THE RIGHTS OF STOCKHOLDERS WITH REFERENCE TO THE MANAGEMENT OF A CORPORATION.—PART III.

3. *ACTS ULTRA VIRES.*

Thus far we have discussed those cases where fraud was practiced within the corporation, or where there was either a consummated or contemplated conversion of the corporate capital to a new business. We come now to the discussion of the rights of the stockholder in respect of those troublesome and indefinite transgressions of the limits of corporate power known as *ultra vires* acts.

And, first, it may be said that nothing is better settled than that the stockholder has a right to intervene to redress any such act done either by the majority of his associates or by the agents elected by the stockholders to conduct the corporate concern. It is, however, by no means a simple matter to determine upon what this right is based and what are its limits.

In most of the cases considered above, under the head of embarkation in a new business, if the change of business had not been authorized by act of the legislature, it would have been an act *ultra vires* of the corporation. If the legislature gives the X R. R. Co. the right to go into the steamboat business, we find that an embarkation of the corporate capital in that business is a breach of the partnership contract, and requires the consent of every corporator. Now, suppose the legislature has never been asked to give the corporation this additional power; does the fact that the act, if done, is *both* a diversion of capital and an act *ultra vires*, alter the substantive ground on which the dissenting stockholders pray the relief of a court of equity? It is not made the less a breach of their individual contracts with their fellows, because it is also an act not sanctioned by the charter granted by the state to the corporation.

It is said, how is such an act a breach of the partnership

contract between the corporators? The answer is that the breach is more palpable than in the case of an act, outside the scope of the original charter, but since sanctioned by the legislature. In addition to hazarding the capital to which the complaining stockholder contributed, in an undertaking for which he did not contract, it renders him liable to have his charter confiscated by the intervention of the state on a *quo warranto*, and the whole concern wiped out of existence. So that even though it be proved that the change will be a profitable one (a ground thought sufficient to justify it by some courts, in case it is not *ultra vires*), still, even in such jurisdictions, it should seem that, in virtue of the partnership relation of the shareholders, the member should have a right to restrain *ultra vires* acts on this further ground—that such acts render him liable to a forfeiture of his charter.

It should seem, then, that the *ultra vires* act is nothing more, only as regards the stockholders, than a diversion of corporate assets to a purpose not specified in the contract of association, and that its added quality of illegality or want of authority is only an aggravation of the dangers to a stockholder's interest involved in any diversion of assets. If this be true, the basis of the partner's right to bring an action in respect of *ultra vires* acts on the part of his corporation or its officers, rests on exactly the same basis as does his right in the case of any diversion of the corporate property from the original objects of the business. *Natusch* v. *Irving* ought, then, to be just as much an authority here as in the preceding class of cases.

This view was adopted by the House of Lords in the case of *Simpson* v. *Directors of the Palace Hotel Co.*[1] In that case the company was formed under the provisions of the "Companies' Act" to erect and maintain a hotel for purposes set forth in a prospectus. Before the hotel was completed, a lease was proposed of a large portion of the building to the Secretary of State for India. The bill was brought by plaintiff, a stockholder, on the theory that this was an act not authorized by the memorandum of association. The House of Lords

[1] 8 H. of L. 712 (1860).

held it to be within the articles on a fair construction of their wording. Every one admitted that the decision was as to an alleged *ultra vires* act. Lord Chancellor Campbell used the following significant language : "I think that this case is to be determined on the principle laid down by Mr. Giffard, . . . and I bow to the authority of *Natusch* v. *Irving* and the other decisions to which he referred. The funds of a joint stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is *ultra vires*, and although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interpose on his behalf by injunction." All the lords, delivering opinions, agreed with this statement of the law.[1]

It is to be noticed that, for all that appears in this case, a single stockholder may maintain such a bill in his own name, and need not allege that he has appealed to the corporation. The reason usually given in support of this position is that the whole body of the stockholders could not affirm or give validity to such acts, even if it were appealed to.

