

New Jersey Court of Errors
and Appeals

Between,
SIMON DALSHIMER, *et al.*,
Complainants-Respondents,
and
GRAPHIC ARTS COMPANY, *et al.*,
Defendants-Appellants.

**BRIEF OF BOURGEOIS & COULOMB
FOR GRAPHIC ARTS COMPANY,
DEFENDANT APPELLANT**

The appeal in this case is prosecuted by the Graphic Arts Company of New Jersey to review a decree made by the Court of Chancery declaring a certain transaction, whereby it transferred its assets to a Delaware corporation, void, and appointing a receiver to proceed to recover such assets from the Delaware corporation.

The bill was filed to set aside a transaction whereby the Graphic Arts Company of New Jersey transferred to the Graphic Arts Company of Delaware all of its assets in consideration of the issuance of the stock of the Delaware corporation to the stockholders of the New Jersey corporation, share for share, both common and

preferred, the holders of the stock in the New Jersey corporation to transfer their holdings in that company to the Delaware corporation. The transfer of the assets was made upon the further consideration that the Delaware corporation should assume and pay all of the debts of the New Jersey corporation. The bill further prayed that the New Jersey corporation be declared insolvent, and that a receiver be appointed to take charge of its affairs.

The bill not only made the New Jersey corporation a party defendant, but also the Delaware corporation and the Directors of the New Jersey corporation. The Delaware corporation, however, was not served with process nor were any of the directors excepting the one qualifying director of the New Jersey corporation served with process. The only party really before the court was the New Jersey corporation.

The facts show that the Graphic Arts Company of New Jersey was engaged in the business of making a certain type of photogravure under patents owned by it, all of the work being done and its plant and equipment being located in the City of Philadelphia.

Sometime in the early part of 1912, the stockholders and directors deemed it expedient to move the business of the corporation to Delaware. It thereupon formed a corporation in the State of Delaware, and on the 20th day of August, 1912, entered into the agreement whereby it transferred its assets as aforesaid. This agreement appears at page 26 of the printed State of the Case.

The plan was the result of the efforts of the Executive Committee who made a report to the Board of Directors suggesting that it be carried

out. This report was received by the Board of Directors, at a special meeting held on August 9, 1912 (see page 106). At that meeting a resolution was passed by the Board of Directors resolving that they recommend to the stockholders the adoption of the plan aforesaid, and for the calling of a special meeting of the stockholders for that purpose to be held on the 20th day of August, 1912. This meeting was held, as appears at page 108, and at that meeting it was decided by the stockholders that the plan suggested by the Board of Directors be adopted, and on that same date, at a later hour, a meeting was held by the Board of Directors adopting the plan (see page 109).

It is admitted that Mr. Dalsheimer, the complainant, had notice of these meetings (see page 65, line 38; page 66, line 20). Mr. Dalsheimer did not appear at said meeting and never, until the filing of the bill of complaint, dissented from the transaction in question. Between the 20th day of August, 1912 and the date of the filing of the bill, September 29, 1914, no objection was interposed by Mr. Dalsheimer whatsoever to the transaction.

A number of letters passed between the defendant corporation and Mr. Dalsheimer, the first of which was the letter of February 3, 1913 (page 76) advising Mr. Dalsheimer that the stock of the corporation was ready for delivery. In reply to this letter Mr. Dalsheimer writes (page 76, line 23) asking for a list of the assets and property of the "present company" (*i. e.*, Delaware company), and in this letter, which is dated February 26, 1913, refers to a letter of August 9, 1912, which is the letter addressed to all of the stockholders advising them of the action of the

directors and the recommendation of the directors of the New Jersey company. In reply to Mr. Dalsheimer's letter, the Graphic Arts Company wrote to Mr. Dalsheimer on March 7, 1913 enclosing a copy of the agreement and an inventory of the assets &c., (pages 77, 78, 79). Nothing further was heard from Mr. Dalsheimer until April 27, 1914, when he wrote the letter which appears at page 80, calling for certain information in regard to the affairs of the corporation. This letter was answered on May 5, 1914 (see page 82). On May 15, 1914 Mr. Dalsheimer writes for further information, which was given him on May 28, 1915 (page 84). On June 2, 1914 he still asks for further information, which was given him on June 12, 1914 (page 89). On June 15, 1914 he writes for further information again, which was given him on June 23, 1914 (page 98). On June 27th he again writes (see page 104) and is answered on July 6th.

