

New Jersey Court of Errors and Appeals.

HERBERT CLARK GILSON, and EL-
MER W. DEMAREST, Recrs. of the
J. C. APPLEBY SAND AND CLAY
COMPANY,

*Prosecutors Below—
Plaintiffs-in-Error,*

vs.

WILLIAM H. SPEER, Judge and
J. CHARLES APPLEBY,

*Respondents Below—
Defendants-in-Error,*

HERBERT CLARK GILSON, and EL-
MER W. DEMAREST, Recrs. of J.
C. APPLEBY SAND AND CLAY
COMPANY,

*Prosecutors Below—
Plaintiffs-in-Error,*

vs.

WILLIAM H. SPEER, Judge and
WILLIAM R. APPLEBY,

*Respondents Below—
Defendants-in-Error.*

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On Error to
Supreme
Court

On Certiorari
to Hudson
County Cir-
cuit Court

In

Attachment
On motion to
quash the
attachments.

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BRIEF OF PLAINTIFFS-IN-ERROR.

The writs of attachment in the above-entitled
causes were sworn out in the Hudson County Cir-
cuit Court; motions were made by the defendants
to quash the writs, testimony was taken upon the
motions and the Court upon considering the testi-

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mony quashed the writs (pages 23 and 36). Writs of certiorari were thereupon allowed bringing up the orders of the Hudson Circuit and the Supreme Court in opinions, pages VIII and XIV affirmed the orders of the Circuit Court, the orders of affirmances appearing upon pages VI and XIII, and thereupon writs of error were sued out.

The cases are printed together.

The writ of attachment in the J. Charles Apple-
 10 by case is found on page 5 and is based upon an affidavit, page 4, wherein it is stated, that the defendant J. Charles Appleby is a non-resident and that

“he owes to the plaintiffs a debt in the sum of Forty-nine thousand dollars as nearly as dependant can specify.”

The writ in the William R. Appleby case is found on page 29 and is based upon an affidavit,
 20 page 28, which states that the defendant William R. Appleby is a non-resident and that

he owes to the plaintiff a debt in the sum of Five thousand dollars as nearly as deponent can specify.”

The petition to quash the writ in the J. Charles Appleby case is found on page 8; that in the William R. Appleby case on page 32.

One set of depositions was taken for both cases,
 30 pages 14 to 23.

The order in the J. Charles Appleby case quashing the writ is found on page 23 and that in the William R. Appleby case on page 36. Both orders are alike and quash the writs upon the ground

“and the court being of opinion upon the evidence so submitted that the claim demanded by the plaintiffs and sworn to in the affidavit upon which the writ was issued is not for a sum certain or capable of ascertainment by
 40 calculation, but is rather in the nature of a claim for unliquidated damages.”

The plaintiffs, Herbert Clark Gilson and Elmer W. Demarest are receivers of the J. C. Appleby Sand and Clay Company appointed by the Court of Chancery upon proceedings in insolvency.

It was disclosed during the course of the receivership that J. Charles Appleby, an original promoter of the company, was still the holder of 490 shares of stock of the company and that of this stock 130 shares was of an original issue, the facts with respect to which are set forth in paragraph 5 of Exhibit P-1, pages 40 and 41. J. Charles Appleby incorporated the company and conveyed to it certain lands in the County of Middlesex, and State of New Jersey, which lands were reasonably worth the sum of Five thousand dollars. In return he received a check for \$100,000, and thereupon gave to the Company a check for \$100,000 and received 1,000 shares of stock, all of which shares he subsequently transferred to other persons except 130.

The Board of Directors of the Company were the dummies of J. Charles Appleby and the check of the J. C. Appleby Sand and Clay Company to the order of J. Charles Appleby and that from J. Charles Appleby to the order of the J. C. Appleby Sand and Clay Company were used as a blind and for the purpose of concealing the real transaction; all of the persons who took the stock knew that the transaction was really a purchase by the corporation of the lands and real estate and knew that the lands were not reasonably worth more than the sum of five thousand dollars; the directors of the corporation were under the control of J. Charles Appleby, and they and each of them knew that the value of the real estate was not in excess of the sum of Five thousand dollars.

It must be kept in mind that the entire 1,000 shares or an equivalent of \$100,000 was issued to

J. Charles Appleby, and that he has transferred all of it with the exception of one hundred and thirty shares or an equivalent of \$13,000, which he still holds.

The 360 shares remaining of the 490 shares of stock now held by J. Charles Appleby were issued *for no consideration whatever* and the facts with respect to such issue will be found in Exhibit P-1, page 43. These 360 shares of stock were issued in
 10 pursuance of a resolution as follows:

“Regularly moved and seconded that in payment to the stockholders as of March 11th, 1905, for their gratuitous services in placing this company in its present position, be distributed to stockholders as of record on that date in proportion to their holdings, \$100,000 of the new stock and that the balance of \$50,000 be sold at par and the proceeds be used for the betterment of the company.”

20 Of these 1,000 shares of stock J. Charles Appleby received 850 shares, or an equivalent of \$85,000 in value; he has transferred all of this except 360 shares, or an equivalent of \$36,000 in value, which he still holds.

A consideration of these stock issues is important because of the errors as to the facts into which the Supreme Court has fallen.

The attachment suit against J. Charles Appleby involves two distinct classes of stock, one of which,
 30 to wit, 130 shares now remaining of the 1,000 shares originally issued were issued for property purchased, the true value of which was about 5% of the stock issue. If this statement is true with respect to the value of the property J. Charles Appleby is liable to the extent of \$95,000 upon this stock inasmuch as the entire \$100,000 worth of stock was issued to him, and as he was the original subscriber he cannot escape liability by trans-
 40 fer. Upon the remaining 360 shares of stock no

amount whatever was paid, yet the Supreme Court in its opinion says (p. XV) :

“Confessedly in this case something was paid on account of the stock. The value of the property which was transferred to the corporation by way of payment may be in dispute, but the corporation took it as the equivalent of the par value of the stock.”

The Court omitted to make a clear distinction between the two classes of stock, the 130 shares for which there was something paid on account and the 360 shares for which confessedly *nothing was paid*. 10

The receivers also found that William R. Appleby was the holder of fifty shares of stock issued “for gratuitous services rendered” and for no consideration whatever, or an equivalent in value of \$5,000. and this stock stands in the same position as does the 360 shares of stock of J. Charles Appleby. 20

Confessedly nothing was paid on account of this stock. Again the Supreme Court fell into error in holding (page VIII) that

“the question involved in this case is the same as in *Gilson vs. J. Charles Appleby* just decided.”

The question was not the same because the decision in that case is put squarely upon the ground that inasmuch as all of the stock involved in that case was issued for property purchased, and that the value of such property was in dispute (which is not the fact—only 130 out of 460 shares having been issued for property purchased, the balance being issued for no consideration whatever and as a bonus) the debt was not liquidated. This reason could not apply in the William R. Appleby because it is not contended that any amount was 30 40

paid on account of the value of the stock, or that any property was transferred to the corporation on account of the value of the stock so that the value of the property transferred to the corporation in exchange for the stock could not have been in dispute, and were it in dispute the debt would nevertheless be liquidated because the agreement under which the stock was issued and the property transferred to the corporation being in fraud of
 10 the act concerning corporations such agreement was under the doctrine of *Volney vs. Nixon*, 68 N. J., Eq. 605, *Easton National Bank vs. American Brick Co.*, 70 N. J. Eq. 72;

“not only voidable but void.” It had as little effect for any purpose as the contract that was before this Court in *Volney vs. Nixon*, 68 N. J. L., 605, and could not be laid hold of by either party as a ground of action or a ground of defense. No bill or other original proceeding was necessary to procure an adjudication of its nullity * * * .”
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And therefore, the corporation can recover upon the stock the entire face value, and the receivers may recover in any event a sufficient amount to pay the debts of the corporation.

It is true that the stockholder is entitled to recover from the corporation the value of the property which he transferred to the corporation, but not by virtue of the contract for that is void, but
 30 rather upon the doctrine that it is unfair for the corporation to retain the property and refuse to pay for it upon the doctrine of unjust enrichment.

The defendant may set up in an action at law as a set off that he has transferred this property to the corporation, which the corporation has not paid for, and that he is entitled to have a set off allowed to him, and the value of the property will be computed as upon a *quantum valebant*. But
 40 the mere fact that the stockholder has, what is

in effect an action against the corporation for the value of the property upon a *quantum valebant*, does not make the claim of the corporation unliquidated. This reasoning, of course, cannot apply in the cases at bar except as to the 130 shares of stock representing a value of \$13,000, held by J. Charles Appleby, for as has previously been pointed out none of the remaining 360 shares of the J. Charles Appleby stock, representing a value of \$36,000 and of the 50 shares of the William R. Appleby stock, representing a value of \$5,000 was ever paid for, either in money or property purchased or in any other way. 10

After discovering the facts above set forth the receivers presented a petition to the Court of Chancery upon notice to J. Charles Appleby and to William R. Appleby and to all of the other creditors and stockholders and secured from that court an order, which order is found upon pages 50, 51, 52, 53 and 54 of the record, and that order after reciting the notice given to all persons including J. Charles Appleby and William R. Appleby orders 20

“that the sum of \$15000 is hereby adjudged to be the amount of money necessary for the receivers to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the receivership.

“And it is further ordered that the receiver may, as he is advised, bring such suits at law or in equity to enforce any and all of the alleged liabilities arising out of the issuance, subscription to or holding of the stock of the insolvent corporation, and that each party is at liberty to apply to the court in the premises upon two days notice for further direction herein.” 30

Upon a subsequent report and petition of the receiver upon notice to all the parties, it was “ordered that the sum of \$20,000 be and is hereby adjudged to be the amount of money necessary for the receivers to collect from 40

the stockholders in order to pay the debts of the insolvent corporation and the expenses of the receivership" page 56.

The receivers thereupon filed a bill of complaint in the Court of Chancery, Exhibit P-1, page 37, in which bill they set up all of the facts with respect to the issuance of this stock, made all of the stockholders parties, and sought by such proceeding to obtain a decree which would
10 do equity between the parties.

J. Charles Appleby and William R. Appleby, however, holders of the bulk of unpaid stock, J. Charles Appleby being the promoter of the company and having secured the entire original issue of 1,000 shares and 850 of the 1,000 shares which were subsequently issued for gratuitous services rendered, was a non-resident, as was also William R. Appleby, his son, who held 50 of the 1,000
20 shares issued for gratuitous services rendered, and they declined to appear in the suit in equity. An attempt was made to bring them in by publication whereupon they filed pleas to the jurisdiction of the court, and whether these pleas are good or no is still to be determined in this court.

Although J. Charles Appleby and William R. Appleby were non-residents, yet they each owned considerable property within the State of New Jersey. If the pleas of J. Charles Appleby and
30 William R. Appleby are good, it may be impossible to reach them in the suit in equity and equally impossible to reach their property; the receivers therefore then proceeded in these suits at law by writs of attachment.