In *Bagshaw* v. *Eastern Cos. Ry. Co.*,[2] a bill was brought by A, a stockholder, against the directors and the company to restrain the application of funds of the company to an enterprise not contemplated by the charter. The defence was that this case fell within the decision of *Foss* v. *Harbottle* (*supra*). But the court said that the case, on its merits, fell without that decision, by virtue of the fact that it was not a case where the majority could authorize the act under any circumstances; the majority of stockholders could not do the contemplated act.[3] The weight of authority seems to favor this view.

The decisions are not uniform on this point, it being held in some that appeal must be made to the corporate agencies before asking aid from the courts. Thus, in *Dunphy* v. *Trav-*

[1] To the same effect see Hoole *v.* G. W. Ry. Co., 3 Ch. App. 262 (1867), at p. 274.

[2] 7 Hare, 114 (1849).

[3] See, also, Heath *v.* Erie Co., 8 Blatchf. 347 (1871); Colman *v.* E. Co.'s Ry. Co., 10 Beav. 1 (1846).

eller Association,[1] Knowlton, J., said, speaking of the acts of directors, "Even when their acts are *ultra vires*, or otherwise illegal, a complaining member must first seek his remedy within the corporation. The only exception . . . is when it appears that such application would be unavailing to protect his rights." This language was *dictum*.

It is to be noted that the language of Mr. Justice Miller, in *Hawes* v. *Oakland* (*supra*), is broad enough to cover the case of *ultra vires* acts as well as fraudulent ones.[2]

The case of *Russell* v. *Wakefield Water Works Co.*[3] reaches the same conclusion as the last two cases cited. In that case the directors of the old water works paid a large sum of money to the promoters of the new water works company, conditioned that the later should withdraw a bill from Parliament which had been introduced to authorize the formation of a new company to compete with the old one. A shareholder in the old company filed a bill to have the transaction set aside and the money refunded. The court held that the act was *ultra vires* of the old company, and that as it did not appear that the majority favored the act of the directors or that there were other obstacles to bringing the bill in the name of the corporation, it must be so brought, if that were possible. Plaintiff was given leave to amend so that he might ascertain the will of a majority and bring his action accordingly.

In *Pickering* v. *Stephenson*,[4] the directors of a company sued for a libel published against them personally, and in which the corporation really had no interest. A, a stockholder, asked for an injunction to restrain them from paying the costs of this suit out of the corporate treasury. The payment of the costs had been authorized by vote of a general meeting of the shareholders. The could said: "The question raised by the bill is whether this is lawful, or whether such a payment is so inconsistent with the objects and spirit of the partnership that no majority of the shareholders, however great, can bind the

[1] 146 Mass. 495 (1888).
[2] 104 U. S. (1881), at p. 460.
[3] L. R. 20 Eq. 474 (1875).
[4] L. R. 14 Eq. 322 (1872).

minority to it?" The injunction was granted. This, as clearly appears, was simply the case of a majority having done things and threatening to do things which no majority can do. Evidently there need be no appeal to the majority, nor any bill in the corporate name in such a case as this.

But in the case of *Studdert* v. *Grosvenor*,[1] a bill was brought by a single shareholder in his own name, on behalf of himself and all other members, to enjoin directors from paying the costs of a criminal prosecution out of the corporate funds. An injunction was granted. The court said that the act was *ultra vires*, and cited *Pickering* v. *Stevenson* in support of their decision. Nothing was said by the court as to an appeal to the corporation, though *Russell* v. *Water Works* (*supra*), was cited by counsel on the argument. The case would seem to be wrong on principle, and it is submitted that *Pickering* v. *Stevenson* is not an authority in its favor, while *Russell* v. *Water Works* is directly opposed to it.

In *Beman* v. *Rufford*,[2] a case quite often cited in support of the proposition that the bill may be brought by a single shareholder, irrespective of the question of who are the offenders, the wrongful act of the directors was ratified by a majority of the members before suit brought; so that it was in fact a case of majority action.

In *Cherokee* v. *Jones*,[3] the directors of an iron company were restrained from operating a grist mill at the suit of a single member, on the ground that the act was *ultra vires*. The question of a prior appeal to the stockholders was not discussed.

