading - it requires averments of facts upon which the plaintiff's cause of action and the jurisdiction of the court rest. It assumes, as the court had already decided, that the ownership of the stock at the time of the transaction is a fact essential to the maintenance of the suit in any event. Unless that fact exists no cause of action exists, whether the suit is collusive or not. Even if the stock was owned prior to the transaction complained of, if the suit is collusive - as it would be, for instance, if one of the defendants had acquired a merely colorable domicile in another State to support the allegation of diversity of citizenship - the plaintiff has no right to maintain the action in a Federal court. Consequently; the rule requires that these two facts

be distinctly averted. The requirement that they be pleaded is procedural; The necessity of the existence of the facts in order to give" rise to the right of action is substantive.

If the Supreme Court had been of the opinion, as are some of the State courts and text writers cited in plaintiff's brief, that the transferee of shares of stock in a corporation acquires the right to sue upon causes of action which accrued before he acquired such shares, it surely would not have attempted to deprive him of the right to exercise in the Federal courts an action which, were it not for diversity of citizenship, he might exercise in a State court. If the court had believed that the transferee of stock could, under any circumstances, sue upon a cause of action accruing to the corporation prior to such transfer, the rule instead of requiring the plaintiff to allege unconditionally that he was a stockholder at the time of the transaction complained of and that the suit is not collusive, would have provided that the plaintiff should be required to aver in his sworn bill the date upon which he acquired his stock, and if it appeared that it was acquired after the occurrence of the acts complained of, then that he should also be required to aver under oath that the suit was not collusive.

"Sound reason and good authority sustain the rule that a purchaser of stock can not complain of the prior acts and management of the corporation." (Home Fire Ins. Co. vs. Baker, 60 L. R. A., 927, 933, citing Hawes vs. Oakland, supra; Dimpfel vs. Ohio & M. R. Co., supra; Taylor vs. Holmes, 127 U. S., 489; Southwest Natural Gas Co., vs. Fayette Fuel Gas Co., 146 Pa., 13; Alexander vs. Searcy, 81 Ga., 536; Clark vs. American Coal Co., 86 Iowa, 436; United Electric Securities Co., vs. Louisiana Electric Light Co., 68 Fed., 673; Venner vs. Atchisdn T. & S. F. R. Co., 28 Fed., 581; Heath vs. Erie R. Co., 8 Blachf., 347; Dannmeyer vs. Coleman, 8 Sawy., 51; Works vs. Sowers, 2 Walk (Pa.), 416; 4 Thompson Corp., 4569.)

In Alexander vs. Searcy, supra, the court said (p. 550):

"The weight of authority seems to be that a person who did not own stock at the time of the transactions complained of can not complain or bring a suit to have them declared illegal."

In United Electric Securities Co. vs. Louisiana Electric Light Co., supra, it is said:

"As a general proposition, the purchaser of stock in ri corporation is not allowed to attack the acts and management of the company prior to the acquisition of bis stock; otherwise we might have a case where stock duly represented in a corporation consented to and participated in bad management and waste, and after reaping the benefits from such transaction, could be easily passed into the hands of a subsequent purchaser, who could make his harvest by appearing and contesting the very acts and conducts which his vendor had consented to."

Where stock is required for the purpose of bringing suit it has been held that the complainant is a mere interloper and entitled to no consideration. And stockholder suits not brought in good faith in the interest of the corporation. have been dismissed on that ground. (Home Fire Ins. Co. vs. Baker, supra, and cases cited therein.) Some of the State courts hold that a purchaser of shares in a corporation acquires all the rights of the vendor. The Alabama Supreme Court has gone so far as to hold that a purchaser in good faith is not necessarily disqualified as a suitor in all cases because the prior holder was personally disqualified. (Parsons vs. Joseph, 92 Ala., 403.) From the pleadings in this case (it having been decided by the Supreme Court upon a demurrer) it appears that Joseph sought to have canceled certain certificates of stock issued by the Street Railway Company to Parsons, on the ground that said stock was fictitious and was issued in violation of the constitution and statute law of the State. It was alleged, as a special defense, that if the transactions, which form the basis of the issuance of the stock to Parsons, were illegal, and fraudulent, and not done in good faith, thje complainant, Joseph, was estopped from setting up fraud in such transactions, or seeking to cancel the stock, because one E. Lesser, who was complainant's transferred participated in all of said transactions. In this case the court, speaking through Mr. Justice Coleman, said:

