HOUSE ET AL. *v.* MULLEN.

1. A bill was filed by two parties, one of whom showed good cause for equitable relief, but the other of whom did not show what interest he had in the subject-matter of litigation, or that he had any. The bill was demurred to on several grounds, one being the want of such showing (which by settled equity rule is a good ground of demurrer), and another ground being that the bill showed that the claim was barred by the statute of limitations, was stale, &c.; an allegation about the bill not true in fact, it showing the reverse, and *this* ground of demurrer therefore failing. The court below "dismissed" the bill generally; and in this state the record was of course capable of being pleaded in bar to a new suit on the merits. This court being of opinion that the only defect in the bill was that it did not show interest in both the parties while it did show cause for equitable relief in one, refused to affirm the decree below, as it would have done had the dismissal been *without prejudice*, or because a party who showed no interest was a complainant. On the contrary, to prevent what might be great injustice in case of another suit on the merits, by the record being used in the way above mentioned, the court reversed the decree and remanded the case with directions to allow the complainant to amend his bill within a reasonable time, or failing to do this to dismiss it without prejudice.
2. When a bill by a widow, claiming real estate, alleges that certain persons named, being several in number, *all* claim through a deed made by her during coverture, which deed the bill alleges was void for want of her free consent in making it, no demurrer lies to the bill on the ground that the defendants were improperly joined, inasmuch as they had separate and distinct interests which could not be joined in one suit.

APPEAL from the District Court for the Middle District of Alabama.

On the 27th of November, 1871, Eliza House filed a bill in chancery, in the court below, against Andrew Mullen and twenty-one others.

The bill set forth that on the 16th of March, 1838, the said Eliza being then a married woman, a conveyance was made by one Lawrence to a certain Gibson, for the consideration of $2700, of the half *or* undivided moiety of lot No. 22, in the town of Selma, Alabama; that by mistake this was recorded as a conveyance of the half *of* the undivided moiety of said lot; that by the terms of the conveyance the

trustee was to hold the property in trust for the benefit of her the said Eliza during her natural life, after which he was to convey in fee simple to such child or children as she might have living at her death. The bill further alleged that Gibson died in 1841, and Reuben House, the husband of the complainant, in 1868; that from the date of the deed from Lawrence to Gibson, the complainant lived on the premises, or received the rents and profits, until 1846; that during this time her husband and herself removed from Alabama to Florida; that the defendants were now in possession of the lot or parts of the same, claiming the whole of it as owners, and asserting title under a deed which they alleged to have been made by the complainant and her husband in 1846 to one Walker, which deed the complainant alleged that she did *not* sign and seal as her voluntary act and deed, freely and without compulsion of her said husband.

The bill prayed for the appointment of a trustee in place of Gibson, who was dead. It also prayed for a partition with the defendants, for an account of rents and profits, and for such other and further relief as to equity belonged.

Before anything further was done, the complainant obtained leave to file an amended bill, and an entire new bill was accordingly filed by her and *Mary Hunter*, and *Charles Hunter*, husband of the said Mary. What interest Mr. and Mrs. Hunter had in the matter, or how either was related to anybody concerned in it, was nowhere stated. As for the rest, the same matters were alleged in the new bill as in the old. To this new bill the defendants demurred.

The grounds of demurrer set forth were—

1. That if the complainants had any rights as shown by the bill, they were separate and distinct, and could not be joined in this suit.

2. That the bill did not show any interest of Mary and Charles Hunter in the subject-matter of the litigation.

3. That the defendants were improperly joined, inasmuch as they had separate and distinct interests which could not be joined in one suit.

4. And that the claim was stale, and barred by the statute of limitations and by the long acquiescence of the complainants in the possession of the defendants as shown by the bill.

The decree ran thus:

"This cause coming on, &c., . . . it is considered by the court that the said demurrer of the defendants . . . be sustained. It is, therefore, adjudged and decreed that the said bill of complaint of Eliza House, Mary Hunter, and Charles Hunter, be and the same is hereby *dismissed* out of this court."

The reader will observe that the dismissal was general and absolute; not one for error or defect of parties or without prejudice.

From this decree the complainants appealed.

Mr. W. W. Boyce, for the appellants:

The second ground of demurrer, and to which we will first advert, was that no interest was specifically stated to exist in Mr. and Mrs. Hunter. But Mrs. Hunter was plainly the daughter of Mrs. House. The fact was inferable from the allegations of both bills, that the trust was for Mrs. House for life and for her *child* afterwards; from the patent fact that the child was a party in interest and necessary; and from the amended bill in which she was brought in. The omission to state in terms the relationship was evidently one merely accidental, which should not have been visited with the heavy penalty of such a dismissal as was made—an absolute one—but if with any dismissal at all with but one giving leave to amend.

But there was no ground for any sort of dismissal. The fact of heirship being shown as above it is, as a matter inferable, the first ground of demurrer falls away. Mrs. House and Mrs. Hunter had the same title; the former being equitable tenant for life and the latter tenant in remainder. The husband was rightly added for form.