It is apparent from a reading of these letters that Mr. Dalsheimer had all the information necessary for a full understanding of the matter, or could have obtained it all on August 9, 1912, when notice of the meeting was sent him as above stated.

In pursuance of said contract of August 20, 1912 the assets were turned over to the Delaware corporation, and the Delaware corporation began to do business thereunder, and from August 20, 1912 to September, 1914, continued to do business, and never in all the correspondence that it had with Mr. Dalsheimer was there any expression at all that Mr. Dalsheimer disapproved of or dissented from or objected to the plan or the means whereby it was put in effect.

The bill appears to have been filed by Dal-

sheimer and the Friedenwald Company of Baltimore (page 1, line 10), but at the trial it was stipulated that Mr. Dalsheimer was the owner of the Friedenwald Company's claim (page 56, line 38; page 57; line 3). The bill was filed by Mr. Dalsheimer on behalf of all the creditors and stockholders of the Graphic Arts Company of New Jersey, and it appears (page 6, line 20) that he was the owner of 412 shares of the common and 412 shares of the preferred stock of the company. He was the only dissenting stockholder.

There were no disputed facts in the case. The case was heard on the bill and answer and on certain stipulations and statements made by counsel, pages 55-75 and upon the admission of certain letters, all of which are printed in the book and have been above referred to (pp. 76-105).

It was contended before the Vice Chancellor that the proceedings in question were authorized by the charter of the corporation (see page 17, line 28) which provides as follows:

“With the consent in writing and pursuant to the vote of the holders of a majority of the stock issued and outstanding, the directors shall have power and authority to sell, assign, transfer or otherwise dispose of the whole property of this corporation.”

It was further contended that the complainant, Dalsheimer, was in gross laches, and had by his acquiescence estopped himself, both as a creditor and stockholder, from assailing the transaction.

The grounds of appeal are as follows:

1. The complainant, Dalsheimer, by his laches and acquiescence was estopped from questioning or attacking the transaction whereby the assets were sold and transferred to the Delaware corporation.

2. The transaction itself was authorized by the charter of the company and the laws of the state of New Jersey.

3. The complainant, Dalsheimer, was without standing as an ordinary creditor whose claim had not been reduced to judgment to attack the transaction in question.

POINTS

I

The complainant was in laches.

The defense of laches in this case is raised by Paragraph 18 of the answer (page 50 of the State of the Case).

In discussing this phase of the case the Vice Chancellor found as a fact that the complainant had notice of the stockholders' meeting at which the action of the directors authorizing the transfer of the assets was approved, and that he failed to attend that meeting, and that thereafter learned of the action which had been taken and for a considerable time failed to protest or make known his dissent.

The Vice Chancellor admitted the principle of law that a stockholder's bill in behalf of his corporation to set aside a contract which had been made by the Board of Directors with its members, must be promptly filed or it cannot

be maintained. Without deciding the question as to the application of that principle in the present case, the Vice Chancellor determined that "whether laches may be attributed to a stockholder which should deny to him a right of this nature, it must be entirely clear that such laches cannot be attributed to him as a creditor."

We find no authority for any such distinction in the law. It must be observed *in limine* that Mr. Dalsheimer, the complainant, was the only dissenting stockholder and creditor, no one else question, so that while the bill is ostensibly filed for the benefit of the stockholders and creditors, attacked or dissented from the transaction in it is really and practically filed only for the benefit of Mr. Dalsheimer himself.

If the doctrine of laches and the application of the principle of estoppel applies to Dr. Dalsheimer as a stockholder so that he would be prevented from attacking the transaction as a stockholder, there seems to be no logical or legal reason why he should not be equally estopped as a creditor. If Mr. Dalsheimer, as a stockholder, had appeared at the stockholders' meeting and had voted in favor of the transaction, it can scarcely be denied but that he would be estopped from afterwards, as a creditor, seeking to overturn the action to which he had thus lent his name and vote. Now, when we come to apply to such a stockholder the doctrine of estoppel upon the theory of acquiescence or laches, equity in applying this principle treats the matter as though the stockholder had actually consented to the transaction. He is as much bound to the transaction as though he had appeared and voted for it, and equity considers that he did vote for it and approve of it, otherwise he would have

acted promptly in his dissent, therefore the same rule that would prevent a stockholder who had actually appeared and voted in favor of a resolution authorizing the transaction from afterwards as a creditor attempting to dissent from it, must equally apply to one whose assent is presumed by reason of his acquiescence or laches.

