

Pacific Railroad Vs. Missouri Pacific Ry. Co.

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Appeal No. : 111 U.S. 505

Appellant : Pacific Railroad

Respondent : Missouri Pacific Ry. Co.

Judgement :

Pacific Railroad v. Missouri Pacific Ry. Co. - 111 U.S. 505 (1884)

U.S. Supreme Court Pacific Railroad v. Missouri Pacific Ry. Co., 111 U.S. 505 (1884)

Pacific Railroad of Missouri v. Missouri Pacific Railway Company

Argued April 23-24, 1884

Decided May 5, 1884

111 U.S. 505

APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF MISSOURI

SYLLABUS

In 1876, K brought a suit, in a circuit court of the United States in Missouri to foreclose a mortgage on a railroad, making the railroad corporation (a citizen of Missouri) and others defendants. There was a decree of sale, and

a sale, and it was confirmed in October, 1876. In February, 1877, the corporation appealed to this Court. The case was affirmed here in April, 1880. In June, 1880, the corporation filed a bill in the same court against another Missouri corporation (a citizen of Missouri) and other citizens of Missouri, alleging fraud in fact in the foreclosure suit, in the conduct of the solicitor and directors of the corporation defendant in that suit, and praying that the decree in the K suit be set aside. On demurrer to the bill, *held*:

1. The record in the K suit, not being made a part of the bill or the record in this suit, could not be referred to.
2. The charges of fraud in the bill were sufficient to warrant the discovery and relief based on those charges;
3. The case set forth in the bill, being one showing that no real defense was

Page 111 U. S. 506

made in the K suit, because of the unfaithful conduct of the solicitor and directors of the defendant in that suit, was one of which a court of equity would take cognizance.

4. There was no laches in filing the bill, as the time during which the appeal to this Court was pending could not be counted against the plaintiff.

5. As the bill showed hostile control of the corporate affairs of the plaintiff by its directors during the period covered by the K suit, mere knowledge by, or notice to, the plaintiff, or its directors, or officers, or stockholders, of the facts alleged in the bill during that period was unimportant, a case of acquiescence, assent, or ratification, or of the intervention of the rights of innocent purchasers not being

shown by the bill, and the corporation having acted promptly when freed from the control of such directors.

6. It did not follow that parties who became interested in the plaintiff's corporation with knowledge of the matters set forth in the bill, were entitled to the same standing as to relief with those who were interested in the corporation when the transactions complained of occurred;

7. The circuit court had jurisdiction of the bill, although the plaintiff and some of the defendants were citizens of Missouri.

On the 26th of June, 1880, the Pacific Railroad (of Missouri), a Missouri corporation, filed a bill in equity in the Circuit Court of the United States for the Eastern District of Missouri against the Missouri Pacific Railway Company, another Missouri corporation, and various individual defendants, citizens of Missouri, Massachusetts, and New York, and a New York corporation. The main object of the bill is to impeach and vacate for alleged fraud in fact a decree made by that court, June 6, 1876, foreclosing a mortgage on railroad property of the plaintiff, and ordering its sale. The sale was made September 6, 1876, it was confirmed by the court October 7, 1876, and a deed was given October 24, 1876, by the master, to the purchaser, who was James Baker. The decree was made in a suit brought November 11, 1875, by one Ketchum, a citizen of New York, against the present plaintiff and various citizens of Missouri and New York, to foreclose a mortgage given by the present plaintiff July 10, 1875, on its railroad and other property, to Henry F. Vail and James D. Fish, trustees, called the "third mortgage," to secure a proposed issue of bonds of \$4,000,000. On the first of February, 1877, the present plaintiff took an appeal to this Court from the decree of June 6, 1876, and from the order confirming the sale. The case was returnable at October term, 1877, was heard here in January,

Page 111 U. S. 507

1880, was decided in April, 1880, the decree below being affirmed, and a rehearing was applied for and was denied May 10, 1880. See *Pacific Railroad v.*

Ketchum, [101 U. S. 289](#) . This bill was then promptly filed.