If these attachments are quashed there may be no way by which these stockholders, one of whom was the promoter of this company and received 1,850 of the total issue of 2,000 shares of stock
40 all of which is practically unpaid for, and both of whom own considerable property within the

State of New Jersey, may be made to respond to the law of the State of New Jersey with respect to liability of shareholders upon unpaid stock.

The receivers contend that they have a claim of \$49,000 against J. Charles Appleby based upon the following grounds:

First for the full par value of the stock for the sum of \$49,000.

(a) For the full par value of 490 shares of stock now held by J. Charles Appleby. 10

In such an action so far as the 130 shares of that stock is concerned, J. Charles Appleby would be entitled to recover against the receivers the value of the property transferred by him to the corporation upon a *quantum valebant*, but so far as the 360 shares of stock is concerned he is not even entitled to this.

(b) The par value of 850 shares of stock issued to him of the issue of 1,000 shares issued for gratuitous services rendered as a bonus, equivalent to \$85,000 he being the original subscriber and not being able to escape liability by transfer. 20

The receivers have only asked for \$49,000 of this \$85,000.

(c) The par value of 1,000 shares of stock, equivalent to \$100,000 originally issued to J. Charles Appleby, for property purchased. 30

In such an action J. Charles Appleby would be entitled to recover from the receivers the value of such property as he conveyed to the corporation upon a *quantum valebant*, estimated by the receivers to be worth \$5,000.

The receivers take the position that they are entitled to recover the full par of the stock where there are stockholders who have paid in the full par of the stock, as there are in the case at bar, 40

yet the Supreme Court in its opinion, page 15 said:

"Whether or not the receiver of an insolvent corporation could maintain a suit for the full amount of the stock, where nothing had been paid thereon and a less sum would suffice to satisfy the debts and obligations, is a question not presented in the present case."

It is presented or can be presented were it
 10 proper to decide it upon a motion to quash because to repeat *confessedly nothing was paid on account of the 850 shares of stock originally held by J. Charles Appleby, 360 shares of which are now held by him*, and the receivers make the contention that they are entitled, where there are stockholders who paid in full, to recover the par value of the stock.

**Second: That in any event they are
 20 entitled to recover against J. Charles Appleby the sum of \$20,000 being the amount of debts of the corporation.**

J. Charles Appleby now has in his possession 360 shares of stock upon which confessedly nothing was paid. It is the contention of the receivers that under the statute any stockholder who has not paid for his stock in full is liable *in solido* for the debts of the company. If the court had con-
 30 sidered that the attachment was for too large an amount, to wit, \$49,000 when it should have been either for \$36,000, that is, the value of the stock now held by J. Charles Appleby upon which confessedly nothing was paid or \$20,000, that is, the amount of the debts of the corporation, the court should have reduced the amount of the attachments as was done in the case of

Heckscher vs. Trotter, 19 Vr. p. 419.

40 With respect to the claim of the receivers against William R. Appleby it is insisted by the

receivers that they are entitled to recover against him the sum of \$5,000 and that such an amount is liquidated upon either of two propositions.

(a) The par value of 50 shares of stock held by him upon which confessedly nothing was paid.

(b) The sum of \$5,000 the par value of 50 shares of stock held by him upon which confessedly nothing was paid, as a part of the debts of the company which have been fixed at \$20,000,¹⁰ he being liable to the extent of the amount unpaid upon his stock for such debts.

The questions raised by these proceedings were of the utmost importance and should not have been disposed of upon the motion to quash the writs of attachment.

The motions to quash were granted upon the ground that the debts were not liquidated and the Circuit Court relied upon the case of²⁰

Heckscher vs. Trotter, 19 Vr. 424,

where the court said:

"It seems to me that neither the contract nor the law prescribes any standard for measuring the damages accruing to the plaintiff on breach of this covenant, sufficiently definite for the proper ascertainment, without the intervention of a jury, and hence that the writ of attachment cannot legally be issued³⁰ for their recovery."

This case is not authority for the proposition that the court can investigate into the justice of the plaintiffs' claim upon a preliminary application to quash the writ.

In *Auspach vs. Spring Lake*, 29 Vr., 138, the court said that the true rule is that upon a motion to quash the court cannot consider the validity or justice of the plaintiff's claim and so try in a sum-⁴⁰

mary and collateral investigation the main issue between the parties. "In New Jersey also the practice on such motions is to test the propriety of the remedy by the *nature* of the cause of action as disclosed by the plaintiff and not by its validity." Citing

Day vs. Bennett, 3 Hal., 287;
Shadduck vs. Marsh, Zab., 434.

- 10 The question is not whether the plaintiffs *can* recover but *do the plaintiffs claim a liquidated debt.*

In both of the cases at bar upon either theory of the plaintiff's claim they claim a liquidated debt.

The receivers assert

That they are entitled to recover against J. Charles Appleby.

- 20 (a) The par value of 490 shares of stock, \$49,000.
(b) The par value of 850 shares of stock, \$85,000.
(c) The sum of \$20,000.

And as against William R. Appleby they claim

- (a) That they can recover the sum of \$5000 as the par value of 50 shares of stock.
30 (b) The sum of \$5,000 as a part of the \$20,000 necessary to be raised to pay debts.

The claims of the receivers are liquidated. The defendants set up that they cannot recover. That they have no right as receivers to bring an action for the par value of the stock. That they have no right to bring an action for the amount of the debts *insolido*. That the defendant, J. Charles Appleby, will be entitled to a set off and there-
40 fore the whole amount will not be recovered.

But these are questions of law and fact which must be determined upon a trial of the action. They do not go to the nature of the plaintiff's claim. They go to its validity and justice.

In the case of *Moore vs. Richardson & Baldwin*, 65 N. J. L., 532, there was an attachment issued for the sum of five thousand dollars. The proof disclosed that the claim arose out of a contract for the care, feed and responsibility of horses. The defendants assumed responsibility in case of accident or death to the amount of the actual cost to the plaintiff. This is all that is disclosed by the proofs. But the Court sustained the attachment and said:

"Under the agreement before set forth there may be a claim capable of being ascertained which constituted a debt for which attachment will lie. Some of the horses may have died or been sold by the defendants before the filing of the affidavit in attachment. The plaintiff has a right to go to a jury upon this question of fact and establish a debt due from defendants if he can."

And in *Sullivan vs. Moffat*, 68 N. J. L., 211, the Court said:

"It may be that the plaintiff will not be able to prove his claim to be as definite as it is stated, but since the defendant based their motion upon the statement we must accept that as the exact truth."

In the *Hecksher* case, 19 Vr., 418, the Court further said

"that where a standard for measuring damages is fixed by the contract, the damage being the difference in value of two articles, the value of which was already determined, either by the sale of the articles themselves or by the market price of other articles of like value; held that, damages so ascertained or by calculation ascertainable could properly be sworn to by the plaintiff."

Whether or not the position of the receivers that they are entitled to recover for the full par value of the stock without regard to the debts of the corporation is correct was not decided by the Supreme Court and could not have been decided by it. It stated that it did not decide it because the question was not presented in the present cases, and for the reason that something was paid on account to the corporation, but as I have

10 pointed out the Supreme Court erred in this statement of fact, as in the J. Charles Appleby case upon 360 shares nothing was paid and J. Charles Appleby was also the original subscriber for 850 shares upon which nothing was paid. So that there was more than \$49,000 worth of stock for which he was liable, upon which nothing had been paid, and in the William R. Appleby case nothing had been paid upon the 50 shares of stock held by him.

20 *It could not be decided in the present case upon motion to quash because it would be going to the validity of the plaintiff's claim and not as to the question as to whether it was liquidated.*

However, upon that question the unreported opinion of Vice Chancellor Stevenson in the case of *Manning vs. Hercules Motor Company* is important. The Court said:

30 "The subscriber who in response to a call pays in his money, relies upon the corresponding action on the part of the other stockholders. It would be an amazing result if a subscriber for stock could hold back and then perhaps when failure of the corporate enterprise becomes apparent, elect to lose what he had put in rather than to complete his contract of subscription and invest more money in a desperate enterprise."

And further:

40 It seems to be quite plain that all the rights of stockholders as against each other based on

the right of contribution, can be enforced by the receiver of the corporation appointed under our statute. The following points I note in glancing through Secs. 66 to 68 of our Corporation Act:

“(a) The receiver is a receiver for the creditors and stockholders of a corporation.

“(b) The receiver takes title to the property of every description of the corporation. This includes the contractual obligation of the stock subscriber, subject, of course, to that subscriber's defence of failure of consideration. Sec. 68 also provides that all real and personal property of the corporation shall forthwith vest in the receiver. 10

“(c) The act expressly provides that after the payment of debts, the surplus funds, if any, shall go first to the preferred stockholders, and after that to the general stockholders, proportionally according to their respective shares. This is most significant language and indicates quite plainly that the receiver's powers to call in the capital are not limited to the satisfaction of debts.’” 20

The fact that the stock is full paid and non-assessable does not prevent the institution of suits.

The Supreme Court placed great stress in its opinion (page XVI) upon the fact that the stock issued to J. Charles Appleby and William R. Appleby contained the statement that it was issued as full paid and non-assessable, and said:

“This necessitates the ascertainment of the amount paid on the stock (ignoring the fact that upon the 360 shares of stock in controversy nothing was ever paid) and the amount of the debts and obligations; and before the receivers can recover at all they must set aside the agreement by which the corporation issued the stock to the stockholder and got it as full paid.” And intimated that only in a court of equity could such a contract be set aside. 30

This is not the law of this state since the decision of the *Easton National Bank vs. American Brick Co.*, 70 N. J. Eq., 728:

10 "Assuming the case showed a contract between the company and its stockholders that the stock certificates should be issued as full paid and as for property purchased, and that this contract was in fact of such a character and made under such circumstances that it contravened the prohibition of the Corpora-
 20 tion Act, it was not merely voidable, but void. It had as little effect for any purpose as the contract that was before this court in *Volney vs. Nixon*, 68 N. J. L., 605, and could not be laid hold of by either party as a ground of action or a ground of defense. No bill or other original proceeding was necessary to procure an adjudication of its nullity, and the court, on the petition originally filed by the receiver for the purpose of enforcing the liability of the stockholders for the unpaid portion of their subscription upon asserting the facts that rendered the so-called contract void was at liberty to treat it as affording no obstacle to the relief prayed by the receiver."