Mr. Dalsheimer as a stockholder and as a creditor had full knowledge of the proposed transaction as early as the 9th of August, 1912. Having had such notice and having had the power and authority to dissent therefrom promptly as a stockholder, it would be inequitable to permit him to play a double role and as a creditor be free to attack a corporate transaction, whereas as a stockholder he would be bound by his laches. There seems to be no reason whatsoever for any such distinction, and right here permit us to observe that there is no charge of fraud or unfair dealings in the matter whatsoever. There is no allegation or attempt to prove that the assets have been in any wise diminished by the transfer, in fact the testimony shows that it was a saving at least of the difference between the tax paid in Delaware and the tax paid in New Jersey. The assets have not been removed from their old location in Philadelphia. They are just as amenable to the process of a creditor as they were while owned by the New Jersey corporation, so that financially Mr. Dalsheimer does not allege nor does he attempt to prove that he has been in any way wise hurt.

The Court of Chancery said that "Patient waiting of a creditor of a corporation for money due him is not laches which denies to the creditor the right to seek the appointment of a receiver to protect his rights as a creditor." Assuming,

but not conceding, that this is so, it certainly has no application to one who occupies the dual role of stockholder and creditor.

Again, the laches complained of is not that of waiting for the payment of his debt but that of waiting before applying to set aside a transaction to which he was bound as a stockholder and which, in the language of the Court of Chancery, he now only has a right to object to as a creditor.

Thompson, in his work on Corporations, referring to an illegal transaction by a corporation, Vol. 5, Sec. 6531, says:

“Whether such a transaction is impeached by creditors or stockholders or by the corporation itself in a suit in equity asking for affirmative relief, or by way of defense by proceedings in a court of equity, the right to relief against it will be lost by circumstances of laches, acquiescence or estoppel.”

It will be noted that the defense of acquiescence, &c., is equally applicable, in Mr. Thompson's opinion, to creditors, as well as stockholders or the corporation itself.

The rule is laid down in Cyc., under the title of Estoppel, as follows:

“Where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other in reliance on such belief alters his position, such person is estopped from repudiating the transaction to the other's prejudice. This rule has

a wide application, and has been invoked in the case, among others, of * * * the acquiescence of stockholders and creditors in corporate acts.”

16 Cyc., 792—795.

In the case of *Rabe v. Dunlap*, 51 N. J. Eq., 40, the court at page 46 held:

“Stockholders, to be entitled to the summary interference of the court where they seek protection against acts which are merely in excess of the power of the corporation and not prohibited by law, must be diligent. They must apply so recently after the committing of the act of which they complain that the court may stop and undo the wrong to them without doing equal wrong or greater wrong to some other person. * * * The doctrine they establish is that where an act is done openly and especially on notice and without evil intent, though clearly in excess of the power of the corporation, a non-assenting stockholder will not be allowed to pause to speculate upon the chances, to wait until he can see whether such act is likely to result in profit or loss, but to be entitled to the summary interference of the court, he must ask for it promptly and before the act of which he complains has become the foundation of rights or equities which must be destroyed or greatly impaired if the act be nullified or undone. Or, stated with greater brevity and in its simple essence, the rule is that if he needs protection against the consequence of an *ultra vires* act, he must ask for it with sufficient

promptness to enable the court to do justice to him without being unjust to others.”

In Cyc., under the title “Corporations” the rule is stated as follows:

“Assuming that such a sale of all of the assets of the corporation as we are considering has taken place under circumstances where dissenting shareholders are entitled to maintain a proceeding to void it, as where it has been done by the directors without the consent of the shareholders expressed in general meeting or otherwise, yet here as in other cases the shareholders may ratify it so as to conclude them from making further objections, and such ratification may be inferred from that species of tacit acquiescence which consists in the entire failure to protest or take any steps to repudiate or set aside the sale.”

10 Cyc., 1269.

The same doctrine is expressed in 5 *Thompson on Corporations*, Sec. 6549.