Copies of the bill in the *Ketchum* suit, and of the decree and the deed of the master and the order of the court approving the deed are annexed to and made a part of the bill in this suit. The material allegations of the latter are these:

C. K. Garrison, James Seligman, and Pierce (three of the defendants in this suit) were made co-plaintiffs in the *Ketchum* suit, before the decree was entered, and their solicitors were directed to receive their instructions from and be advised by said Baker, who was the solicitor of this plaintiff, and they did follow Baker's instructions. The decree was procured to be made by the court by false and fraudulent representations made by the defendants herein. The decree and the master's deed designedly and fraudulently embraced more and other property of this plaintiff than was embraced in the mortgage being foreclosed, in the following language, which was interpolated without the knowledge of this plaintiff, *viz.*,

"Including, among other things, the track on Poplar Street, and the levee in the City of St. Louis, commonly known as the 'Poplar Street track,' the value of which property is more than \$200,000. All of the defendants in this suit (only three of whom, Baker, Vail, and Fish, were defendants in the *Ketchum* suit, and four others of whom, Ketchum, C. K. Garrison, James Seligman, and Pierce, were plaintiffs in the *Ketchum* suit) had knowledge of and were parties to the frauds herein complained of, either at their inception or by 'subsequent subrogation.' The Atlantic & Pacific Railroad Company (which will be called the Atlantic Company) was the lessee of this plaintiff's railroad, under a lease, a copy of which is annexed to the bill as an exhibit, and which this plaintiff asks leave to refer to with the same effect as if it were set out at length in the bill, and was in possession of the property of this plaintiff. By the terms of said lease, the Atlantic Company assumed certain obligations, including the payment of a rental to this plaintiff, being unable to pay which, its manager sought to evade its obligation by destroying this

plaintiff. On and before June, 1872, the chief officers and directors of the Atlantic Company, who were Andrew Pierce, Jr., Joseph Seligman, A. V. Stout, and others unknown, procured the ownership or control of a majority of this plaintiff's stock, for the avowed purpose of procuring control of all its assets and road, and in execution of such purpose, said directors and officers procured the execution of said lease between the two roads on June 29, 1872. Upon the execution of the lease, the Atlantic Company became possessed of all the property and franchises of this plaintiff, and at all times since this plaintiff has not been in control of any of its property except to receive rents under the lease, from June, 1872, to July, 1875. Since the making of the lease, the stockholders of this plaintiff have been paid all dues under the lease, to July, 1875. All interest on its bonds was also paid, and this plaintiff was not in default on any mortgage liability which existed when the lease was made. During the lease, the Atlantic Company, by false and fraudulent representations that this plaintiff was indebted to it for improvements made on this plaintiff's property, procured the execution by this plaintiff of three issues of bonds, namely income bonds, for \$1,500,000; improvement bonds, for \$2,000,000; third mortgage bonds, so-called, for \$4,000,000. The proceeds of all of said issues of bonds went to the Atlantic Company or the persons by whose false and fraudulent action their issue was procured. At or before November 11, 1875, when the *Ketchum* foreclosure suit was begun, the Atlantic Company was indebted to various persons and corporations, whose names are set forth. C. K. Garrison, on his examination in the *Ketchum* suit, said that he was one of the complainants in that suit, and the owner of over \$1,500,000 of the third mortgage bonds, and represented the owners of the rest. By the terms of the lease, the Atlantic Company undertook to pay all the debts of this plaintiff, as well as all operating and repairing expenses and all interest on bonds to be issued after the date of the lease, for extending its lines, buying rolling stock, and rentals. The pretended increase of mortgage debt of \$4,000,000, between July 1, 1871, and July 10, 1875, is fictitious, fraudulent, without consideration, and contrary

to the laws of Missouri. The net income of this plaintiff's road from the date of the lease to December 31, 1874, was \$739,172.68. The recitals in the third mortgage bonds that they were issued to procure additional rolling stock for this plaintiff's road were false. This plaintiff had no legal capacity to execute the third mortgage or to issue \$4,000,000 of bonds. The law of Missouri only authorized mortgages of railroad property for certain stated purposes, and no issue of bonds is valid without the vote of the stockholders. The only pretended authority for making the third mortgage (a copy of which is annexed to the bill) is shown by a circular and form of proxy issued to the stockholders by Mr. Hays, president, of which copies are attached to the bill. The circular and "