It seems that if the corporation can, under no circumstances, either ratify or disavow the act complained of, then it is a piece of useless formality to compel the stockholder to appeal to the corporation before bringing suit. But if the act complained of be a wrongful act on the part of the directors or officers, then it should seem that the complainant must appeal to the body of shareholders before bringing an action in his own right. There is a clear distinction between such an

[1] 55 L. T. 171 (1886).
[2] 1 Sim. (N. S.) 550 (1851).
[3] 52 Ga. 276 (1874).

act and one done by a majority. In the case of the latter act, as in the case of fraudulent acts, the stockholder may bring his suit at once. It is believed that the courts which have laid down the rule more broadly than this, have, in most cases, been misled by the general hostile attitude of the courts towards *ultra vires* acts.

The cases noticed above allow the stockholder to bring suit against the corporation on the basis of the injury done to his interest by the *ultra vires* act. There are some cases which apparently allow him to sue on the ground of the injury which results to the public generally from allowing corporations to act beyond the scope of the limits of their charters. Thus, in *Tompkinson* v. *S. E. Ry. Co.*,[1] plaintiff, a shareholder, moved for an injunction to restrain the company and its officers from paying out the sum of £1000 by way of donation, or otherwise, to, for or on behalf of the Imperial Institute. This institute was an exhibition company, and it was said that its success would bring the railroad company many more passengers than they would otherwise have. The injunction was granted, as the contract was *ultra vires.* The key-note of the court's decision is expressed in the words of Justice Kay: "It is absolutely necessary to keep incorporated or joint-stock companies within the limits of their powers." The whole decision seems to go on the ground of public policy. *Natusch* v. *Irving*, and like cases, are not mentioned. It is submitted that if the case was decided on any such ground, it cannot be supported. The result, however, was clearly right.

It is conceived that a member of a corporation may bring his bill against the company in either of two capacities; first, as a citizen; second, as a partner. The results are, in the first case, forfeiture of the charter; in the second, simple restraint of the unauthorized act,—though in an extreme case dissolution might be ordered, as in the case of a partnership. If he bring it in the first capacity, he sues to redress a breach of the contract between the corporation and the state of which he is a citizen. In such a case, the injury is not done to him alone,

[1] 35 Ch. D. 675 (1887).

but equally to every other citizen. He cannot, therefore, bring a simple bill in equity, but must resort to a *quo warranto* proceeding to which the state is a party. On the other hand, if he proceed in the second capacity, he stands not on any public right, common to him with all other citizens, but on his peculiar rights created by his agreement with his associates. In such a suit the breach of the private contract is the gist of the action, and the breach of the public contract is, so to speak, the inducement which gives him a right to redress under his private contract.

This distinction is very clearly brought out in the case of *Hough* v. *Land Co.*[1] There A filed a bill to have a transaction set aside as *ultra vires*. The facts were that the X company was incorporated to deal in certain lands. The company bought land, other than that specified in the charter, from A, and gave A in payment money and shares of stock in the company, which shares he returned to the company as collateral security for a loan made to him. A prayed that the transaction might be set aside and the contract cancelled; that the said stock might be cancelled and the company restrained from selling said stock so held as collateral. The court said: "Our conclusion is, assuming appellant's construction of the several statutes affecting appellee's corporate powers to be correct, appellant may, as a stockholder, on a bill filed for that purpose, have relief in equity to restrain appellee from acting in excess or in violation of its corporate powers; and he may also, as a citizen of the state, cause steps to be taken in its name, for the same cause, to have judgment of forfeiture of its franchise; but he cannot, as grantor of lands, urge such acts as a cause for decreeing his deed void, and a rescission of his contract."