Neither this case nor that of *Bigelow vs. Old Dominion Copper Co.*, 74 Eq., p. 515, where Pitney, C., and Walker, V. C., reiterated the doctrine of the *Easton National Bank vs. American Brick Company*, nor that of *Carver vs. Southern Iron & Steel Co.*, 78 Atl., p. 245, where Garrison, V. C.,
 30 said:

"With respect to the suggestion of the defendant that the complainant is a holder of a small amount of stock, and that the proposed issuance of new stock at less than par cannot injure her interests, the complete answer, in my view, is contained in the language of the present Chancellor in the case of *Easton National Bank vs. American Brick Company*, 72 N. J. Eq., at page 740, where he said: 'The express prohibition of Section 54, and the
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whole spirit and policy of the act, are so clearly opposed to any arrangement by which corporate stock shall be issued without the receipt of the company of an equivalent in value to its par, that any agreement to this effect must be deemed as contrary to the policy of the law.' ”

nor that of *Arnold vs. Searing*, 78 Atl., p. 762, in which case Howell, V. C., follows *Easton National Bank vs. American Brick Company*, nor that of *Johnson vs. The Tennessee Oil Company*, 10 4 Buch., 32, where Emery, V. C., said:

“Under the New Jersey statutes such payment of stock by property fraudulently over-valued can be questioned by the receiver representing creditors because such issue is a violation of the letter and spirit of our Corporation Act and is, as against creditors, *to be treated as absolutely void for the purpose of payment, thus leaving the stockholders within reach of the sections of the Act providing a remedy for creditors against stockholders for the amount 20 unpaid on his stock,*”

were noticed by the Supreme Court in the decision of the cases below.

The claim that there was no assessment or call cannot support the judgment of the Supreme Court.

The Supreme Court intimated that there had been no call by the receivers and that therefore there was no debt for which an attachment could 30 lie.

There are three answers to this proposition:

First. There was no necessity for an assessment or call.

Second. There was an assessment and call.

Third. Whether an assessment or call were necessary should not be determined upon the motion to quash.

First. There was no necessity for an assessment or call.

If the receivers' contention be correct that they are entitled to recover the par value of the stock under the doctrine enunciated by Vice Chancellor Stevenson in *Manning vs. Hercules Motor Company* as representing both creditors and stockholders, there was no necessity for an assessment or call.

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There was no necessity for an assessment or call because the cause of action for the full par value of the stock resided in the corporation at the time the Receivers were appointed and vested in them at that time, the Receivers proceeding not on the statutory liability but on the contract.

- 20 In the cases at bar the stock was taken by the defendants *as full paid stock*. It was not the ordinary case of stock taken by stockholders not purporting to be paid in full and under an agreement by which the stockholders agreed that they would pay the balance which might be due upon the stock *as and when assessments were regularly made*. The defendants in the case at bar never contemplated that they would be obliged to pay any amount upon their capital stock. The corporation never contemplated that it would subsequently be entitled to get in any amount on account of this stock. The agreement, therefore, between the parties as to the sale of the stock was not that the stockholders should become subscribers paying a certain amount down and then as and when assessments were made the balance of the par of the stock, but that the stockholders should pay at the time the stock was delivered the full par value of the stock and the parties
- 40 agreed that what the stockholders did turn over,

to wit, in the one case, property and in the other case "gratuitous services rendered" was equal to the par value of the stock. *Now this agreement is void as against the policy of our law.* The acts of the directors of the company because of fraud are not binding upon the corporation or its receivers. There was a right of action therefore in the corporation prior to the appointment of the receivers and which is now vested in the receivers to recover against these stockholders not the amount of a call or an assessment as upon a contract to pay such subsequent calls and assessments as might be made *but for the value of the stock upon the agreement originally entered into between the corporation and the defendant stockholders, that they should take the stock and pay par they not having done so because of the fraud of the directors.* Considering the right of action from this point of view, it is, of course, unnecessary that there should be any call or assessment either by the court, the receivers or the corporation. It is only where the original agreement between the stockholders and the corporation is that they should pay a certain amount upon their stock and then the balance as and when calls are made that it is necessary that the receivers, before they can collect, should make a call or assessment.

The right of action to recover for the value of this stock resided in the corporation at the time of the appointment of the receivers, and could be asserted by the corporation without calling upon each of the stockholders for the par value of their stock.

In other words, to take an example. Suppose a corporation sells 1,000 shares of its stock, at par, upon the agreement that the subscriber shall pay 20% down, 80% as and when assessments are made. It may be that under such an agreement

there must be an assessment and call and that such assessment and call should be pro rata.

Suppose the same corporation issues to one man 1,000 shares of stock upon the agreement that he shall pay par for that stock in full at once he being in control of the Board of Directors of the Corporation succeeds in getting the corporation to accept his property at less than par, so much less as to render the agreement that the amount accepted at par should equal par, is void under the doctrine enunciated in the Easton National Bank vs. American Brick Company case. It seems to me that the corporation would be entitled to recover as against this stockholder so having this 1,000 shares of stock, *the full par of the stock*, because that was the agreement that he should pay par at once, and it seems to me *that that right of action resided in the corporation until the appointment of the receivers and vested in the receivers at the time of their appointment*, and that the receivers are entitled to recover upon that agreement not the amount necessary to pay debts, but the amount necessary to make up the full value of the par of the stock, because the stockholder had taken the stock agreeing to pay the par at once *and a debt had accrued and resided in the corporation at the time of the insolvency.*

If this theory is correct, and it is submitted that whether it is or not should not be determined upon a motion to quash the attachment, an attachment can, of course, *lie because the debt which has accrued at the time of the appointment of the receivers vested in the receivers.* That the defendant is entitled to a set off cannot affect the plaintiffs claim which is legally a debt for the par of the stock under the agreement with the defendant to pay par.

Second. There was an assessment and call.

The testimony discloses that the receivers demanded of the stockholders the amount due upon their stock before the institution of the suits. In the case of J. Charles Appleby this meant the payment by him upon 130 shares of stock of the difference between the par value of the stock and the value of the property transferred, and as to the 360 shares the par value of these shares, and as to William R. Appleby the par value of the 50 shares held by him. 10

The receivers could make this call without the intervention of the court.

Barklow vs. Totten, 53 N. J. Eq., 573;
Scoville vs. Thayer, 105 U. S., 145;
Hood, Recr. vs. McNaughton, 25 Vr., 425;
Vanderbilt vs. Central Railroad Co., 43 N. J. Eq., 682.

Furthermore, the Court of Chancery in the insolvency proceedings upon petition of the receivers setting up that J. Charles Appleby and William R. Appleby and others were stockholders and that they had not paid their subscription, and that there was a deficiency of assets to meet liabilities, upon notice to all the creditors including J. Charles Appleby and William R. Appleby, ordered that the sum of \$20,000 was the amount of money necessary for the receivers to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the receivership. 20 30

This was a call upon the stockholders to pay such moneys, the receivers being authorized to bring such suits, as might be proper to enforce collection.

Third. Whether it was necessary to make an assessment or call is not to be determined in these proceedings.

This goes to the truth of the plaintiff's claim and to the equity and justice of it and not to its nature. Whether the plaintiffs have any claim or not is to be determined in the attachment proceedings, not upon motion to quash the original attachment, which is nothing but a summons. It would be remarkable if in all cases the equity and justice of the plaintiffs' claim could be tried out in attachment proceedings. It may be that the plaintiffs cannot recover because no assessment or call has been made but if this Court should determine in these proceedings that the plaintiffs have no debt because no assessment or call has been made with equal force could it be contended that in any action commenced by attachment the defendants might come in upon motion to quash the writ of attachment and prove that the claim had been outlawed and that the statute of limitation prevented recovery. It will not be contended for one moment that upon motion to quash the writ of attachment such defenses can be raised.

As the court said in *Anspach vs. Spring Lake*, 29 Vr., 138:

"The court cannot consider the validity or justice of the plaintiffs' claim, and so try in a summary and collateral investigation the main issue between the parties. In New Jersey also the practice on such motions is to test the propriety of the remedy by the nature of the cause of action as disclosed by the plaintiff and not by its validity."

The receivers are in any event entitled to proceed against J. Charles Appleby for \$20,000, the amount of money necessary to be raised from stockholders to pay debts and against William R. Appleby for \$5,000 that being the par value of his stock and less than the amount necessary to pay debts.

The statute, "An Act Concerning Corporations" provides, Sec. 21: "Where all the capital of a corporation shall not have been paid and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations." 10

In the case at bar the Court of Chancery in the insolvency proceedings made an order upon notice to all the stockholders of the company including J. Charles Appleby and William R. Appleby determining that there was necessary to be raised to pay the debts of the company \$20,000 from unpaid stock. That this \$20,000 was the deficiency necessary to be raised out of stockholders and directed the receivers to bring such suit or suits as they might be advised were proper. This order was made upon petition of the receivers reciting all the facts with respect to the issuance of stock and holdings of J. Charles Appleby and William R. Appleby and the order recited such holdings and adjudged that \$20,000 was necessary to be collected from the stockholders, and was an assessment and call upon the stockholders to pay within the case of *Cumberland Lumber Co. vs. Clinton Hall Mfg. Co.*, 57 N. J. Eq., 627. 20 30

The statute Sec. 21 does not say that each stock- 40

holder shall be liable to pay the same proportion upon his stock as every other stockholder has to pay so as to create a fund to pay the debts. It says: "each stockholder shall be liable to the extent of the amount unpaid on his capital stock *for the debts* and obligations of the company." It, in so many words, makes him liable *insolido*. By reason of his contractual relations with his fellow stockholders he is entitled to contribution
 10 against them, but this is a right arising not from the statute but from his contractual relations and is a right given to him and in no wise affecting the rights of the receivers in the first instance to recover from the stockholders and each one of them the entire sum necessary to pay *all the debts*.

The receivers may select the stockholders whom they will pursue. They sue each of the stockholders and in each case sue for the amount sufficient
 20 to pay all the debts. The amount that they can sue each stockholder for being limited only to the amount due upon his stock.

They may secure judgments against each. Any stockholder may file a bill in equity and enforce his right of contribution. He has the right if he pays the judgments against him to be subrogated to the rights of the receiver.

That this is so is settled by the case of *See, Rec'r. vs. Heppenheimer*, 69 Eq., 36, affirmed in
 30 the Court of Errors and Appeals.

The defendants cannot set up contribution at law. They must go in equity.

69 N. J. Eq., 83 and 84.

They are joint guarantors, page 83 and of course, if joint guarantors, each liable *insolido*.

The amount necessary to be raised from the stockholders having been fixed by the Court of Chancery at \$20,000 and J. Charles Appleby hav-
 40

ing in his possession more than \$20,000 worth of stock *upon which nothing has been paid* and William R. Appleby having in his possession \$5,000 worth of stock *upon which nothing has been paid*, a writ of attachmen in the J. Charles Appleby case can be sustained for \$20,000 and in the William R. Appleby case for \$5,000.

If the Court takes this view, the proper order of the Supreme Court in the J. Charles Appleby case would have reversed the order of the Circuit Court with direction to reduce the amount claimed in the J. Charles Appleby case from \$49,000 to \$20,000. 10

The Supreme Court in its opinion said:

"These questions seem to show that there is no debt due for which an attachment would lie until after an order has been made by the Court of Chancery fixing the amount of the stockholders' liability."