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proxy do not authorize the mortgage of \$4,000,000, or of any amount whatever. The Atlantic Company did not negotiate absolutely any of the \$2,000,000 of improvement bonds, but used them to aid its own credit, and several of its directors and officers of this plaintiff were endorsers on obligations of the Atlantic Company secured by said bonds. The third mortgage was procured to be executed fraudulently, to be used as additional security for said endorsements, and \$2,500,000 of the third mortgage bonds were used to secure the payment of obligations of the Atlantic Company, and said Garrison and Seligman and the defendant Sage, with full knowledge of these facts, bought at heavy discount the past-due obligations of the Atlantic Company, with the accompanying third mortgage bonds. Some of the directors and former officers of this plaintiff were interested in the bonds or the obligations, and vigorously prosecuted the foreclosure suit, to the destruction of the interests of the stockholders of this plaintiff. The defendants Stout, Fish, D. R. Garrison, Samuels, W. R. Garrison, and C. K. Garrison were, during all these transactions, up to the commencement of the foreclosure suit, either directors of the Atlantic Company or of this plaintiff, or creditors of, or otherwise interested in, the Atlantic Company, and benefited by said frauds, and were fully cognizant of the creation of said fraudulent bonds and of said fraudulent acts, and are not holders in good faith of said third mortgage bonds. The defendant C.

K. Garrison agreed with Andrew Pierce, Jr., Baker, and D. R. Garrison that if they, controlling, as they did, the defense to the *Ketchum* suit, would consent to a decree therein in the manner and form in which consent to the entry of said decree was given, he would pay all their liabilities in connection with the Atlantic Company. Pursuant to such agreement, said Garrison did pay said liabilities and took the improvement or third mortgage bonds which were held as collateral, and thereupon said Pierce, Baker, and D. R. Garrison caused said decree to be entered, and falsely set forth that this plaintiff consented to the decree and authorized the action of Baker in the premises. Prior and subsequent to November 1, 1875, Baker, one of the directors of this plaintiff and its general attorney, with Andrew Pierce, another director, and others unknown, confederated with some of the defendants herein to institute proceedings to foreclose the third mortgage for the entire \$4,000,000 in order to obtain the entire property for themselves for greatly less than its real value. In execution of this scheme they procured the bill of foreclosure in the *Ketchum* case to be printed prior to November 1, 1875, and filed in the Circuit Court of the United States for the Eastern District of Missouri, and procured the complainant, Ketchum, to allow his name to be used therein, and the bill was sworn to before the coupons were in default, and, without waiting the six months required by the trust deed or procuring the request of the requisite number of bondholders, they began suit. Baker admitted service of subpoena in the name of this plaintiff, without authority, and without authority filed the answer of this plaintiff, falsely admitting the due and lawful execution of the mortgage and the liability of this plaintiff to pay the bonds, well knowing the said facts invalidating the bonds. As a part of the fraudulent schemes of the defendants, no replications were ever filed to put the cause at issue; no reference was ever made to a master, so as to truly inform the court of the character and amount of the debt; the cause was hurriedly disposed of, without waiting for the three months allowed by the rules of that court, in equity; no defense was ever undertaken to be interposed at any stage of the proceedings by Baker, who pretended

to act as solicitor for this plaintiff, but who really acted for Andrew Pierce, W. R. Garrison, C. K. Garrison, Russell Sage, James Seligman, and others unknown, in procuring the decree of foreclosure and the sale thereunder; the trustees, who alone had any right to foreclose the mortgage, never filed any cross-bill or prayed any relief; the recital in the decree that the cause was heard on "proofs" was wholly false and fraudulent, and there never was any judicial hearing whatever; no proofs were ever taken or offered, but the decree was prepared and entered entirely by consent of and collusively between the complainants and the counsel and officers of this plaintiff, who were both carrying out the common purpose of procuring the speediest decree of foreclosure, for which the action was originally instituted, and in fraud of the rights and property of this plaintiff, and without any authority from it; it was false that Garrison, Pierce, and Seligman were the owners of the bonds, as recited in the decree, and the complainants and Baker,