In *Babcock v. Farwell*, 91 N. E. 683 (Supreme Court of Ill. Dunn, J., speaking for the court, at page 692 said:

“The theory of a stockholder’s suit is that the stockholder has sustained a wrong from the injurious effect upon his stock of the wrong done to the corporation. If he has himself consented to or participated in the acts constituting such wrong, or has waived his right to object to them, he cannot afterwards maintain a bill on account of such transactions for the benefit

of the corporation or of the other stockholders.”

In the case of *Belling v. American Tobacco Co.*, 72 N. J. Eq. 32, Vice Chancellor Pitney held (page 41) that:

“The complainant’s assignor, Potter, is chargeable with negligence of not coming forward and asserting his rights in time to have prevented the merger being so far carried out as to render it impossible to grant the relief which he asks.”

It is interesting and important to note that in this case the action which the complainant asked to have set aside was not sanctioned by law.

Vice Chancellor Pitney goes on to say:

“Now, the existence of this act shows clearly the fallacy of the complainant’s argument that by the contract he is entitled to have the old company carried on until the time limited in its original certificate of organization, and it meets and disposes of many of the *dicta* cited in his argument and relied upon to support his position. That right to have the business carried on until the natural death of the corporation is subject to the will of the majority of two-thirds provided for in the statute.

Now, while the merger proceedings here attacked do not amount, strictly speaking, to a legal winding up, their effect was in substance precisely the same, and the only difference to the complainant is that he did not receive the share of the proceeds of the winding up which he would have got

under formal proceedings under the statute.

But the large vote for the merger shows conclusively that if the winding-up proceedings had been necessary, they would have been taken and pursued to the end, and it further indicates, with sufficient certainty for present purposes, that if the decree asked for by the complainant were granted, its practical effect to the complainant would be immediately met by formal winding-up proceedings."

To the same effect is the case of *Dana v. American Tobacco Co.*, 72 N. J. Eq. 44. This latter case was affirmed in 73 N. J. Eq. 636, the court saying:

"The fact that so much time had elapsed since the making of the merger agreement before he made up his mind to dissent . . . and that the actual business of the company was being carried on in such manner as to render separation from the consolidated company into its constituent elements increasingly difficult, these and other peculiar circumstances disclosed in the evidence and to some extent adverted to by the learned Vice Chancellor in this case and in that of *Belling v. American Tobacco Co.*, 72 N. J. Eq. 32 were such as to call the utmost diligence on the part of the complainant in making application to the court of equity, if he desired the very drastic relief which he prays for."

In the case of *Marks v. Paper Company*, 203 Fed. Rep. 16, it was held that where minority stockholders delayed for nearly a year in insti-

tuting suit to set aside the sale of the corporation's assets to another company, and in the meantime write that innocent bondholders and other creditors have intervened, such minority stockholders were barred by laches from having the transfer rescinded.

For other cases on the question of laches see :

- Rabe v. Dunlap, 51 N. J. Eq. 40;
 Lehigh Valley R. R. Co, v. MacFarland, 43 N. J. Eq. 607;
 Twinlick Oil Co., v. Marbrey, 91 U. S. 587;
 Mumford v. Equador Co., 50 Atl. Rep. 476;
 Marr. v. Marr, 72 N. J. Eq.

In the case of *Keasbey v. Wilkinson*, Recr., &c., 51 N. J. Eq. 29, an injunction was sought to prevent the Receiver from prosecuting a suit on a bond made and delivered by the complainant and one Compton to the Newark Savings Bank. The bond was a joint bond, and the defendant had agreed to release Keasbey if said Keasbey would not charge for legal services which he had performed, and would perform other services without compensation. The defendant did not agree to release the other joint obliger. Although the favored debtor, *i. e.* Keasbey, knew that the creditor did not intend to release his joint debtor, and further knew that his release would defeat that intention, he, notwithstanding, in sincerity and good faith, interpreted the decision of the creditor that he, Keasbey, would be released in any event, and thereupon he failed to take measures to protect himself in the sale of certain property, &c. The services were performed and accepted. It was held that the creditor's con-

duct estops it from now claiming a meaning contrary to that which the debtor adopted and in which the creditor acquiesced, and hence the debtor was discharged from liability by virtue of the bond, and the creditor perpetually enjoined.

In the case of *Erie R. R. Co. v. D. L. & W. Co.*, 21 N. J. Eq. 283, it was held that a court of equity will never lend its active aid to a party who, by a superior knowledge and artful silence, has gained an unfair advantage over another. In this case the principle enunciated by Sir Samuel Rommelly, Master of the Rolls, was adopted in the following language (page 290).