If it is to be admitted that the member has a standing on grounds of public policy apart from his contract, then we must admit that any one, in any action, may raise the issue of *ultra vires;* a doctrine which even the advocates of the special capacities theory of corporate existence would not countenance, and, *a fortiori*, those who advocate the general capacities theory

[1] 73 Ill. 23 (1874).

would not countenance. It is conceived that the cause of action of the stockholder is the same, whether one hold to the special capacities theory or to the general. In either case, his rights as a partner are infringed by the danger of a loss—from the non-enforcement of the *ultra vires* contract by the courts which recognize the special capacities theory, or from the forfeiture of the charter, in case the general capacities theory is recognized.

The cases on the subject of *ultra vires* acts are not numerous, as we are not concerned with the question of what is an *ultra vires* act, to which most of the cases address themselves, but with the right to redress such act, granted its existence. The issue of *ultra vires* is far oftener raised by a stranger than by a member of the corporation.

C. Of Such Actions in General.

At considerable and, doubtless, at unnecessary length, the jurisdiction of courts to enforce the rights of stockholders, and the nature and kinds of such rights have been discussed.

It remains but to add a few words with reference to some general substantive characteristics of such rights, and some requisites of the actions founded on these rights, applicable to actions brought for any of the causes which have been considered.

And first as to the parties plaintiff to such bills.[1]

It is unquestioned that a single stockholder may maintain such a bill on account of the injury which is being done him, whether the gravamen of his action be fraud or an *ultra vires* act. This was stated in *Mozeley* v. *Alston*.[2] But the general rule is, in accordance with the usage of equity pleading, that the plaintiff must bring his suit on behalf of himself and all those who may join him in sustaining it and sharing the cost of its prosecution.[3]

[1] Of course, all discussion here as to parties is subject to what has before been said as to making the corporation itself the plaintiff where possible; this whole essay deals with the state of affairs in which the stockholder finds himself when he discovers that corporate action is an impossibility.

[2] Supra; 1 Phill. 800 (1847).

[3] Armstrong *v.* Church Society, 13 Grant Ch. (U. C.) 552 (1867). An examination of almost any of the cases cited under the head of "Fraud" (supra), will illustrate this proposition.

Enough has been said on the subject of *ultra vires* acts to show that the same practice would prevail in such cases. The reason for requiring the bill to be cast in this form, as a general rule, is, that it avoids multiplicity of actions by numerous dissatisfied stockholders. It should seem, therefore, that if a disgruntled shareholder fails to join in such a suit, when he has knowledge of its existence, he will be bound by the decree rendered, and cannot re-open the litigation by a second bill filed in his own behalf. This was the view taken by the court in *Willoughby* v. *Chicago Junction Company*.[1] The court reasoned that such a suit was brought, in fact, not in the right of the stockholder, but on behalf of the corporation which he was unable to set in motion; the corporation must, therefore, be considered bound by the decree rendered; and if the corporation be bound, it follows that the other stockholders are also bound. This reasoning, while undoubtedly correct, seems unnecessary to reach the result at which the court arrived, which, however, is evidently correct on general principles of equity.

The cases which dealt with the averments necessary to sustain the action, such as *Dodge* v. *Wolsey* and *Hawes* v. *Oakland*, were cited at the points where they appear because it was conceived that they dealt not with mere matters of procedure —granted the right of the individual—but with the very question of the individual's right itself.

Further than this, however, it is always requisite that complainant be a *bona fide* shareholder, and that he bring his bill to enforce his rights as a member of the company, and because such rights have been infringed and his interest in the company is thereby jeopardized. This appears from the case of *Forrest* v. *Railway Company*.[2]

In that case, A, a stockholder in the X railway company, filed a bill setting out that the company was running a packet line, which was beyond the scope of its charter—which gave it merely the rights of a railway company—and prayed an injunction. From the evidence, it appeared that plaintiff

[1] 50 N. J. Eq. 656 (1892).
[2] 4 DeG. F. & J. 125 (1861).

was a much heavier stockholder in the Y Packet Company, a company which competed with the line of packet-boats established by the X company, than he was in the X company. A testified that he brought this suit by "direction" of the directors of the Y Packet Company, and that they had undertaken to indemnify him against the costs of the suit.