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counsel for them, and the officers of the corporation, consenting to said decree, knew of all the facts invalidating the bonds, and wrongfully concealed all such facts from the court; no decree was entered decreeing what debt was due under the mortgage or ordering the payment thereof or giving any time or opportunity for redemption; the third mortgage bonds neither by their face nor by any provision of the mortgage were due at the time the decree was made, and no interest thereon was unpaid, except the coupons which matured on the first of November, 1875, well knowing that there was cash in the hands of the receivers appointed by the court in the case and valuable real estate in the City of St. Louis which could be separately sold which was far more than sufficient to pay the entire amount of interest justly due on the mortgage debt, even if valid, the complainants and the attorney for this plaintiff, jointly, and for the purpose of defrauding this plaintiff, procured the entry of a decree to sell the entire property of this plaintiff to pay the principal and interest of the bonds, and the whole amount of the third mortgage bonds were not then and have not since been issued, and in any event were not, to the full sum of \$4,000,000, a

lien upon the premises. Baker, in pursuance of said fraudulent understanding, purchased the property at the sale not for this plaintiff, his clients, and received a pecuniary reward from the defendant the Missouri Pacific Railway for doing the same. He bought the property upon secret agreements, and in trust for C. K. Garrison and his associates, for \$3,000,000, payable in third mortgage bonds, a sum greatly less than its actual cash value. C. K. Garrison was surety for Baker, as purchaser. Baker transferred his interest in the purchase to the defendant the Missouri Pacific Railway Company, which has since held it. It has issued to the holders of the third mortgage bonds of this plaintiff, bonds of itself for an equal amount, the third mortgage bondholders receiving accrued interest in cash, and purchasing an equal amount of the stock of the Missouri Pacific Company. The principal holders of the third mortgage bonds are and were C. K. Garrison, Sage, James Seligman, and others, who confederated to procure the decree. On November 1, 1876, the Missouri Pacific Company made a mortgage for \$4,500,000 to secure a pretended and fraudulent indebtedness, in which mortgage the defendant the Central Trust Company is now mortgagee. The defendants the Missouri Pacific Company, C. K. Garrison, Sage, and James Seligman own and control, or the same are held for their use, nearly the whole amount of the third mortgage bonds, and all took them with full knowledge of the want of authority to issue them and of their fraudulent character. As part of said fraudulent scheme, the Atlantic Company, in 1872, procured the passage of an act of the legislature to enable the directors of this plaintiff to retain control of the company against the will of the stockholders. From the passage of said act to December, 1876, the Atlantic Company, through the directors of this plaintiff, who were false to their trust, have, by means of said law, controlled the organization and management of this plaintiff's corporation. The directors of this plaintiff did not properly represent the interests of its stockholders, but used their position to strip it of its property. The stockholders of this plaintiff, in writing, requested said directors to resign, that others might be appointed in their place who would properly attend to the duties of their

office, and requested them to employ other counsel than Baker to defend the *Ketchum* suit, but said directors allowed Baker, who had caused the *Ketchum* complaint to be prepared before any cause of action arose and had caused the subpoena to be served on himself, to put in the answer of this plaintiff in said suit when said directors and Baker knew that the averments admitted were many of them false in fact. The defendants C. K. Garrison, W. R. Garrison, Oliver Garrison, D. R. Garrison, Jay Gould, Russell Sage, A. V. Stout, George J. Forrest, Webb M. Samuels, and Joseph L. Stephens, with others unknown, are now, or have been, directors of the defendant the Missouri Pacific Railway Company and in the receipt of its income, and had knowledge of all the matters complained of and were parties to said frauds, and have been, from October, 1876, to the present time, in possession of this plaintiff's property.