“The principle on which the defendants rely is often recognized by this court, namely, that if one man stand by and encourage another, though but passively, to lay out money under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the court will not permit any subsequent interference with it by him who formely permitted and encouraged those acts, of which he now either complains or seeks to obtain an advantage.”

As tersely expressed by Vice Chancellor Van Fleet in the case of *Besson v. Eveland*, 26 N. J. Eq. 468, “He who is silent when conscience requires him to speak will not be permitted to speak when conscience requires him to be silent.”

The laches of Mr. Dalsheimer is plainly evidenced in the correspondence offered in evidence, some of which is attached to the bill of complaint (see Exhibit 4, page 27, Exhibit 5 and 6, page

28). On August 9, 1912 Mr. Dalsheimer was notified of the contemplated action of the Board of Directors of the New Jersey corporation. That this is so is evidenced by his letter under date of February 26, 1913 (page 28, line 1) wherein he says:

“In referring to your letter of August 9, 1912, I note you write that the assets and property of the present company would be sold and transferred to the new company, and that the new company would assume all the obligations of the old one.”

It was Mr. Dalsheimer's duty to have attended the meeting of the stockholders if he intended to dissent from or object to the proposed plan, or at least to have written the directors or stockholders of the New Jersey corporation informing them that he did not approve of or objected to the plan as proposed. He had no right, having been informed of the proposed plan, and having been informed of the date of the meeting when the stockholders were to meet and either ratify or reject such plan, to stand silently by and permit it to be done, and then subsequently to come in and object thereto and seek by this bill to set aside.

In none of his letters, beginning on February 3, 1913 and extending down to July 6, 1914 (page 76 to 105) did he at any time suggest that he did not approve of the plan under which the corporation with which he was then corresponding was doing business, and it will be noted that in all this correspondence he was being furnished from time to time with statements of the assets and liabilities and the business being done by the Delaware corporation, information to which he

was not entitled, strictly speaking, unless he recognized the Delaware corporation as the operating company, and as a stockholder of that company. In fact, never until the filing of the bill did he in any wise by word, deed or letter intimate that he objected to the plan. He permitted the stock to be transferred and exchanged between the stockholders; he permitted the newly formed corporation to engage in business; to incur obligations and indebtednesses; to undertake contracts, all of which he was kept fully informed of, and never stated that he objected to or even that he might have objected if the information which he was requesting did not prove satisfactory to him.

Such an example of gross laches is seldom met with. He would have been in laches under the circumstances of the case had he not known of the proposed transaction; had he had written the letters and correspondence which he did write; and had he not been furnished the information which he sought.

In *Stephany v. Marsden*, 75 N. J. Eq. 90, Vice Chancellor Leaming charged stockholders who did not attend stockholders' meetings with notice of what occurred there, and announced the rule to be that it was the duty of a stockholder to make some inquiry.

But having been dully acquainted with the scope and purpose of the plan as early as August 9, 1912; having known at that time that the stockholders were to meet and ratify or reject the same on the 20th of August; having failed in any way to protest against the same; then having followed this gross neglect, with the failure to object during the course of correspondence aforesaid, and having never brought to the attention

of the corporation that he was dissatisfied or objected to the plan until the filing of the bill, without a single bit of excuse for his delay, we insist that he is barred by his laches, and that such laches places him in the same position as though he had actually appeared at the meeting of the corporation on August 20, 1912 and voted for the proposed plan.

In a very recent case, Justice Bergen, speaking for the Court of Errors and Appeals, said:

“We think that, where as in this case the complainants were present and voted for the resolution and with knowledge of the fact that for more than two years the two companies had been operating under the purchase, and during all that time stood by and made no protest, that they are now estopped in the absence of proof tending to show that the action of the directors was a fraud upon them, to deny the force and effect of their conduct, relying upon which the two defendant companies have availed themselves of the terms of the contract, which in equity has been executed.

McMahon v. Pneumatic Transit Co.,
85 Eq. 544-550.

It is not without interest to note that the complainant's real status in filing the bill was that of a stockholder and not a creditor. In the 19th paragraph of the bill (page 11) complainant sets forth that the transaction was in violation of his right as a stockholder. In the 21st paragraph, which is the only allegation as to his interest as a creditor, he merely alleges that the result of the transaction was to leave the New

Jersey company insolvent. In his prayer for relief he nowhere asks for relief as a creditor. He does not pray to have the corporation wound up under the Insolvency Laws, nor does he pray that the corporation be declared insolvent. We therefore contend that his status before the court is that of a stockholder and not a creditor.