Such an order was made. The Court of Chancery, by its order adjudged that \$20,000 was the deficiency necessary to be collected from stockholders. The statute did the rest. It provided that "each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the corporation or such proportion of that sum as shall be required to satisfy such debts and obligations." 20

The Court of Chancery having settled the amount "required to satisfy such debts and obligations", each stockholder is liable for that full amount to the extent of the amount unpaid upon his capital stock. The word proportion used in section 21 of the statute does not mean that each stockholder is liable in the same proportion that every other stockholder is. In fact, the word "proportion" is misused. The word should have been "portion". That it does not mean proportion 30 40

in the sense that you can only collect from each stockholder the amount that you can collect from every other stockholder is settled in *See vs. Heppenheimer*, 55 N. J. Eq., 240; 69 Eq., 240.

That the receivers should sue at law upon an assessment being made is settled by

Hood, Recr. vs. McNaughton, 25 Vr., 425;

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Barlow vs. Totten, 53 Eq., 573.

FINALLY.

Almost all of the questions which have been discussed in this brief and which I have considered it necessary to discuss because of the importance given to them in the court below should have no effect upon the decision of this cause because they are questions which properly go to the merits of the case and the validity of the plaintiffs claim and should not be determined in a summary and collateral proceeding to quash the writ of attachment.

It is submitted that the judgment of the Supreme Court should be reversed and the Supreme Court directed to enter an order in the certiorari proceedings reversing the rules of the Hudson County Circuit Court and if this Court takes the view that the fact that there was some property transferred for the 130 shares of stock makes any difference, then that the judgment in the J. Charles Appleby case should be directing the Supreme Court to enter a rule in the certiorari proceedings setting aside the rule of the Hudson County Circuit Court and directing that court to reduce the amount claimed in the J. Charles Appleby case to \$36,000, in accordance with the doctrine of *Heckscher vs. Trotter*, and if this court takes the view that the receivers cannot recover more than the amount which the Court of

40

Chancery has authorized them to collect to meet the deficiency of assets to pay liabilities, to wit, the sum of \$20,000, then that the judgments of the Supreme Court should be reversed and the Supreme Court directed to enter a rule setting aside the rules of the Hudson Circuit and in the J. Charles Appleby case reducing the amount claimed to \$20,000.

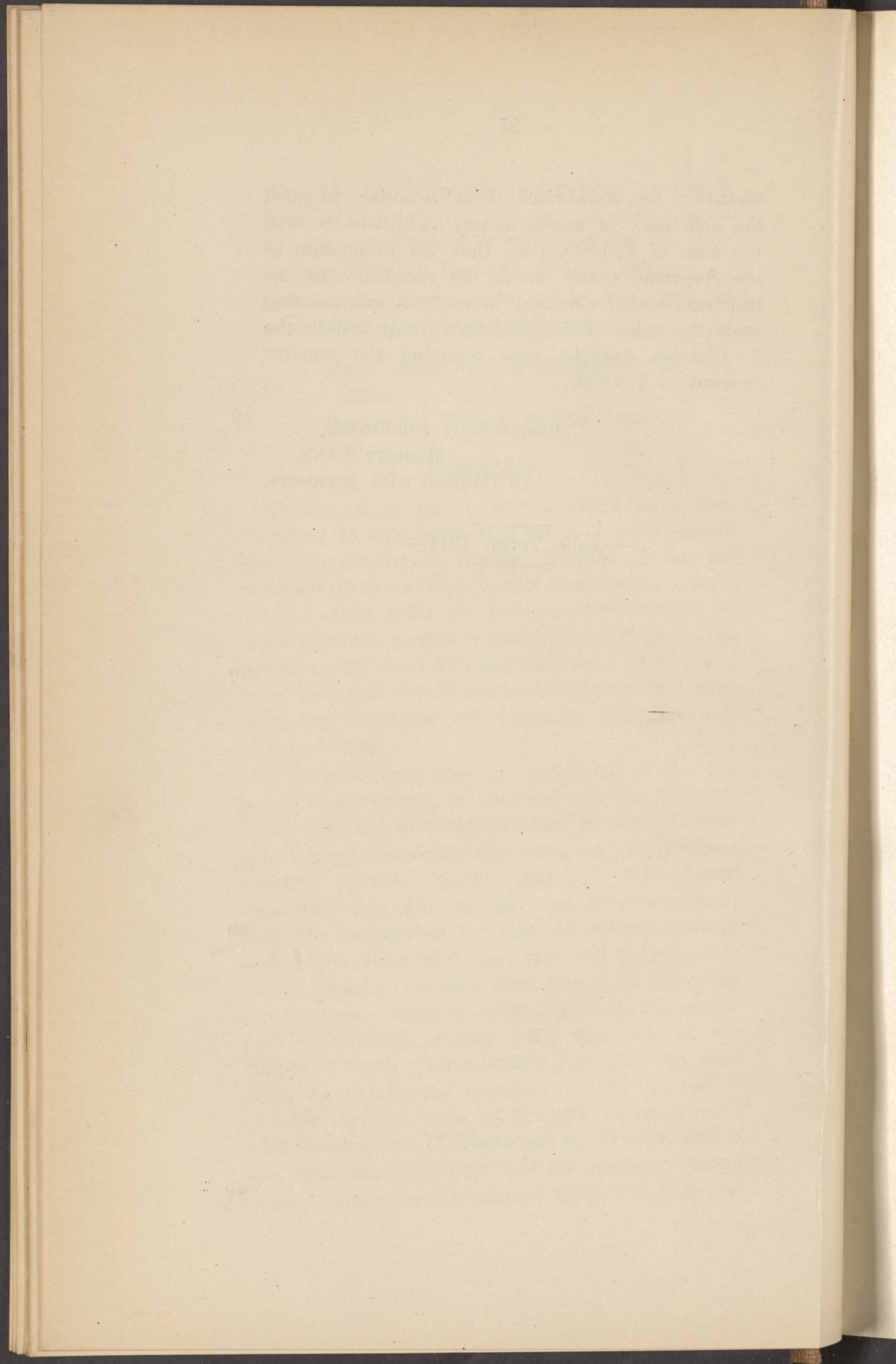
Respectfully submitted, 10
 MERRITT LANE,
 Of Counsel with Receivers.

—June Term, 1911.—

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Court of Errors and Appeals of NEW JERSEY

HERBERT CLARK GILSON & E. W.
DEMAREST, RECEIVERS,
Plaintiffs in Error
and Plaintiffs below,
and

J. CHARLES APPLEBY,
Defendant in Error
and Defendant below.

*On Error to the
Supreme Court.*

SAME

Plaintiffs in Error
and Plaintiffs below,
and

WILLIAM R. APPLEBY,
Defendant in Error
and Defendant below.

**Brief of Hartshorne, Insley & Leake for the De-
fendants in Error.**

STATEMENT OF THE CASE.

The Circuit Court, by order, quashed the two writs of attachment which had been issued from that Court against the two defendants separately, upon the ground that the alleged debts sworn to in the affidavits on which the writs issued were in the nature of claims for unliquidated damages. On certiorari the Supreme Court affirmed that order.

In the case of J. Charles Appleby the plaintiffs' claim was for the full par value (\$49,000) of 490 shares of the stock of the J. C. Appleby Sand & Clay Company issued as full paid. That corporation was adjudged insolvent by the Court of Chancery and the plaintiffs were appointed receivers. That Court, in the insolvency proceedings, by order dated June 14, 1909, adjudged that \$20,000 was the sum necessary for the receivers to collect from the stockholders in order to pay the debts of the company and the expenses of receivership.

But there had been no order or call fixing the quota or amount due from any stockholder.

The receivers have filed a bill in Chancery against these defendants and the other stockholders, charging them with liability as for unpaid stock, claiming that part of the stock issued to them was for property purchased at an excessive valuation, and that part was issued for no consideration at all. The bill states that some of the defendant stockholders are insolvent and that some of the stock so issued has been transferred to other persons and now stands on the books of the company in the names of those persons. The bill prays that an investigation be made of the financial responsibility of the defendant stockholders and that the Court should determine how much should be paid by the several defendants on their stock respectively, and that those defendants be ordered to pay the balance due on their stock until they shall have paid so much as shall be necessary to pay the debts of the corporation and to do equity between them and those of the stockholders who have paid the full par value of the stock. Answers have been filed by most of the defendants to that suit and the suit is still pending.

In the attachment case against William R. Appleby, the facts are the same, except that his lia-

bility is claimed upon only \$5,000 par of stock, (all of which was issued as full paid), and the bill alleges that all of this was issued to him without consideration at all. It appears upon the face of the bill that he has transferred that stock and is no longer the owner of it on the books of the company.

I.

"An attachment will not lie for unliquidated damages, and can be used only when the demand is for a sum certain."

Heckscher vs. Trotter, 19 Vr., at p. 420.

"Where the cause of action consists merely in a right to recover some damages, but those damages are general, indefinite and undetermined, or incapable of being reduced by calculation to a proper degree of certainty, without the intervention of a jury," the defendant cannot be held to bail as of course, and in such case the writ of attachment cannot be issued.

Ibid., 421.

In that case the Court held that neither the contract sued on, nor the law, fixed a "standard for measuring the damages * * * sufficiently definite for their proper ascertainment, without the intervention of a jury, and hence, that the *writ of attachment cannot legally be issued for their recovery*," p. 424.

It also held that the affidavit on which the writ was issued "is not conclusive as to the nature of the plaintiff's claim," p. 424.

In Moore vs Richardson, 36 Vr., 531, the Supreme Court reviewed the previous cases upon the subject of quashing the writ or (where defendant

had appeared generally) ordering the lien of the attachment discharged and said, in effect, that in those cases the Court did not intend to declare that a writ of attachment would not be quashed after appearance, if it was undisputed that it was prosecuted against a person not subject to attachment, or *for a demand for unliquidated damages*," * * * p. 535.

II.

The liability of the defendants (if there be any liability) is not for a liquidated sum, and is not capable of being ascertained, except by a judicial proceeding and decree of a Court of equity.

"When the business of a corporation has been abandoned, and the corporation is insolvent, subscribers for, or holders of, its stock, not paid for, have no further obligation with respect thereto than to pay so much of what is unpaid on the stock as will satisfy the claims of corporate creditors and meet the expenses of winding up its affairs."

Cumberland Lumber Company vs. Clinton Hill, etc., Co., 12 Dick., 629.

"The proper tribunal to ascertain the amount necessary for these purposes is a court of equity, since courts of law have no procedure adapted to marshalling of assets and liabilities requisite in such a calculation" * * * "when in such a suit an assessment of the stock has been *ordered by the Court*, to meet corporate liabilities, and an action is brought against a stockholder to collect his quota, he cannot there question the propriety of the assessment."

Ibid., 629, 630.

The Court also held that the order making such an assessment against stockholders "is the result of an exercise of judicial power, and therefore that it should be made only in observance of those rules which are designed to insure the administration of justice."