Answers on oath to interrogatories in the bill are required from all the defendants except Baker (Stout not being made a defendant in the prayer for process). The prayer of the bill is that the improvement bonds, and the third mortgage bonds, and the two mortgages securing them, and the mortgage to the Central Trust Company, be declared void; that the decree of foreclosure in the *Ketchum* suit be set aside, and that proper accounts be taken, and this plaintiff be allowed to redeem, and its property be restored to it. The decree in the *Ketchum* suit states that this plaintiff, as defendant, appears by James Baker, as its solicitor, and that he appears, as defendant, in his own proper person, and as solicitor for five other defendants, who are not defendants in the present suit. It also states that the

"court, being fully advised in the premises, and by the consent of the parties to this suit, through their solicitors of record, thereupon and in consideration thereof,"

decrees, but the terms of the consent are not otherwise set forth in the decree.

There are two demurrers to the bill, one by the Missouri Pacific Railway Company, O. Garrison, D. R. Garrison, Samuels, and Baker, the other by Ketchum, C. K. Garrison,

Pierce, and Stephens. The two demurrers are substantially identical, except that in the first one, O. Garrison, D. R. Garrison, and Samuels allege that they are not proper or necessary parties, and in the second one it is alleged that the circuit court has no jurisdiction over the suit. In other respects, each demurrer is as follows:

"The defendants, . . . by protestation, not confessing all or any of the matters or things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that the said complainant has not, by its said bill, made such a case as entitles it, in a court of equity, to any discovery from these defendants respectively, or any of them, or any relief against them, as to the matters contained in said bill, or any such matters, and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of. And for further and more specific grounds of demurrer, these defendants aver as follows, to-wit:"

"(1) If or insofar as the said bill of complaint is to be treated and regarded as a bill of review for errors apparent in the record, then it clearly appears that the time limited by law for the bringing of such a bill of review had elapsed long prior to the bringing of the present suit, and also that said decree has been affirmed on appeal by the Supreme Court of the United States. If or insofar as the said bill of complaint is to be regarded and treated as a bill of review instituted upon the discovery of new matter, or based upon errors not apparent of record, then it appears that no leave of this Court has been obtained for the filing of such a bill of review. It does not appear in the bill of complaint or otherwise that the matters of complaint therein set forth were not known to the complainant at the time of the pendency of the foreclosure or that they could not have been therein set forth or determined, and the bill of complaint discloses such negligence and laches in the institution of the suit as destroys complainant's right to the relief prayed for."

"(2) The bill of complaint contains

Page 111 U. S. 515

no description of the property mortgaged or covered by the decree, and in reference to which relief is sought to be had."

"(3) The bill of complaint fails to set forth the bill of complaint or the decree in the proceedings sought to be assailed, or the tenor or purport thereof, all of which things should appear in the body of the bill of complaint, in order to entitle the complainant to any relief or discovery."

"(4) The averments of the bill of complaint show that the complainant, even if its bill is to be treated as an original one and not a bill of review, should be precluded by its own laches and neglect from now instituting the present proceeding, for it is nowhere averred that the complainant or its stockholders were at any time ignorant of the various alleged frauds complained of, and on the other hand it does appear that the complainant and its stockholders were all along aware of all the facts now sought to be assigned as grounds for relief and discovery in the bill, and that the complainant could have instituted its suit under the authority of the officers now representing it as early as March, 1877, and that the stockholders of complainant had the means and remedies to have averted the alleged wrongs, as well as the rendering of the decree and the foreclosure of the property now complained of, insofar as they may have had any just defenses thereto."

"(5) It affirmatively appears by said bill of complaint, in conjunction with the exhibits sought to be made a part thereof, that the said stockholders of the complainant, having full knowledge of all the matters now sought to be set up as grounds of relief and discovery in this case, were allowed full opportunity to interpose any and all objections they might have to the rendering of said decree, and not only failed to do so, but actually assented to said decree in manner and form as it was rendered, and that the said stockholders actually assented to and ratified the sale of the property which was made under and by virtue of the foreclosure proceedings."

"(6) The bill of complaint fails to aver that its stockholders were at the time ignorant of the various facts alleged as occurring and existing prior to the foreclosure suit, or during the pendency of said suit, or that they were in any way precluded from making any defenses that they might have to said decree of foreclosure, all which averments, under the facts and circumstances of this case, should be made to appear by the bill of complaint, in order to entitle it to any relief or discovery."