If it be argued that the complainant Dalsheimer had placed the defendant company on notice that he was not satisfied with the transaction merely by reason of the fact that he had not accepted the stock in the Delaware corporation, we reply that even had he dissented, much less remained silent, his laches would still operate against him.

In the case of *Lehigh Valley Railroad Co. v. McFarland*, 43 N. J. Eq., 607, Justice Deoue, speaking for the Court, said:

“Protests and remonstrances by the owner of the servient tenement against the use of the easement rather add to the strength of the claim of a prescriptive right, for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse, and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruptions or obstructions of the enjoyment.”

So in the case of *Mumford v. Equador Co.*, 50 Atl. Rep., 476, it was held that a dissenting stockholder cannot satisfy himself by merely protesting against the illegal or voidable action of his directors, but must follow up his protest with a suit to enforce his claim.

In the case of *Marr v. Marr*, 72 N. J. Eq., 797, it was held that mere protest availed nothing.

Surely if protests could avail nothing, much less could silence avail.

II

The transaction was not ultra vires.

If there is any vice in the transaction under review, it consisted in the fact that the stock of the Delaware corporation was transferred directly to the stockholders of the New Jersey company rather than to the corporation itself. It will be observed, of course, that this was in accordance with the terms of the contract which was known to the complainant at the time of its adoption, and was equally well known to him all during the course of the correspondence between himself and the Delaware corporation, and, as we have above argued, the doctrine of laches and estoppel certainly applies, but it must be noted that the transaction, so far at least as the stockholders of the corporation are concerned, would have been valid had no consideration whatsoever passed other than the assumption of the debts.

We contend that the assumption of the debts of the New Jersey corporation by the Delaware corporation was sufficient consideration for the transfer of the assets independent of any consideration arising out of the transfer or delivery of stock to the stockholders of the New Jersey corporation.

There is no proof in the case as to the value of the assets as compared with the debts, and whether or not the consideration was adequate

was a matter for the directors to determine in the absence of fraud.

Edison v Edison Phonograph Co., 52
N. J. Eq., 620.

In the case of *McMahon v. Transit Co.*, 85 N. J. Eq., 544-546, in discussing a similar situation, Mr. Justice Bergen, speaking for the Court of Errors and Appeals, said:

“The learned Vice Chancellor put his conclusion upon the ground that there was an over-valuation of the property because the patents had cost the seller but \$47,000 and the purchase was accomplished through the complete dominion and control of the International Company over the Transit Company. This is not in our opinion sufficient to overcome the judgment of the directors of the Transit Company as to the value of the property, which judgment by the terms of the statute is conclusive in the absence of actual fraud. *Corporation Act*, Comp. Stat. 1630, Sec. 49; *Donald v. American Smelting Co.*, 62 N. J. Eq., 729.”

It has been held that if the consideration for the sale is the assumption and payment by the purchasing company of the mortgage debts of the selling company to the full value of all the property conveyed, the sale will not be set aside in favor of other unsecured creditors of the selling company, nor will they have a lien on the property for which full value has been paid in good faith.

5 Thompson on Corporations, Sec.
6548, p. 5163.

The charter of the New Jersey corporation (see p. 17, l. 28) provided for the sale of all of the assets, so that the sale itself is not *ultra vires*. The contract whereby the sale was effectuated provided for the payment of all of the debts by the Delaware corporation, so that the sale was *not* without consideration. There is no allegation nor proof that this transaction was made fraudulently or with any intention to defeat creditors or defraud them.

In the case of *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq., 717, the following appears:

“Defendant corporation was organized under Revision p. 567 authorizing it to deal in lands, and providing that the company’s business should be managed by a Board of Directors. Defendant was threatened with a mortgage foreclosure of its entire property, which was depreciating in value. Its debts were large and all attached to its property in its entirety. Held, that the Court would not interfere with the directors in disposing of the property of a corporation where there is no fraud and no violation of the company’s by-laws, and the directors are sustained by the large majority of the stockholders.”