Lord Westbury, C., said: "But, can I permit a man who is the puppet of another company to represent the shareholders of the company against whom he wishes to establish the interests and benefits of a rival scheme . . . I have nothing to do with the motives of the plaintiffs suing in this court. If they come here in a *bona fide* character, the reason for their coming here is a matter beyond the province of a court of equity to inquire into. But if a man comes here representing to me that he is a *bona fide* shareholder in a company, and that it is the *bona fide* suit of that company, and it turns out not to be the suit of that company, but in reality to be in its origin and its very birth and creation the suit of another company, then I repeat that illusory proceeding, and ought not to be attended to by the court . . . I treat this suit as an imposition on the court."

This case is not to be understood to decide that the motives of the plaintiff or his personal character are to be considered by the court in such a suit.

In *Seaton* v. *Grant*,[1] plaintiff had lost money by speculation in the stock of the X company. He purchased five shares for the purpose of qualifying himself as a shareholder, and then filed a bill on behalf of himself and the other shareholders against the company and third persons impeaching certain transactions between them, on the ground of fraud. Defendants moved to take the bill off the file, showing (a) that plaintiff sued *mala fide*; (b) that his interest was too insignificant to justify his maintaining the suit. The court held that it had nothing to do with the *mala fides* of the plaintiff, and distinguished the case from *Forrest* v. *Ry. Co.* (*supra*). Secondly, they held that the fact that plaintiff was suing on behalf of the other shareholders was a sufficient ground to sustain the suit.

[1] L. R. 2 Ch. App. 459 (1867).

And in *Colman* v. *Eastern Counties Ry. Co.*,[1] an action was brought on a state of facts similar to those of *Forrest* v. *Ry. Co.*, the plaintiff appearing in this case to have been "instigated" by the board of directors of the rival company of which he was also a member. The court held, however, that the action could be maintained, as his motive was immaterial.

The cases are hard to reconcile. A possible distinction is that between "instigation" and "direction," but such a distinction is clearly unsatisfactory.

It is suggested that where plaintiff has a property right to protect, as where he sues to enjoin or set aside a fraudulent act which will endanger his interest in the business, in such a case he must sue to protect that interest, and so, if the case of *Forrest* v. *Railway Company* had been such a case, the decision would have been very reasonable. But, on the other hand, where he sues to enjoin or to set aside an act which is a breach of contract, such as an *ultra vires* act, there he has a right to have his contract with his fellows enforced, no matter what his motive or interest may be, and the court has not the slightest concern with the capacity in which he sues. If this position be sound, it should seem that *Forrest* v. *Railway Company* was wrongly decided, and *Colman* v. *Eastern Counties Railway Company* and *Seaton* v. *Grant* rightly decided; for they were all cases of *ultra vires* acts—breaches of contract as regards plaintiff.

These cases point us naturally to the inquiry as to when plaintiff's interest must have been acquired to enable him to sue. And on this point we find the cases in apparent conflict.

Windsor v. *Bailey*[2] was a bill in equity by W et al. against the H. Mfg. Co. and various individuals, alleging wrongful payment of certain moneys of the company to parties outside the corporation, and praying that the recipients be decreed to re-pay the same. The bill alleged that plaintiffs were the owners of the stock and showed how many shares each owned, but did not allege that they were owners of the stock at the time of the payments complained of. Defendants demurred

[1] 10 Beav. 1 (1846).

[2] 55 N. H. 218 (1875).

on the ground that plaintiffs were not owners of the stock at the time of the said acts. The court said: "The transfer of the stock conveyed to them not only the ownership of the shares and the right to take the future dividends thereon, but also placed them on an equal footing with the other stockholders in respect of the right to call the officers and agents of the corporation to an account for their fraudulent conduct."

In *Dimpfel* v. *Railway Co.*,[1] A, a stockholder, brought his bill against the company to set aside a contract between the campany and the X company, by which the company became the owner of part of its road, known as the Springfield Division. It did not appear that plaintiff owned his stock when the transaction took place. Held, that on that account he was not entitled to relief and, further, that if he was a stockholder at the time mentioned he had been guilty of laches, and had so barred himself from bringing an action.