"(7) The said bill of complaint is altogether vague, uncertain,

Page 111 U. S. 516

and inconsistent in its various averments, and abounds in prolix, redundant, and impertinent matters, and it is not such a bill as, under the course of proceedings in chancery and of this Court, these defendants ought to be called upon to make plea or answer to."

"(8) There is a defect of material and necessary parties defendant in said suit, for it appears from said bill of complaint that in order to the obtaining of the relief sought for, J. B. Colgate & Co., D. L. Caldwell, the National Bank of Commerce of New York, the National Shoe and Leather Bank, Andrew Pierce, as well as other corporations and individuals, and especially the officers of the Atlantic and Pacific Railroad Company at the time of the perpetration of the alleged frauds, and the former officers of the Pacific Railroad, are necessary and proper parties to the suit, in order to the obtaining of the relief sought to be had in the bill of complaint."

"(9) The thirty-fourth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty-first, and forty-second clauses of the bill of complaint contain matters and allegations that are entirely immaterial and irrelevant, and all of which have been adjudicated against the complainant on appeal by the Supreme Court of the United States."

The demurrers were brought to a hearing, and were, by consent, ordered to stand as demurrers for the Central Trust Company, and were sustained. 12 F. 461. The plaintiff elected to abide by the bill, and it was dismissed and the plaintiff has appealed.

The circuit court, in its opinion, regarded the bill as an original bill to impeach the prior decree for fraud, and not as a bill of review upon newly discovered facts and evidence. It held the bill to be insufficient, for want of an affirmative allegation that the plaintiff was ignorant, during the pendency of the original suit, of the facts set up in the bill, much less that it was unable, after due diligence, to ascertain and plead

Page 111 U. S. 517

them. The court added:

"But the demurrer goes further and raises the question whether the bill and exhibits do not show affirmatively that the present complainant, through its stockholders, had notice of the foreclosure suit, knowledge of the defense now insisted upon against the third mortgage bonds, and ample opportunity to make that defense. It is, we think, very clear that in considering the question of notice, no distinction can be made between the corporation and its officers and stockholders. We cannot separate them and say the officers and stockholders knew of the fraud, but the corporation did not. If therefore the stockholders were advised of the foreclosure suit, and of the facts now charged as constituting fraud in the execution of the bonds and mortgages sued on therein, and had an opportunity to intervene and defend, and did not do so, the corporation is concluded by their laches. That the stockholders, as a body, were advised of the foreclosure suit, and took action looking to its defense, and that they did not rely upon the officers of the corporation, but distrusted and antagonized them, is clear from the allegations of the forty-fifth count of the bill, by which it is charged that the stockholders, in writing, requested the directors to resign, that others might be appointed in their place who would properly attend to the duties of their office; also that the stockholders requested said directors to employ counsel other than James Baker to defend the suit of Ketchum."

The court in its opinion then makes reference to various matters which, it states, appear in the record of the *Ketchum* case; that at a meeting of stockholders held in March, 1876 at St. Louis, several months before the decree of foreclosure was

made, a resolution was adopted requesting the directors to employ counsel to aid in the defense of the foreclosure suit; that the stockholders, or their managing committee, afterwards assented to the decree, and that the stockholders knew the facts now set up by way of defense.

The record in the *Ketchum* suit is not before us on this appeal. The only allegation in the bill in regard to it is this:

"Your orator prays liberty to refer to the files and records of said United States circuit court in the case of *George E.*

Page 111 U. S. 518

Ketchum v. Pacific Railroad et al. to show the collusive, irregular, and fraudulent character of the legal proceedings instituted, with advice of said Baker, the counsel of your orator, to sell all its property for the enforcement of a security which your orator avers to be fraudulent and void, and for which your orator had received no valuable consideration."

There is not in the record on this appeal any stipulation that the *Ketchum* record be considered as a part of the bill, nor is it identified in any way. It is no part of the transcript certified from the circuit court. The clerk of that court certifies that what is before us is

"a true transcript of the record in case No. 1,677, of *Pacific Railroad (of Missouri), Plaintiff, against Missouri Pacific Railway et al., Defendants*, as fully as the same remain on file and of record in said case in my office."