Ibid., 630.

The Court reversed the decree below which had ordered an assessment against stockholders "of the whole amount of the unpaid subscriptions." The stockholders having made no payment on that stock and the par of the stock being more than enough to meet the debts of the corporation.

In that case an order was at last got in the Court of Chancery fixing the liability of each of the stockholders and assessing upon each the exact sum for which he was liable.

McCarter vs. Ketcham, 43 Vr., 247; S. C., 45 Vr., 825.

In See vs. Heppenheimer, 3 Robb., at p. 80, Pitney, V. C., said that in proceedings by receivers against stockholders to recover on unpaid stock in order to satisfy debts of the corporation, "it has always been the practice of this Court—

"*First*—To ascertain the whole amount of the unpaid debts;

"*Second*—In case of unpaid stock subscriptions, or stock issued without payment, to determine the names of such stockholders *and the amount due from each*; and

"*Third*—To make an assessment against those stockholders which, in case an action at law is

brought based upon that assessment, is conclusive against the stockholders."

The plaintiffs in this case admit (by the statements in their bill of complaint) that they do not know how much they are entitled to collect from each of the holders of unpaid stock severally. (Paragraph 14 of the bill.)

The defendant, J. C. Appleby, is not liable for \$20,000, much less for the par value of all his stock. He is liable for his *quota* or share of that sum; and that share is indeterminate, till determined by an assessment or call. The stock was issued as full paid stock and his liability (if any) is for so much only as is equitably due from him as his share of the sum necessary to be raised. How much the share of each of the Applebys will be, must depend upon many questions to be judicially determined; among them the following:

(1). What was the value of the property for which stock was issued to J. C. Appleby?

(2). Whether he is liable to an assessment on the stock surrendered by him.

(3). Whether he is liable on stock which has been transferred by him to others on the books of the Company.

(4). Whether W. R. Appleby is liable at all, he having transferred all his stock on the books of the Company.

(5). How much of the sums chargeable against insolvent stockholders (see paragraph 14 of the bill) is chargeable against the Applebys.

(6). How much is necessary "to do equity between the stockholders" (see paragraph 14 of bill).

III.

**There is no legal liability for a fixed sum because
there has been no assessment or call.**

"As a general rule a call must be made in order to render a subscription or any part thereof due and payable to the corporation," * * * "in other words, the subscription is a debt payable at a future time. The time when it should be paid is indefinite until fixed by call."

1 Cook on Corporations, Sec. 105.

A general subscription to the stock of a corporation "imports an agreement, not to pay at once the whole sum representing the value of the shares subscribed for, but a stipulation to pay such sum *when called for* by the directors *in amounts duly assessed*."

Grosse Isle Hotel Company vs. I'Anson's 13 Vr., at page 13; affirmed 14 Vr., 442.

See Falk vs. Whitman Cigar Company, 10 Dick., 396.

Speaking of an assessment or call by a receiver upon the notes of the members of an insolvent mutual insurance company, the Court of Errors said: "One of the steps necessary to be taken by the directors, in order to render these notes enforceable by suit, was a determination, made agreeable to the charter, of the proportions in which, and the times when, payment, should be required." The right to make the determination passed to the receiver.

Meley vs. Whitaker, 32 Vr., at p. 605.

"A call cannot be make so as to affect a part only

of the subscribers. It must be made on all alike or it will be void."

1 Cook on Corporations, Sec. 114, *citing*,
Great Western Tel. Company vs. Burnham,
79 Wis., 47.

Bowen vs. Kuehn, 79 Wis., 53.

IV.

The plaintiffs have no legal right of action whatever against defendants. Their remedy, if any, is purely equitable.

The distinction is between the *legal* obligation of a stockholder on a contract of subscription for stock which has not been issued as full paid, and the *equitable* obligation of the stockholder to the receiver for the benefit of the creditors where the stock has been issued as full paid, although, in fact, it has not been paid for as the law requires.

Stock issued as fully paid is binding between the corporation and the stockholder.

Goodnow vs American Writing Paper Company, 2 Buch., 645; affirmed, 3 Id., 692.

Hebberd vs. Southwestern Land, etc., Company, 10 Dick., 18, 31.

Arnold vs. Searing, 3 Buch., 262.

In the Goodnow case, Bergen, V. C., reaffirmed the ruling of Chancellor McGill in the Hebberd case, "that a contract between the company and its stockholders that the stock issued to him is full paid and not subject to further call is, in the absence of fraud affecting other shareholders, binding upon the company and its stockholders" (p. 648). That con-

tract may be set aside by creditors in equity, but not at law.

The distinction is recognized in the following cases:

In *Barkalow vs. Totten*, 8 Dick., 574, a suit in equity brought on an ordinary unpaid subscription for stock was dismissed upon the ground that it should have been brought at law upon the contract of subscription. But if the stock were issued as paid, then "In an action at law the complainant would find himself confronted with the certificate of stock, apparently with due conformity, declaring on its face that it was full paid and non-assessable. No action could be maintained in the face of that contract under seal until it was disposed of and annulled. Whether that could be done in a Court of law may well be doubted. It is enough to say that it is clearly the province of a Court of equity to relieve the complainant under those circumstances."

See *vs. Heppenheimer*, 3 Robb., at p. 82.

And see *Clevenger vs. Moore*, 42 Vr., at p. 150, where it said, that after an assessment has been made, "an action at law may be brought against a stockholder to collect *his quota*."

The distinction is clearly stated by Vice-Chancellor Stevenson in an unreported case—*Manning vs. Hercules Motor Company*, in which he held that the proper remedy of the receiver to collect from stockholders on stock which had been issued as full paid, but was not in fact paid up, was in equity.

The case of *Volney vs. Nixon*, 2 Robb., 605, is not to the contrary. That was a case in equity where the complainant asked the aid of that Court to get the benefit of a contract which on its face showed that the parties (who were individuals and not

corporations) were proposing to organize a corporation and issue ten shares of its stock for one share of the stock of an old company controlled by these parties when there was nothing to show that the stock of the old company was worth even par. The Court of Appeals held that equity would not lend its aid to the enforcement of such a contract.

V.

Costs—The Circuit Court rightfully awarded costs to defendants. Costs should also be allowed them in all the proceedings on the writs of error.

Receivers are liable for costs.

Columbia Ins. Co. *vs.* Stevens, 37 N. Y., 536,
34 Cyc., 448.

Here they have wrongfully used the process of the Court to seize the property of defendants. They compel defendants to appear for the purpose of getting it released.

In *Reeve ads Eft*, 2 Vr., 139, costs were allowed against one who had given notice of an application for mandamus, but who did not make the application.

And see, *State, Britten vs. Blake*, 7 Vr., 442.

We submit that the judgment of the Supreme Court should be affirmed with costs.

HARTSHORNE, INSLEY & LEAKE,
Counsel of Defendants.

SUPPLEMENTAL.

The draft of Mr. Lane's brief for the appellant which he has served upon us makes a number of statements of facts which do not appear in the case, except as mere allegations in the bill of complaint, and some of the most important of which are denied by the defendants. They deny that the land conveyed by J. Charles Appleby to the company was worth only \$5,000 and insist that it was worth very much more. They deny that the second issue of stock was "for no consideration whatever." The brief also says that for the stock issued to William R. Appleby "confessedly nothing was paid." If by this is meant that defendants admit that nothing in value was given for that issue of stock, the statement is denied by defendants. There is not a word in the deposition of Mr. Gilson printed in the case (case, p. 14), which supports any such statements as those made in the brief upon these points.

The appellants' brief also refers to Easton National Bank vs. American Brick, &c., Co. (70 N. J. E. at page 728), to show that a contract between the corporation and its stockholders that stock should be issued as full paid, when in fact it was given for property worth less than the par of the stock, is absolutely void. But the point before the Court for its consideration was whether the Receiver could enforce the statutory liability against the stockholders in the form of a petition in the insolvency suit instead of bringing a new suit by an original bill to enforce that liability; and, the petition having been amended by leave of Court into the form of a bill for that purpose, whether the bill was multifarious as presenting a claim that the stock was legally issued, subject to future assessment, and also presenting the contradictory claim that the stock was fraudulently issued as fully paid when in fact it was

not full paid. It was with reference to that situation of the case that the Court of Appeals said that if the contract between a corporation and the stockholders for the issue of stock as fully paid was made contrary to the statute, "it was not merely avoidable but void;" that is, the Court said that it was void in equity and the defect could be taken advantage of by petition as well as by bill. There is nothing in the opinion to warrant the inference that such transactions are open to attack in Courts of law; that the Receiver may bring an action at law against a stockholder holding stock issued as full paid, and submit to a jury the question of the value of the consideration given to the company in payment for the stock.

The effect of sustaining the Receiver's action would be to establish the rule that a Receiver of an insolvent corporation may collect from a single stockholder, out of any number equally liable, the total deficit in its assets for payment of the corporate debts.

HARTSHORNE, INSLEY & LEAKE.

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Writ of Error.

New Jersey, ss:

The State of New Jersey to the Chief
Justice and other Justices of our
Supreme Court of Judicature, 10

GREETING:

Because in the record and proceedings and also
in the giving of judgment in a plaint which was
in our Supreme Court before you between HER-
BERT CLARK GILSON and ELMER W. DEMAREST, re-
ceivers of the J. C. Appleby Sand and Clay Com-
pany, prosecutors against J. Charles Appleby, de-
fendant, upon a writ of certiorari issued out of
our said Supreme Court to the Hudson County 20
Circuit Court, as is said, manifest error hath
intervened to the great damage of the said Her-
bert Clark Gilson and Elmer W. Demarest, re-
ceivers of the J. C. Appleby Sand and Clay Com-
pany, as by their plaint we are informed, we being
willing, that the error, if any there be, should in
due manner be corrected and full and speedy
justice done to the parties aforesaid in this behalf,
do command you that if judgment be thereupon 30
given then you distinctly and openly send under
your seal the record and proceedings and plaint
aforesaid with all things touching and concerning
the same to our Court of Errors and Appeals be-
fore the Judges thereof on the Fifth day of
December next and this writ, and that the record
and proceedings aforesaid being inspected we may
cause to be further done thereupon what of right
and according to the law should be done.

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New Jersey State Library

Writ of Error—Assignment of Errors.

Witness, Mahlon Pitney, our Chancellor and President Judge of our Court of Errors and Appeals, at Trenton, this Fifteenth day of November, A. D. Nineteen hundred and ten.

S. D. DICKINSON,
Clerk.

10

MERRITT LANE,
Attorney.

(Common joinder in error.)

Assignment of Errors.**New Jersey Court of Errors and Appeals.**

20

HERBERT CLARK GILSON and
ELMER W. DEMAREST, Receiv-
ers of the J. C. Appleby Sand
and Clay Company,

Prosecutors—

Plaintiffs-in-Error,

vs.

WILLIAM R. APPLEBY,

30

Defendant—

Defendant-in-Error.