In *Parsons* v. *Joseph*,[2] the facts were similar to those of the Dimpfel case, but the court refused to follow it, saying that the rule was settled the other way, and that the better opinion in most of the state courts was that plaintiff need only show an interest at the time of bringing suit. In commenting on the Dimpfel case, the court said that that case was based on Equity Rule No. 94 of the Supreme Court of the United States,[3] and that that rule was only devised to guard the courts of the United States from imposition and fraud, and was not to be considered as expressing a substantive rule of law. This view seems quite reasonable. The Supreme Court evidently framed the rule in question while smarting under the sense that it had been frequently imposed upon by corporations; it is rather too severe to be adopted in ordinary suits.

It is believed that the decision in *Parsons* v. *Joseph* is preferable, and that the better rule is that a plaintiff need not show when he acquired his stock, so long as he is the *bona fide* owner of it at the time of suit brought. There is a proviso, however, to be added to this proposition, viz.: that he must

[1] 110 U. S. 209 (1884); see, also, Taylor *v.* Holmes, 127 U. S. 489 (1888).
[2] 92 Ala. 403 (1892).
[3] Supra.

have purchased his stock without knowledge of the alleged wrong. In *Parsons* v. *Joseph*, the answer of defendants averred that plaintiff's transferor knew of the acts complained of and consented thereto. The court held that this could not affect plaintiff's right to bring an action unless plaintiff had knowledge of the acts.

On the other hand, it has been held in New York,[1] that the transferee can have no higher right than had his transferor, and cannot maintain a suit if his transferor could not have done so, irrespective of plaintiff's knowledge or ignorance of the acts complained of. The court said that, as the action must be brought by a plaintiff in the same right as it would have been brought by the parties to the fraud (his transferors), he was not entitled to recover.

The facts were, in both the Alabama and the New York cases, that the officers, with the consent of the members, had issued shares of stock, to a party made defendant in the suit, in exchange for property of far less value than the stock so issued. They had "watered" the stock of the company.

It is submitted that the view of the New York court is the better under the circumstances involved, but that the Alabama case expresses the general principle applicable to most actions of this sort. In each case, plaintiff would have had an action against the directors if he had suffered any damage. But it is evident that in such an action as the present he sues on behalf of the corporation, and, as a matter of fact, the corporation has not suffered because it has been deprived of nothing of value by the issue of the stock. The purchaser took back what he gave in another form. If the corporation could not complain, much less could the stockholder who sues to enforce its rights because it cannot or will not do so. But these two cases must go on their own peculiar facts. *Parsons* v. *Joseph* expresses the law applicable to all cases in which the corporation would have a right to sue, but refuses to exercise the right, and where plaintiff's transferor also neglected or refused to exercise his right or was a party to the fraud. Justice, public policy and convenience seem to

[1] Parsons *v.* Hayes, 14 Abbot, N. C. 419 (1883).

demand that in such cases as, for instance, fraudulent sale of corporate assets by officers, *ultra vires* acts of directors, etc., the assignee of the stock, *bona fide* and without notice, should have the right to sue,[1] and in so far as *Parsons* v. *Hayes* lays down any different rule, it seems that it is erroneous. Any such rule laid down, however, would not be necessary to the decision of the case, and while the court's statements are very broad, still the facts of the case are sufficient to support the decision apart from the question of assignment. If the case be rested purely on the ground of assignment, and the fact that plaintiff cannot recover because his title is tainted with the same fraud as that of those whom he sues, it is submitted that *Parsons* v. *Joseph* is expressive of the better rule.[2]

It is further necessary to plaintiff's success that he be free from laches. Such suits are governed by the ordinary rules of equity. One of its cardinal rules is *equitas vigilantibus non dormientibus subvenit.* This, as was seen, was one of the grounds for denying relief in *Dimpfel* v. *Railway Co.* (*supra*), and it has been a frequent cause for the dismissal of stockholders' bills. Naturally, the rule applies to all cases, whether of fraud, of *ultra vires* acts, or of diversion of the corporate assets to a new enterprise.[3]

A novel decision on this subject was *Burt* v. *British Association.*[4] There plaintiff sued on behalf of himself and all the other stockholders of the company. The defence was that plaintiff had been a director and so had knowledge of the transactions complained of, and was to be taken to have acquiesced in them and to be disqualified to sue. Plaintiff insisted, however, that the suit was maintainable because there were others interested in the subject matter of his bill who were not in his position.