It follows that the record in the *Ketchum* case was never made part of the record in this case so far as appears from the only record which is before the court on this appeal. In regard to the bill in the *Ketchum* suit, and the decree, and the master's deed, and the order approving the deed, they are made a part of the bill in this suit, and identified by the annexing of copies. But the statement in the bill that the plaintiff prays liberty to refer to the files and records of the circuit court in the *Ketchum* suit, to show such and such things, can be of no force or effect to allow

either party to claim, in this Court, the right to produce or refer to anything as answering the description of such files and records, which it may assert to be such, or as being what the circuit court considered as before it. One of the assignments of error on this appeal is that the circuit court considered matters outside of the record, and matters not embraced in the bill. We are of opinion that this Court cannot consider anything which is not contained in the bill and the exhibits which are annexed to it, and that it cannot look into anything otherwise presented as the files and records of the *Ketchum* suit or of any other proceedings in any court for the purpose of determining the questions arising on the demurrers to this bill.

The decision of the circuit court was placed upon the ground that the stockholders, being dissatisfied with the action of the

Page 111 U. S. 519

directors and the attorney of the company in defending the foreclosure suit, were put on inquiry, and bound to do whatever it was in their power to do to protect their interests; that any individual stockholder was at liberty to apply to the court for leave to intervene and defend; that the stockholders were parties in interest, and, upon representing that fact to the court and showing that the officers were not defending in good faith, they would without doubt have been allowed to defend, and that stockholders of a corporation, though not bound to intervene in a suit against the corporation for the protection of their rights, cannot, after having notice that the officers are not faithfully defending a suit, neglect to intervene or to take any steps in the way of endeavoring to do so, and permit a final decree to be entered, and a sale to take place, and then, after years have elapsed, be permitted to attack the validity of the proceedings.

The case therefore was made to turn on the question of laches. The decree was made June 6, 1876, the sale September 6, 1876, the report of sale September 15, 1876, the confirmation of the sale October 7, 1876, and the master's deed October 24, 1876. The present plaintiff took an appeal to this Court from the decree, and from the order confirming the sale, February 1, 1877. It prosecuted that appeal in

due form, and the case was heard here as soon as the Court could hear it, as the bill states. It appears from the report of the case in [101 U. S. 101](#) U.S. 289 that the present plaintiff contended here that it had not consented to the decree, and sought to examine the question of the alleged fraud or unauthorized conduct of its solicitor and its officers, and also sought to defeat the jurisdiction of the circuit court and to attack the propriety of the purchase by the solicitor. The conclusion of this Court was that it could not discover any error that could be corrected by appeal. But in its opinion it said:

"The remedy for the fraud or unauthorized conduct of a solicitor or of the officers of the corporation in such a matter is by an appropriate proceeding in the court where the consent was received and acted on and in which proof may be taken and the facts ascertained."

Thereupon, this bill was immediately filed.

Page 111 U. S. 520

The demurrers in this case are to the whole bill. If any part of the bill is good, the demurrers fail. The charges of fraud in the bill, which are admitted by the demurrers for present purposes, are sufficient to warrant the discovery and relief based on such charges, leaving for consideration only the questions of laches and of jurisdiction.

On the admitted allegations of the bill, there was no real defense made in the *Ketchum* suit, and the present plaintiff was prevented from making that defense by the unfaithful conduct of its solicitor and its directors, and the directors of the Atlantic Company. A case of that kind is one of which a court of equity will take cognizance. *United States v. Throckmorton*, [98 U. S. 61](#) .

As to the question of laches, the pendency of the appeal taken in the *Ketchum* suit suspended the control of the circuit court, and of every other court except this Court, over that decree in respect to the relief sought in this suit of setting that decree aside and declaring it fraudulent and void, all the other relief asked being

consequent on that. The appeal appearing to have been taken and prosecuted in good faith in view of what appears in the bill herein and in the report of the case in this Court, we cannot hold on this demurrer that the time during which that appeal was pending can be counted against the plaintiff on the question of laches. *Ensminger v. Powers*, [108 U. S. 292](#) .