On Error.

Afterwards, that is to say, on the Fifth day of December, Nineteen hundred and ten, in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, comes the said Herbert Clark Gilson and Elmer W. Demarest, Receivers of the J. C. Appleby Sand and Clay Company, by Merritt Lane, their attorney, and
40 says that in the record and proceedings aforesaid,

III.

Assignment of Errors.

and also in the giving of judgment aforesaid, there is manifest error in this, to wit:—

First: That the Supreme Court affirmed the order of the Hudson County Circuit Court whereas it should have reversed such order.

Second: That the Supreme Court erred in not finding that the Hudson County Circuit Court had no jurisdiction upon the facts to make an order quashing the writ of attachment. 10

Third: The Supreme Court erred in not finding that the Hudson County Circuit Court erred in permitting depositions to be taken and in considering the depositions which were taken upon the motion to quash.

Fourth: The Supreme Court erred in not finding that the affidavit upon which the writ was obtained was sufficient and that the Circuit Court erred in permitting depositions to be taken, and in considering the depositions so taken, the affidavit being conclusive. 20

Fifth: The Supreme Court erred in not finding that the Circuit Court erred in adjudicating upon the legality and validity of the plaintiffs' claim upon the motion to quash.

Sixth: The Supreme Court erred in not finding that the claim of the plaintiffs as disclosed was a liquidated claim and that the Circuit Court erred in quashing the writ. 30

Seventh: The Supreme Court erred in not finding that the Circuit Court erred in awarding costs against the plaintiffs.

Eighth: The Supreme Court erred in not finding that the order of the Hudson County Circuit Court was in divers other respects illegal, unjust, oppressive and contrary to law. 40

IV.

Assignment of Errors—Return.

Wherefore the said Herbert Clark Gilson and Elmer W. Demarest, Receivers of the J. C. Appleby Sand and Clay Company pray that the judgment aforesaid, by reason of the aforesaid errors and of other errors appearing in the record and proceedings be reversed, annulled and for nothing
10 holden and that the said order brought up of the Hudson County Circuit Court be reversed, annulled and held for nothing and that the said Herbert Clark Gilson and Elmer W. Demarest, Receivers of the J. C. Appleby Sand and Clay Company be restored to all things which they have lost on account of the said judgments.

MERRITT LANE,
Attorney for Plaintiffs in Error.

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Return.

The Answer of the Chief Justice and other Justices of our Supreme Court within named:—

The record and proceedings of the plea whereof mention is within made with all things touching and concerning the same to the Court of Errors and Appeals in the last resort in all causes within
30 specified at the day and place within contained we certify in a certain schedule to this writ annexed as within we are commanded.

WILLIAM S. GUMMERE,
Chief Justice.

Order of Affirmance.**New Jersey Supreme Court.**

HERBERT CLARK GILSON & ELMER
W. DEMAREST, Receivers of
J. C. Appleby Sand & Clay
Company,

Plaintiffs,

vs.

WILLIAM R. APPLEBY,

Defendant.

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On certiorari
to the Hudson
Circuit Court.

The Court having heard the arguments of Harts- 20
horne, Insley & Leake, Counsel for the defendant
and of Merritt Lane, Counsel for the plaintiffs in
the above entitled cause at the June term, Nine-
teen hundred and ten, and having inspected the
said writ of certiorari and the return made there-
to, and being of opinion that there is no error in
the order made by William H. Speer, Esquire,
Judge of said Circuit Court, which was brought
up by the said writ:

It is ordered that the said order brought up by 30
the said writ of certiorari, be and the same is
hereby affirmed; and that the plaintiffs in cer-
tiorari, Herbert Clark Gilson and Elmer W. Dema-
rest, Receivers of the J. C. Appleby Sand & Clay
Company, do pay to the defendant, his costs in
this court to be taxed, and that the record be re-
mitted to the Court below to be proceeded in ac-
cording to law.

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Order of Affirmance—Reasons.

Rule entered in the minutes November 15, 1910.

On motion of Hartshorne, Insley & Leake,
Attorneys of defendant.

A true copy.

WM. RIKER, JR.,
Clerk.

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For remainder of return see pages 1 to 23 and
page 59.

Reasons.**New Jersey Supreme Court.**

20 HERBERT CLARK GILSON and
ELMER W. DEMAREST, Receiv-
ers of the J. C. Appleby Sand
and Clay Company,

Prosecutors,

vs.

WILLIAM H. SPEER, Judge of the
Hudson County Circuit Court;
JOHN F. CROSBY, Clerk of the
Hudson County Circuit Court,
30 and WILLIAM R. APPLEBY,

Defendants.

On Certiorari.

And the said prosecutors, by Merritt Lane, their
attorney comes and prays that the order of the
Hudson County Circuit Court brought up by the
writ may be reversed and set aside for the follow-
ing reasons:

40 FIRST: The Hudson County Circuit Court had
no jurisdiction upon the facts to make an order
quashing the writ of attachment.

VII.

Reasons.

SECOND: The Hudson County Circuit Court erred in permitting depositions to be taken and in considering the depositions which were taken upon the motion to quash.

THIRD: The affidavit upon which the writ was obtained was sufficient and the Circuit Court erred in permitting depositions to be taken, and in considering the depositions so taken, the affidavit being conclusive. 10

FOURTH: The Circuit Court erred in adjudicating upon the legality and validity of the plaintiffs' claim upon the motion to quash.

FIFTH: The claim of the plaintiffs as disclosed was a liquidated claim and the Circuit Court erred in quashing the writ. 20

SIXTH: The Circuit Court erred in awarding costs against the plaintiffs.

SEVENTH: The order of the Hudson County Circuit Court is in divers other respects illegal, unjust, oppressive and contrary to law.

MERRITT LANE,
Attorney for Plaintiffs.

Opinion.**New Jersey Supreme Court.**

JUNE TERM, 1910.

10	HERBERT CLARK GILSON, et al., Receivers, <i>Prosecutors,</i> <i>vs.</i> WILLIAM R. APPLEBY, <i>Defendant.</i>	}	Certiorari.
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Before Justices SWAYZE, PARKER & VOORHEES.
 Merritt Lane, for Prosecutors,
 Hartshorne, Insley & Leake, for Defendant.

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Per Curiam.

The question involved in this case is the same as in Gilson vs. J. Charles Appleby, just decided. For the reasons stated in the opinion in that case, the order of the circuit judge in this case is affirmed with costs.

30

40

Writ of Error.

NEW JERSEY, SS.:

The State of New Jersey to the
 Chief Justice and other Justices 10
 of our Supreme Court of Judica-
 ture, GREETING: Because in the
 (Seal) record and proceedings and also

in the giving of judgment in a plaint which was
 in our Supreme Court before you between Herbert
 Clark Gilson and Elmer W. Demarest, receivers
 of the J. C. Appleby Sand and Clay Company,
 prosecutors against William R. Appleby, defend-
 ant, upon a writ of certiorari issued out of our 20
 said Supreme Court to the Hudson County Cir-
 cuit Court, as is said, manifest error hath inter-
 vened to the great damage of the said Herbert
 Clark Gilson and Elmer W. Demarest, receivers
 of the J. C. Appleby Sand and Clay Company, as
 by their plaint we are informed, we being willing,
 that the error, if any there be, should in due
 manner, be corrected and full and speedy justice
 done to the parties aforesaid in this behalf, do
 command you that if judgment be thereupon 30
 given then you distinctly and openly send under
 your seal the record and proceedings and plaint
 aforesaid with all things touching and concern-
 ing the same to our Court of Errors and Appeals
 before the Judges thereof on the Fifth day of
 December next and this writ, that the record and
 proceedings aforesaid being inspected we may
 cause to be further done thereupon what of right
 and according to the law should be done.

Writ of Error—Assignment of Errors.

Witness, Mahlon Pitney, our Chancellor and President Judge of our Court of Errors and Appeals, at Trenton, this Fifteenth day of November, A. D. Nineteen hundred and ten.

S. D. DICKINSON,
Clerk.

10

Merritt Lane.
Attorney.

Common Joinder in Error.

Assignment of Error.

20

New Jersey Court of Errors and Appeals.

HERBERT CLARK GILSON and ELMER
W. DEMAREST, Receivers of the
J. C. Appleby Sand and Clay
Company,

*Prosecutors-
Plaintiffs-in-Error,*

vs.

J. CHARLES APPLEBY,

*Defendant,
Defendant-in-Error.*

On Error
Assignment of
Error.

30

Afterwards, that is to say, on the fifth day of December, Nineteen hundred and ten, in the Court of Errors and Appeals in the last resort of all causes of the State of New Jersey, comes the
40 said Herbert Clark Gilson and Elmer W. Demarest, Receivers of the J. C. Appleby Sand and Clay

Assignment of Errors.

Company, by Merritt Lane, their attorney and says that in the record and proceedings aforesaid, and also in the giving of Judgment aforesaid, there is manifest error in this, to wit:

First: That the Supreme Court affirmed the order of the Hudson County Circuit Court where- 10
as it should have reversed such order.

Second: That the Supreme Court erred in not finding that the Hudson County Circuit Court had no jurisdiction upon the facts to make an order quashing the writ of attachment.

Third: The Supreme Court erred in not finding that the Hudson County Circuit Court erred in permitting depositions to be taken and in considering the depositions which were taken upon the motion to quash. 20

Fourth: The Supreme Court erred in not finding that the affidavit upon which the writ was obtained was sufficient and that the Circuit Court erred in permitting depositions to be taken, and in considering the depositions so taken, the affidavit being conclusive.

Fifth: The Supreme Court erred in not finding that the Circuit Court erred in adjudicating upon the legality and validity of the plaintiffs' claim 30
upon the motion to quash.

Sixth: The Supreme Court erred in not finding that the claim of the plaintiffs as disclosed was a liquidated claim and that the Circuit Court erred in quashing the writ.

Seventh: The Supreme Court erred in not finding that the Circuit Court erred in awarding costs against the plaintiffs.

Eighth: The Supreme Court erred in not find- 40

Assignment of Errors—Return.

ing that the order of the Hudson County Circuit Court was in divers other respects illegal, unjust, oppressive and contrary to law.

WHEREFORE, the said Herbert Clark Gilson and Elmer W. Demarest, Receivers of the J. C. Apple-
 10 by Sand and Clay Company pray that the judgment aforesaid, by reason of the aforesaid errors and of other errors appearing in the record and proceedings be reversed annulled and for nothing holden and that the said order brought up of the Hudson County Circuit Court be reversed, annulled and held for nothing and that the said Herbert Clark Gilson and Elmer W. Demarest, Receivers of the J. C. Appleby Sand and Clay Company be restored
 20 to all things which they have lost on account of the said judgments.

MERRITT LANE,
 Attorney for Plaintiffs-in-Error.

Return.