The third ground of demurrer is bad, because *all* the defendants are alleged to be in possession under a deed made

by the complainant, Mrs. House, which was executed under duress.

As for the fourth ground, the statute of limitations, &c., the bill was filed in November, 1871. Mr. House, the husband, it is alleged in the bill and admitted by the demurrer, died only in 1868. Till 1868 the complainant, Mrs. House, was under disabilities. Every ground of demurrer, therefore, was bad.

No opposing counsel.

Mr. Justice MILLER delivered the opinion of the court.

The fourth ground of demurrer—that the bill shows that the claim was stale, barred by the statute, &c.—is sufficiently answered by the averment of the bill that the plaintiff, Eliza House, was a *feme covert* from the time she parted with the possession until the year 1868, the bill being filed in 1871.

The third ground—that the defendants are improperly joined—is equally indefensible, as the bill shows that defendants all claim through a deed from her, which deed she alleged to be void for want of her free consent in making it.

If the case should come to a hearing the contest must turn upon the validity of this deed, in which all the defendants have a common interest. Besides, she asks to have her half divided or partitioned off to her. To obtain that she is not obliged to file a separate bill against each of the twenty-two defendants, if she is entitled to a half of the whole lot on partition.

The two first causes of demurrer may be treated together.

The bill is fatally defective in joining Mary Hunter and her husband, Charles Hunter, as plaintiffs, and making no allegation or averment of any interest whatever which they have in the matter.

It is suggested by counsel for appellants that Mary Hunter is the child of Eliza House, and that the statement of this fact is omitted by a mere accident. But we have no evidence that Mary Hunter is the child of Eliza House, except

the statement of appellants' brief; nor could any evidence of that fact be admitted under this bill.

The authorities are very clear that such a misjoinder, or the bringing a suit by a plaintiff who shows no interest of any kind in the suit, is fatal to the bill if taken on demurrer or answer. We must in this suit hold that they have no interest, as none is alleged, though it seems almost incredible that when this was distinctly pointed out as a ground of demurrer the counsel did not ask leave to amend, either by stating their interest or striking out their names.

The demurrer was, therefore, properly sustained and the bill dismissed, as the presumption must be that no leave to amend was asked.*

But when a bill is dismissed for misjoinder of parties it settles nothing but that the suit cannot progress in that condition; and if parties will not or cannot amend so as to remove that difficulty, the court will go no further, but will dismiss the bill. It does not and cannot, in the nature of things, conclude either party upon the merits of the matter in controversy, and the plaintiffs, or any one of them, should be at liberty to bring another bill, with proper parties, in regard to the subject-matter of the first one. And the right to do this cannot be doubted when it appears plainly that the first bill was dismissed either for want of necessary parties or for a misjoinder of parties, or when by the terms of the decree the bill is dismissed without prejudice.†

But neither of these things appear in the present case. There are grounds stated in the demurrer which would, if sustained, be a bar to any other suit, to wit, staleness of the claim, statute of limitations, and long acquiescence in the possession and claim of title by defendants. It does not appear by the decree, or by the order sustaining the demurrer, on which of the grounds set out in the latter it was

* Story's Equity Pleadings, §§ 509, 544; Mitford's Equity Pleadings, 6th American edition, 177, side paging, 154; Page *v.* Townsend, 5 Simons, 395; King of Spain *v.* Machado, 4 Russell, 225; Cuff *v.* Platell, Ib. 242; Bill *v.* Cureton, 2 Mylne & Keen, 503, 512.

† Story's Equity Pleading, § 541.

sustained, or on what ground the bill was dismissed. As the record stands this decree might be pleaded successfully as a bar to any other bill brought by Eliza House, or by Mary Hunter, her child, in assertion of her right to this lot, though we are of opinion that the only defect in the bill is that it shows no interest in Mary Hunter, while it does show a good cause for equitable relief on the part of Eliza House. If the decree had dismissed the bill without prejudice,* or had stated as the ground of dismissal the misjoinder of parties, or want of interest in two of them, we would have affirmed it, but, to prevent what may be a great injustice, we must reverse the present decree and remand the case, with directions to allow plaintiffs to amend their bill as they may be advised, and if they fail to do this within a reasonable time, to dismiss it without prejudice.

REVERSAL AND REMAND ACCORDINGLY.

JEFFRIES *v.* LIFE INSURANCE COMPANY.

Where a policy of life insurance contains the following conditions, to wit:

> "This policy is issued by the company, and accepted by the assured, on the following *express conditions and agreements, which are a part of the contract of insurance:*
>
> "*First.* That the statements and declaration made in the application for said policy, and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured *affecting the interest of the company*—"

And the further condition:

> "That in case of the violation of the foregoing condition, . . . this policy shall become *null and void*—"

Any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given, to the risk.

Accordingly, where, on a suit against an insurance company, the plea alleged that the party insured, by his application for a policy, in answer

---

* Story's Equity Pleading, § 541.