"If the transferee purchased the shares in good faith, and without notice of the fact that the prior holder had precluded himself from suing, he would have as just a title to relief as if he had purchased from a shareholder who was under no disability; but if the purchaser was aware that the prior holder had barred his right to relief, neither justice nor public policy would require that the transferee, under these circumstances, should be accorded any greater rights than his transferrer.

* * * * *

"If a stockholder participates in a wrongful or fraudulent contract, or silently acquiesces until the contract becomes executed, he can not then come into a court of equity to cancel the contract, and more especially if the company, or himself, as a stockholder, has reaped a benefit from the contract; and this rule holds good, although the consideration of the contract may be one expressly prohibited by statute. The same disability would attach to the transferee of his stock who bought with notice."

This rule, in the main, is correctly stated, but we think that the latter part of the same should be modified so as to read: "The same disability would attach to the transferee of his stock who bought with or without notice." We base our modification of this rule upon the ground that a transferee could not sue as being a bona fide purchaser in ignorance of the disability attaching to his vendor, because shares of stock, strictly speaking, are not negotiable, and the sale can not pass greater rights than those possessed, by the vendor. (Clark vs, American Coal Co., 86 Iowa, 436; 4 Thomp. Corp., 8410.)

It is self-evident that the plaintiff in the case at bar was not, before he acquired in September, 1903, the shares which he now owns, injured or affected in any manner by the transactions set forth in the second cause of action. His vendor could have complained of these transactions, but he did not choose to do so. The discretion whether to sue to set them aside, or to acquiesce in and agree to them, is, in our opinion, incapable of transfer. If the plaintiff himself had been injured by the acts of defendants' predecessors that is another matter. He ought to take things as he found them when he voluntarily acquired his ten shares. If he was defrauded in the purchase of these shares he should sue his vendor.

"If the party himself, who is the victim of fraud or usury, chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recall and assume the remedy for him. (Quoted with approval in the case of Graham vs. La Crosse and Milwaukee R. R. Co., 102 U.S., 148.)

"But it is contended that this is a case in which the debtor corporation was defrauded of its property, and that as the company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right, and one that inures to the benefit of creditors.

"Conceding that creditors who were such when the fraudulent procurement of the debtor's property occurred - and cases to that effect have been cited - the question still remains, whether, the debtor being unwilling to disturb the transaction, subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case, going as far as this, can be found. No such case has been cited in the argument. Dicta of judges to that effect may undoubtedly be produced, but they are not supported by the facts of the cases under consideration.

"It seems clear that subsequent creditors have no better right than subsequent purchasers, to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right." (Id.)

So it seems to be settled by the Supreme Court of the United States, as a matter of substantive law, that a stockholder in a corporation who was not such at the time of the transactions complained of, or whose shares had not devolved upon him since by operation of law, can not maintain suits of this character, unless such transactions

continue and are injurious to the stockholder, or affect him especially and specifically in some other way.

We are, therefore of the opinion, and so hold, that the judgment appealed from, sustaining the demurrer to the first cause of action should be, and the same is hereby reversed; and the judgment sustaining the demurrer to the second cause of action should be, and is hereby affirmed, without any special ruling as to costs. The record will be returned to the court whence it came for further proceedings in accordance with this decision. So ordered.

Arellano, C. J., Torres, Mapa, and Johnson, JJ., concur.

CARSON, J., with whom concurs MORELAND J., concurring in part:

I concur in the foregoing opinion in so far as it overrules the demurrer but dissent in so far as it sustains the same in part.

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