In *Cyc.* it is laid down that a strictly private corporation, owing no particular duties to the public, has the same dominion over and power to dispose of its property that an individual has, and when the exigencies of its business render it necessary it may, if done in good faith and with the assent of its shareholders, discontinue business and dispose of its entire assets and property with

a view to paying its debts and closing up the affairs of the corporation.

10 Cyc., 1038.

The consent of a creditor is not necessary to the validity of such a transfer.

7 Thompson on Corporations, 8235; 10 Cyc., 301.

Thompson lays down the rule as follows:

“The consent of the creditors of a constituent corporation is not necessary to the validity of the consolidation since their rights continue against the new corporation and its property the same as against the old.”

We submit that this expression contained in Thompson on Corporations contains in a nutshell the answer to the complainant's objection to the present transaction. Inasmuch as the rights of the present creditor, to wit, the complainant Dalsheimer, continue against the new corporation the same as against the old, his consent was not necessary, therefore his dissent could not prevent.

Again Thompson says:

“Nor is it beyond the power of such a corporation to sell all its property to a new corporation and to receive pay therefor in stock of the new corporation, the stock being taken in lieu of money to be distributed among those stockholders of the new corporation who are willing to receive it, or to be converted into money for those who do not desire to retain it. This is not a sale by a trustee to himself for his own

benefit, but is a sale to another corporation for the benefit and with the consent of the *cestuis que trustent*, the old stockholders. Being open, fair and not collusive and devised as a mode of payment for the property of the old corporation, the transaction is not open to objection by a minority of the stockholders."

5 Thompson on Corporations, Sec. 6542.

In the present case it will be borne in mind that the contract provided that the Delaware corporation was to pay all of the debts of the New Jersey corporation, hence it appears that there was no design to defraud the creditors. The case, therefore, does not fall within the line of cases where a creditor brings a suit to restore assets, for in all such cases the transaction sought to be avoided was made for the purpose of putting the assets beyond the reach of creditors. Such is not the present case.

The result of such a creditor's suit would be to enable the stockholders to pursue the assets into the new corporation for the purpose of imposing his rights upon those assets, but such pursuit is rendered unnecessary in the present case by reason of the fact that that obligation is assumed by the terms of the contract of conveyance itself.

All of the cases and all the observations of text-writers upon the subject proceed upon the theory that the assets are transferred *cum onere*. No case that the writer has been able to discover permits a creditor under the circumstances of the present case to revive a corporation and have a receiver appointed for it for the purpose of bringing the assets back into the old corporation when the only result of such an action can be to make

the assets subject to his debt, when the assets are already subject to his debt. The effect of the present decree is not to bring these assets physically back into the State of New Jersey but to have them restored to the New Jersey corporation for the purpose of subjecting them to the complainant's debt. The answer to all this is that the assets now in Philadelphia are now and always have been subject to the debt of the complainant, as much so now as when they were owned by the New Jersey corporation.

III

Complainant Dalsheimer was without standing to question the transaction.

If the complainant Dalsheimer has any status under his bill as a creditor, the bill must be considered as a creditor's bill. There is no prayer in the bill to declare the corporation insolvent under the Insolvency Laws, or to wind up its affairs as an insolvent corporation. As a creditor, Mr. Dalsheimer complains that the corporation disposed of its assets in fraud of his rights as a creditor. It is therefore a creditor's suit, and before he could file his bill to set aside the transaction, he must have reduced his claim to judgment and have issued execution and had it returned *nulla bona*.

“Equity will only grant its aid to enforce legal process. A creditor must reduce his debt to judgment before he can resort to a Court of equity for aid in its collection.”

United Railways Co. v. Hoppack, 28
N. J. Eq., 261.

IV

No decree could properly be made without the Graphic Arts Company of Delaware being before the Court, either by the entry of an appearance, or by process or actual service or by publication.

We further contend that it was not sufficient merely to have made the Delaware corporation and the directors of the New Jersey corporation party defendants to the bill; but that at least the Delaware corporation should have been brought in by publication or otherwise. Such was not done, and we protest that a decree in the Court of Chancery which in terms affected the rights of the Delaware corporation of its property was *coram non iudice*.

Wilson v. American Palace Car Co.,
65 N. J. Eq., 730;
Elkins v. Camden & Atlantic R. R. Co.,
36 N. J. Eq., 241.

We respectfully submit that the decree should be reversed.

BOURGEOIS & COULOMB,
Solicitors for and of counsel
with Defendant-Appellant.