[1] Morawetz Priv. Corps. §§ 267–70.

[2] Re British Etc. Co., 17 Ch. D. 467 (1881); Flagler *v.* Flagler, 19 Fed. 468 (1884); Foster *v.* Seymour, 23 Fed. 65 (1885).

[3] Peabody *v.* Flint, 6 Allen, 52 (1863), at p. 57; Allen *v.* Wilson, 28 Fed. 677 (1886); Ffooks *v.* L. & S. W. Ry. Co., 1 Sm. & G. 142 (1853); Graham *v.* Birkenhead Ry. Co., 2 Macn. & G. 148 (1850); Taylor *v.* Holmes, 127 U. S. 489 (1888); Gregory *v.* Patchett, 13 Beav. 595 (1864); Brady *v.* Atlantic City, 32 Atl. 271 (1895).

[4] 4 DeG. & J. 158 (1859).

The court said: "But that will not give the plaintiff a title to sue for them. As on the one hand a plaintiff who has a right to complain of an act done to a numerous society of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested though no other may wish to sue, so, although there are a hundred who wish to institute a suit, and are entitled to sue, still if they sue by a plaintiff only, who has personally precluded himself from suing, that suit cannot proceed."

This case seems most sound. It is not in conflict with the case of *Willoughby* v. *Chicago Junction Co.*[1] It is conceived that the other alleged plaintiffs of record in this suit would not be precluded from bringing another action, for the reason that there has been no hearing on the merits. Their rights have not been adjudicated nor have they been before the court. So a dismissal of the suit for the cause given would be no bar to a subsequent suit. In the Willoughby case, on the other hand, the judgment was rendered at the instance of a properly qualified plaintiff and on the merits. There the court properly held that the other stockholders were precluded from bringing another suit because they had had an opportunity to join in the first and had neglected to do so, and their cause of action had been considered and adjudicated on its merits.

The question of parties plaintiff having been discussed, it remains to determine who should be made defendants to such bills.

In the first and simplest case, that of fraud—a matter wholly within the corporation—it is necessary to join the corporation as a party of some sort, so that its rights may be defined as well as those of the other stockholders. These stockholders' bills are brought on the express ground that the corporation cannot be made plaintiff; it, therefore, follows that it must be made a party defendant. The failure so to join the corporation is cause for dismissing the bill.[2] The same reasoning applies to suits arising out of *ultra vires* acts or diversion of the corporate capital.

[1] Supra.

[2] Hersey *v.* Veasie, 24 Me. 9 (1844).

In *Macbride* v. *Lindsay*,[1] a bill by a single stockholder alleged the incorporation of the company for the purpose of working certain mines ceded to the English Crown, and that said purpose had not been carried out, and prayed an injunction against the collection of certain calls from plaintiff, and a decree that the company should return him his contribution to the capital stock. The directors and one X were made defendants. The answer set up that all the other shareholders had consented to the application of the corporate funds to other purposes. Plaintiff claimed that this was a reason why he should have his contribution back. Held, that the other stockholders might be prejudiced by a decree where they or the corporation were not parties, and bill dismissed.

Nothing has as yet been said with reference to the making of third parties defendants to suits of this character, but many of the cases which have been cited and commented upon have recognized the right, and some have gone expressly on such a theory. For example, *Dodge* v. *Wolsey*,[2] was a case where an injunction was asked against a state treasurer to prevent his collecting a state-tax from the corporation in question. An injunction was issued, the court finding no difficulty in thus reaching a stranger to the corporation. If the wrongful act is that of the directors themselves, plaintiff sues them; if the wrong is done by a third party, not a member of the corporation, and the directors refuse to redress it, and are sustained by the corporation, then, in addition to making the latter parties to his bill, he, of course, joins the said third party. Equity will make its remedy complete and will assume jurisdiction over all the parties concerned in the wrong complained of. The language of Sir George Jessel, in *Russel* v. *Wakefield Water Works Company*,[3] is in point.