The Answer of the Chief Justice and other Justices of our Supreme Court within named:

30 The record and proceedings of the plea whereof mention is within made with all things touching and concerning the same to the Court of Errors and Appeals in the last resort of all causes within specified and the day and place within contained, we certify in a certain schedule to this writ annexed as within we are commanded.

WILLIAM S. GUMMERE,
 Chief Justice.

Order of Affirmance.**New Jersey Supreme Court.**

HERBERT CLARK GILSON AND EL-
MER W. DEMAREST, Receivers of
J. C. Appleby Sand & Clay Com-
pany,

Plaintiffs,

vs.

J. CHARLES APPLEBY,

Defendant.

On certiorari
to the Hudson
Circuit Court,
Order of Af- 10
firmance.

The court having heard the arguments of Harts-
horne, Insley & Leake, Counsel for the defendant
and of Merritt Lane, Counsel for the plaintiffs
in the above entitled cause at the June term,
Nineteen hundred and ten, and having inspected
the said writ of certiorari and the return made 20
thereto, and being of opinion that there is no error
in the order made by William H. Speer, Esquire,
Judge of said Circuit Court, which was brought
up by the said writ:

It is ordered that the said order brought up by
the said writ of certiorari, be and the same is here-
by affirmed; and that the plaintiffs in certiorari,
Herbert Clark Gilson and Elmer W. Demarest,
Receivers of the J. C. Appleby Sand & Clay Com- 30
pany, do pay to the defendant, his costs in this
court to be taxed, and that the record be remitted
to the Court below to be proceeded in, according
to law.

Rule entered in the minutes November 15, 1910.

On motion of Hartshorne, Insley & Leake, At-
torneys of defendant.

A true copy,

Wm. Riker, Jr.,

Clerk.

39 40

For remainder of return see pages 25 to 27.

Opinion.

New Jersey Supreme Court.

JUNE TERM, 1910.

HERBERT CLARK GILSON, et als.,

10 Receivers,

Defendant.

J. CHARLES APPLEBY,

vs.

Prosecutors,

When stock in a corporation has been issued as
 20 full paid, and it is sought to enforce further liability of a stockholder upon the ground that the stock was in fact issued for property at an overvaluation, there is no debt due for which an attachment will lie until after an order has been made by the Court of Chancery ascertaining the amount of the stockholder's liability.

CERTIORARI.

Before Justices SWAYZE, PARKER and VOORHEES.

30 Merritt Lane, for Prosecutors.

Hartshorne, Insley & Leake, for Defendant.

The Opinion of the Court was Delivered
 By SWAYZE, J.

The plaintiffs issued an attachment out of the Hudson Circuit Court founded upon an affidavit of Gilson that the prosecutor owed the plaintiffs a debt in the sum of \$49,000, as nearly as deponent could specify. Upon a rule to show cause why
 40

Opinion.

the attachment should not be quashed, testimony was taken, and it appeared that the alleged debt was a liability as a stockholder for stock which had been issued as full paid by the corporation of which the plaintiffs were upon its insolvency appointed receivers, and thereupon the Circuit Judge quashed the writ. We are now asked to review his action. It is obvious that the liability of a stockholder upon stock which by the agreement between him and the corporation has been issued as full paid is very different from the liability upon stock which is subject to no such contract. The statute provides, section 21, that where the whole capital of a corporation shall not have been paid in and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations. Whether or not the receiver of an insolvent corporation could maintain a suit for the full amount of the stock where nothing had been paid thereon and a less sum would suffice to satisfy the debts and obligations is a question not presented in the present case. Confessedly in this case something was paid on account of the stock. The value of the property which was transferred to the corporation by way of payment may be in dispute, but the corporation took it as equivalent of the par value of the stock. The receivers say it is worth only five per cent. of that amount, but the stockholders in any event can be liable only for a portion of the par of his stock, and that portion under the statute is such a pro-

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Opinion.

portion as shall be required to satisfy the debts or obligations. This necessitates an ascertainment of the amount paid on the stock and the amount of the debts and obligations; and before the receivers can recover at all they must set

10 aside the agreement by which the corporation issued the stock and the stockholder took it as full paid. As Vice Chancellor Pitney said in *See vs. Heppenheimer*, 69 N. J. Eq., 36, at page 82, "In an action at law the complainant would find himself confronted with the certificate of stock, apparently issued with due formality, declaring on its face that it was full paid and unassessable. No action could be maintained in the face of that

20 contract under seal until it was disposed of and annulled. Whether that could be done in a court of law may well be doubted. It is enough to say that it is clearly the province of a court of equity to relieve the complainant under those circumstances. The rule thus stated by the Vice Chancellor must equally apply where it is conceded that the company took the property as the equivalent of the full par value of the stock even if that is not expressed in the certificate. Chancellor McGill said in *Hibbard vs. The Southwestern*

30 *Land & Cattle Co.*, 10 Dick., 18, at page 31; "Such a contract is binding upon the company and its shareholders, but as the capital stock constitutes a trust fund for the payment of debts it cannot be given away from the demands of creditors, and hence the holders of bonus stock may be required to pay for it in satisfaction of the demands of creditors, after the exhaustion of all other as-

40 sets, upon the ground that its issuance to them was a fraud in law upon the creditors." That fraud, however, must first be ascertained. In accordance with these views, it has been held by

Opinion.

the Court of Errors and Appeals in *Cumberland Lumber Co., vs. Clinton Hill Manufacturing Co.*, 12 Dick., 627, at page 629, that "when the business of a corporation has been abandoned and the corporation is insolvent, subscribers for or holders of its stock, not paid for, have no further obligation with respect thereto than to pay so much of what is unpaid on the stock as will satisfy the claims of corporate creditors and meet the expenses of winding up its affairs. The proper tribunal to ascertain the amount necessary for these purposes is a court of equity since courts of law have no procedure adapted to the marshaling of assets and liabilities requisite in such a calculation;" and in that case an order of the court of chancery assessing the stock for the full amount unpaid, being more than enough to satisfy the debts, was set aside. The court said: "Our conclusion is that it was the duty of the court below to determine judicially, before ordering an assessment, what proportion of the unpaid subscription would probably be needed to meet the liabilities and to confine the levy accordingly." When the Court of Errors came to deal with the same corporation, after the Court of Chancery had ascertained the amount necessary to pay debts, it was set up in an action at law upon the assets that the right of the receiver to recover was barred by the statute of limitations; but the court held that the statute did not begin to run until the assessment had been made by the Court of Chancery. It said, "It (the assessment) could not be considered as payable until the creditor's claim had been established and it had been ascertained that the corporation had no assets outside of these stock subscriptions to pay that debt * * *

Opinion.

Unpaid subscriptions to stock are assets, and the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds held in trust. Statutes of limitations do not commence to run in respect to them until after a call or assessment has been made." 10
 These quotations suffice to show that there is no debt due for which an attachment would lie until after an order has been made by the Court of Chancery ascertaining the amount of the stockholder's liability. The receivers had, therefore, no right to issue this writ of attachment.

That the affidavit is not conclusive of the right to the attachment is sufficiently established by our authorities. *Day vs. Bennett*, 3 Harrison, 287. *Shadduck vs. Marsh*, 1 Zab., 434. *Hecksher vs. Trotter*, 19 Vroom, 419. 20
 fore affirmed with costs.

We think the Circuit Judge was quite right in quashing this attachment, and his order is therefore affirmed with costs.

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Writ of Certiorari.

NEW JERSEY, SS.:

[SEAL]



THE STATE OF NEW JERSEY, to the
Honorable William H. Speer, Judge of
the Hudson County Circuit Court, and
John F. Crosby, Clerk of the Hudson
County Circuit Court, GREETING:

We being willing for certain reasons to be certified of and concerning a certain proceeding, writ, motion to quash, depositions, and order quashing the writ of attachment in a suit brought in the Hudson County Circuit Court by Herbert Clark Gilson and Elmer W. Demarest, receivers of the H. C. Appleby Sand & Clay Company against William R. Appleby, as is said, do command you that the said writ, motion to quash, depositions, proceedings and order aforesaid, with all things touching and concerning the same, together with this writ, you do distinctly and openly send under your hand and seal to our Justices of our Supreme Court of Judicature, at Trenton, on the thirty-first day of May, Nineteen hundred and ten, that our Justices may cause to be done thereupon what of right and according to the laws of this state should be.

WITNESS, WILLIAM S. GUMMERE, Chief Justice
of our Supreme Court at Trenton, this twenty-sixth
day of May, One thousand nine hundred and ten.

WM. RIKER, JR.,
Clerk.

MERRITT LANE,
Attorney.

Writ of Certiorari.

NEW JERSEY SUPREME COURT.

10 HERBERT CLARK GILSON and EL-
MER W. DEMAREST, Receivers
of the J. C. Appleby Sand and
Clay Company,
Prosecutors,

vs.

20 WILLIAM H. SPEER, Judge of the
Hudson County Circuit
Court; JOHN F. CROSBY,
Clerk of the Hudson County
Circuit Court, and WILLIAM
R. APPLEBY,
Defendants.

Writ of Certiorari.

Returnable May 31st, 1910.

MERRITT LANE,
Attorney Prosecutors.

30 A motion having been argued upon notice to
William R. Appleby, this writ was allowed by me
in open Court. Let it be sealed. Let both sides
have leave to take depositions upon two days' no-
tice. Let it be argued at the June Term.

F. J. SWAZE,
J. S. C.

Return.

In obedience to the command of this writ to us directed, we, WILLIAM H. SPEER, Judge of the Hudson County Circuit Court, and John F. Crosby, Clerk of the Hudson County Circuit Court, do hereby certify and send to the Honorable, the Justices of the Supreme Court of Judicature of New Jersey within mentioned, in a certain schedule of this writ annexed, the proceedings, writ, motion to quash, depositions and order quashing the Writ of Attachment in the suit in the Hudson County Circuit Court, of Herbert Clark Gilson and Elmer W. Demarest, receivers of the J. C. Appleby Sand & Clay Company, against J. Charles Appleby, whereof mention is within made, together with all things touching and concerning the same as fully as before us they remain.

10

20

IN WITNESS WHEREOF we have hereunto set our hands and official seals this thirty-first day of May, A. D. Nineteen hundred and ten.

WILLIAM H. SPEER,
Judge of the Hudson County Circuit Court.

JOHN F. CROSBY,
Clerk of the Hudson County Circuit Court.
[SEAL]

30

Schedule.

1. Affidavit upon which Writ of Attachment was obtained.
2. Writ of Attachment and Return to Writ.
3. Order to Show Cause and Petition.
4. Depositions.
5. Order quashing the writ.

10

Affidavit of Herbert Clark Gilson.

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.:

HERBERT CLARK GILSON, of full age, being duly sworn according to law, upon his oath, deposes and says:

20

That he is one of the receivers of the J. C. Appleby Sand & Clay Company; that Elmer W. Demarest is the other receiver that this deponent and the said Elmer W. Demarest as receivers of the J. C. Appleby Sand & Clay Company are plaintiffs in this action that deponent is the agent of the said receivers that J. Charles Appleby, the defendant, is not, to deponent's knowledge or belief, resident in this state at this time, and that he owes to the said plaintiffs a debt in the sum of Forty-nine thousand (\$49,000) dollars, as nearly as this deponent can specify.