As to the frauds alleged in the bill respecting the matters in the conduct of the suit resulting in the decree, the right to relief is based on the view that the corporation itself, the present plaintiff, speaking and acting now for its stockholders as a body, was powerless then because it was misrepresented by unfaithful directors who did what was done and refused to do otherwise, and through whom alone it could then speak and act. The allegations in the bill of facts showing the existence of hostile control of the corporate affairs of the plaintiff by its directors, from before the bringing of the *Ketchum* suit till after the foreclosure sale, are entirely adequate as against a demurrer. Under such circumstances, mere knowledge by or notice to the plaintiff, or its directors or officers, or more or

Page 111 U. S. 521

less of its stockholders, is unimportant, and the plaintiff cannot be concluded by the failure of any number of its stockholders to do what unfaithful directors ought to have done unless a case is shown of such acquiescence, assent, or ratification as would make it inequitable to permit what has been done to be set aside or unless the rights of innocent purchasers have subsequently intervened to an extent creating an equitable bar to the granting of relief. The bill in this case does not show such a state of things. While stockholders, more or less in number, may be allowed to interpose, if they have the means or the inclination to take upon themselves the burden of such gigantic controversies as are involved in the railroad transactions of the present day, it would go far to legalize condonation of such transactions as are set forth in this bill if mere knowledge by helpless stockholders of the fraudulent acts of their directors were to prevent the corporation itself from seeking redress if it acts promptly when freed from the control of such directors. Fruitlessly requesting unfaithful directors to resign and to employ other counsel, so far from throwing on the stockholders the peril of losing

their rights, represented by the company, if they do not personally assert them in place of the directors, operates of itself, without more, only to aggravate the wrong. At the same time, it by no means follows that parties who have become interested in the plaintiff's corporation with knowledge of the matters set forth in the bill, are entitled to the same standing, as to relief, with those who were interested in the corporation when the transaction complained of occurred.

As to the matters alleged which are extrinsic or collateral to the issues in the *Ketchum* suit, to what extent, greater or less, there is jurisdiction to examine them under this bill is a question not to be decided on these demurrers to the whole bill. The bill is sufficient in regard to the other frauds alleged. But in regard to one of those extrinsic matters, the bill states that specified property not covered by the mortgage was put into the decree without the knowledge of this plaintiff.

Upon the question of jurisdiction, there can be no doubt that the circuit court, as the court which made the *Ketchum* decree

Page 111 U. S. 522

and had jurisdiction of the *Ketchum* suit, as this Court, in *Pacific Railroad v. Ketchum*, [101 U. S. 289](#) , held it had, has jurisdiction to entertain the present suit to set aside that decree on the grounds alleged in the bill if they shall be established as facts and if there shall be no valid defense to the suit, although the plaintiff and some of the defendants are citizens of Missouri. The bill falls within recognized cases which have been adjudged by this Court, and have been recently reviewed and reaffirmed in *Krippendorf v. Hyde*, [110 U. S. 276](#) . On the question of jurisdiction, the suit may be regarded as ancillary to the *Ketchum* suit, so that the relief asked may be granted by the court which made the decree in that suit without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by MR. JUSTICE MILLER in *Pacific Railroad v. Missouri Pacific Railway Co.*, 3 F. 772. The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the circuit court. [Minnesota Co. v. St. Paul Co.](#), 2 Wall. 609, [69](#)

We do not see any force in the second and third grounds of demurrer, nor at present in the eighth. The seventh ground of demurrer alleges what is, if true, matter for exception, and so does the ninth in part. As to the rest of the ninth, it is matter for an answer. All the demurring parties seem to be proper parties.

If, as has been strenuously argued for the defendants, there are complete defenses on the merits to the bill, answers should have been put in and proofs taken. We can act only on what the bill brings before us, and all it alleges is admitted for present purposes. The future proceedings in the case may show that the allegations of the bill are untrue or may disclose perfect defenses to the suit. But as the suit now stands, the plaintiff is entitled to have the matters it alleges inquired into and adjudicated.

The decree of the circuit court is reversed and the case is remanded to that court with direction to overrule the demurrers, with costs, and to take such further proceedings in the suit as shall be proper and not inconsistent with the opinion of this Court.