He said: "If the subject matter of the suit is an agreement between the corporation acting by its directors or managers and some other corporation, or some other persons, strangers to the corporation, it is quite proper and quite usual to make

[1] 9 Hare, 574 (1852).
[2] Supra.
[3] L. R. 20 Eq. 474 (1875), at p. 481.

that other corporation or person a defendant to the suit, because that other corporation, or person, has an interest, and a great interest, in arguing the question and having it decided, once for all, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member. So that in these cases you must always bring before the court the other corporation."[1]

In *Salamons* v. *Laing*,[2] a bill by a stockholder was filed against the X company, of which he was a member, and the Y company, to set aside a certain *ultra vires* transaction, and for an account and restitution by the Y company. The court held that the Y company was a proper party defendant, saying, "they are not third parties; they have made themselves principal parties to this misapplication."

In *Elkins* v. *C. & A. R. R. Co.*,[3] A, a stockholder in the B company, brought his bill against the company to restrain it from entering into certain contracts with the X company and the Y company, which he alleged were fraudulent as against him. X and Y were not made parties defendant. It was held that no decree could be made. "It is an obvious dictate of reason and justice that a court shall not determine the rights of a party not before it, and who has had no opportunity to be heard in defence of them."

It is not, however, possible for the plaintiff to proceed directly against the outside party or corporation. He must make his own corporation a party.

In *Davenport* v. *Dows*,[4] D, a citizen of New York, on behalf of himself and all the other stockholders of the X railway company, who were not citizens of Iowa, filed his bill in the United States Circuit Court for the District of Iowa, to enjoin the collection of a tax levied by the City of Davenport. The city demurred on the ground that the railway company was not made a party to the bill.

[1] Simpson *v.* Denison, 10 Hare, 51 (1852); Hare *v.* Ry. Co., 2 J. & H. 80 (1861).

[2] 12 Beav. 377 (1850).

[3] 36 N. J. Eq. 241 (1882).

[4] 18 Wall. 626 (1873).

Mr. Justice Davis said, in the Supreme Court, "Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted, the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit involving precisely the same subject matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is an essential party in interest unless it is made a party to the litigation." The bill was dismissed.[1]

It may further be said, in the language of Jessel, M. R., "When you have got the second corporation or person a party to the suit it may happen that, in addition to the relief you are entitled to as regards the first, you are entitled to have relief against the second for something that has been done under the *ultra vires* agreement. You may be entitled to have money paid back which has been paid under the *ultra vires* agreement, as in the case of *Salamons* v. *Laing*, and you may be entitled to have property returned or other acts done. . . . It is a necessary incident to the first part of the relief which has been obtained by individual corporators, and will do complete justice on each side, and that has always been the practice in this court. Therefore, in a case so framed, there is no objection to a suit by an individual corporator to recover, from any other persons being strangers to this corporation, the money or property so improperly obtained."[2]

With the foregoing comment as to the parties to these actions, we may bring the discussion of their nature and incidents to a close. The field here attempted to be covered

[1] See, also, Robinson *v.* Smith, 3 Paige, 222, 233 (1832); Cunningham *v.* Pell, 5 Id. 607 (1836); Charleston Insurance and Trust Co. *v.* Sebring, 5 Rich. Eq. 342 (1853).

[2] Russell *v.* Wakefield Water Works Co. (supra).

is a large one, in spite of its recent development, and the name of the cases coming within it is legion.

The effort has not been, in any sense, to compile an exhaustive digest of the decisions, but simply to choose such illustrative cases as are important as leading cases on the various heads treated, or as striking decisions. It is believed that no topic of importance has been omitted from this review, or has been left without the citation of some judicial utterance with respect to it.

Owen J. Roberts.