30

HERBERT CLARK WILSON.

Sworn and subscribed to before me
 this 20th day of December, 1909.

CHARLES M. VREELAND,
 Master in Chancery of N. J.

40

Writ of Attachment.

HUDSON COUNTY, SS.:

THE STATE OF NEW JERSEY to the Sheriff of the
County of Hudson, aforesaid, GREETING:

YOU ARE HEREBY COMMANDED to attach the rights
and credits, moneys and effects, goods and chattels,
lands and tenements of J. Charles Appleby, where- 10
soever in your county, the same may be found, so
that the said J. Charles Appleby be and appear
before our Circuit Court, to be holden at Jersey
City, in and for the said County of Hudson, on
the twenty-second day of January, 1910, to answer
unto Herbert Clark Wilson and Elmer W. Demar-
est, receivers of The J. C. Appleby Sand & Clay
Company, in an action upon contract, wherein the
plaintiff demands One hundred thousand dollars 20
as is said. And have you then there this writ.

WITNESS, FRANCIS J. SWAYZE, ESQ., a Judge of
our said Circuit Court, at Jersey City aforesaid,
the 7th day of January, in the year One thousand
nine hundred and ten.

JOHN ROTHERHAM,
Clerk.

MERRIT LANE, 30
Attorney.

Return to Writ.**HUDSON COUNTY CIRCUIT COURT.**

HERBERT CLARK GILSON and
ELMER W. DEMAREST, Receiv-
ers of the J. C. Appleby Sand
& Clay Co.,

10

against

J. CHARLES APPLEBY.

Returnable January 22d, 1910. Merritt Lane, at-
torney, 260 Washington street, Jersey City.

Affidavit for Forty-nine thousand dollars, and
filed before issuing this writ.

20

JOHN ROTHERHAM,
Clerk.

I hereby deputize John Cruden to serve the with-
in writ.

Witness my hand and seal this 7th day of Jan-
uary, 1910.

N. P. WEDEN,
Under Sheriff.

Received in Hudson County Clerk's office Janu-
ary 7th, A. D. 1910, at 11 A. M., and recorded in
Liber 7 of the Writ of Attachment, page 157.

30

JOHN ROTHERHAM,
Clerk.

I executed the within writ on Thursday, the 20th
day of January, 1910, at 3 o'clock in the afternoon
of that day, as appears in the schedule hereto an-
nexed.

40

JAMES J. KELLY,
Sheriff.
By John Cruden,
S. D. S.

Order to Show Cause.

HUDSON COUNTY CIRCUIT COURT.

HERBERT CLARK GILSON and
ELMER W. DEMAREST, Receiv-
ers of the J. C. Appleby Sand
& Clay Co.,

against

J. CHARLES APPLEBY.

On attachment
and petition
to quash
writ.

10

On reading and filing the petition of J. Charles
Appleby in the above stated cause, duly verified by
affidavit,

20

IT IS ORDERED that the plaintiffs in the above
stated cause do show cause before me in the Court
House at Jersey City, on the twenty-eighth day of
January, instant, at ten o'clock in the forenoon,
why the writ of attachment issued in the above
stated cause should not be quashed.

IT IS FURTHER ORDERED that both sides have leave
to take affidavits to be used on the return of this
order.

30

Dated January 21st, 1910.

WILLIAM H. SPEER,
Circuit Judge.

40

Petition to Quash Writ.

HUDSON COUNTY CIRCUIT COURT.

10	HERBERT CLARK GILSON and ELMER W. DEMAREST, Receiv- ers of the J. C. Appleby Sand & Clay Co., against J. CHARLES APPLEBY.	}	On attachment and petition to quash writ.
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To the Honorable WILLIAM H. SPEER, Judge of the
 Circuit Court of Hudson County:

20 The petition of J. Charles Appleby respectfully
 shows that:

1. He appears in the above stated cause spec-
 ially for the sole purpose of moving to set aside
 the writ of attachment issued therein.

2. He is a citizen and resident of the State of
 Virginia.

30 3. On January 7, 1910, a writ of attachment
 was issued in the above stated cause, returnable on
 the 22d day of that month, against the rights and
 credits, moneys and effects, goods and chattels,
 land and tenements of this petitioner, wheresoever
 they may be found. The affidavit on which the
 writ was issued alleges that petitioner is not a
 resident of New Jersey, and that he owes to the
 said plaintiffs in said cause a debt in the sum
 of Forty-nine thousand dollars, as nearly as the
 40 affiant can specify.

Petition to Quash Writ

4. The said alleged debt mentioned in that affidavit consists of an unliquidated claim by the said plaintiffs against this petitioner for the full amount of the par value of the four hundred and ninety shares of capital stock (par of which is \$100), of the J. C. Appleby Sand & Clay Company, a corporation of New Jersey. Said corporation was adjudged insolvent by decree of the Court of Chancery, and said plaintiffs were appointed receivers thereof. The Court of Chancery by its order dated June 14, 1909, a copy of which is hereto attached, ascertained and ordered that the sum of Twenty thousand dollars was thereby adjudged to be the amount necessary for the receivers to collect from stockholders, in order to pay the debts of the insolvent corporation and the expenses of the receivership. But neither the said Court, nor the said corporation, nor any official representing the Court or corporation has at any time fixed or assessed any sum as the amount due from this petitioner upon stock alleged to be owned by him, or by any stockholder; nor has the Court or the corporation or any official representing either of them, fixed or assessed any pro rata share in which this petitioner or any stockholder should be bound to contribute toward the payment of said debts and expenses, nor has the Court or corporation, or any official representing either, adjudged any liability of this petitioner or of any other individual stockholder, to pay any sum whatever upon the said stock alleged to have been held by this petitioner or by any other stockholder.

5. The said receivers, as plaintiffs, have filed a bill in the Court of Chancery, against this petitioner and other stockholders of the said corpora-

Petition to Quash Writ

tion, alleging that this petitioner and other stockholders of the said corporation received stock from said company, which has not been paid in full, and alleging the said insolvency and charging that this
10 said stock. But the said bill alleges that part of the stock was unpaid stock issued, or stock for property purchased, and it is in the bill charged that the property for which said stock was issued was grossly over-valued. It also appears by said bill that much of the stock alleged to be unpaid stock has been transferred by those persons who first received it to other persons, in whose names it now stands on the books of the company. The
20 stock, which is alleged to have been issued to this petitioner, or some of it, was, in fact, transferred on the books of the said company to other persons, and at the time of adjudication of insolvency was not owned by and does not stand on the books of the company in the names of petitioner, and that fact was stated in said bill of complaint. The said bill of complaint prays the Court to ascertain how much, if anything, has been paid by each stockholder on his stock, and how much is necessary to collect from stockholders to pay the debts of
30 said corporation and the expenses of the receivership, and that an investigation be made of the financial responsibility of the parties to the said suit, and that the Court determine how much should be paid by the said different parties on their stock, and that the defendants in that suit be ordered to pay the balance due upon their stock until they shall have paid so much as shall be necessary to do equity between them and those of the stockholders who have paid the full par in cash for
40 their stock and for their relief. Answers have been filed by several of the defendants to that suit, but

Petition to Quash Writ

the suit has not yet been set down for hearing, nor has any evidence been taken in it, and the said suit is still pending.

Your petitioner prays that the said writ of attachment may be set aside, and the lien thereof (if any there be upon any property of petitioner) may be discharged. 10

J. CHARLES APPLEBY.

By

HARTSHORNE, INSLEY & LEAKE,
Attorneys.

NEW JERSEY, }
HUDSON COUNTY, } ss.:

CHARLES H. HARTSHORNE, being duly sworn on his oath, says: That he is one of the firm of Hartshorne, Insley & Leake, who have signed the foregoing petition as attorneys of J. Charles Appleby. That he and his firm are authorized by said J. Charles Appleby to present to this Court the said petition, and make application for the relief therein prayed for. That the said J. Charles Appleby is absent from this state and is now actually residing in Virginia. Deponent has read the bill of complaint mentioned in the foregoing petition, and is personally familiar with all of the facts stated in the said petition. Deponent says that the statements contained in the said petition are true. 20 30

CHARLES H. HARTSHORNE.

Subscribed and sworn to before
me this 20th day of January,
1910, at Jersey City.

EVA T. ALLMAN,
Notary Public,
[SEAL]

Between
ANNIE E. DICKINSON,
Complainant,

and

J. C. APPLEBY SAND & CLAY
COMPANY.

This matter coming on to be heard upon the report and petition of Herbert Clark Gilson and Elmer W. Demarest, receivers of the J. C. Appleby Sand & Clay Company, and it appearing that the order to show cause made herein upon the ninth day of June, Nineteen hundred and nine, has been served, as in said order directed and prescribed, and in the presence of Merritt Lane, of counsel with the receivers, Pierre F. Cook, solicitor of George R. Gardner, who is alleged to be a stockholder, and Isaac R. Garsed, who is alleged to be a stockholder, and Isaac V. Pearson, who is alleged to be a stockholder, Tennant & Haight, solicitor of Elmer J. Lawson, who is alleged to be a stockholder, James E. Pyle, solicitor for C. Howard Slater, Immanuel Britten, Robert B. Morrison, James E. Pyle, individually and as trustee, all of whom are alleged to be stockholders; and it appearing to the Court that the amount heretofore adjudged to be necessary for the receiver to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the receivership should be increased from Fifteen

Order

thousand dollars heretofore adjudged by this Court upon the fifteenth day of February, Nineteen hundred and nine, to Twenty thousand dollars;

It is, on this 14th day of June, Nineteen hundred and nine, on motion of Merritt Lane, of counsel with the receivers, in the presence of the solicitors above named, 10

ORDERED, That the sum of Twenty thousand dollars is hereby adjudged to be the amount of money necessary for the receivers to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the receivership.

Respectfully advised, 20

MAHLON PITNEY,
C.

LINDLEY M. GARRISON,
V. C.

Deposition.**HUDSON COUNTY CIRCUIT COURT.**

10	HEBERT CLARK GILSON and ELMER W. DEMAREST, Receiv- ers of J. C. Appleby Sand & Clay Company, against WILLIAM R. APPLEBY, HERBERT CLARK GIBSON and ELMER W. DEMAREST, Receiv- ers of J. C. Appleby Sand & Clay Company, against J. CHARLES APPLEBY.	}	On Attachment
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20

Depositions taken in the above stated cases at my office in Jersey City, on January 31st, 1910, at two o'clock P. M., pursuant to the attached notice of taking such affidavits.

Depositions taken in the presence of Merritt Lane, Esq., of counsel for the plaintiffs and Charles H. Hartshorne, Esq., of counsel for the defendants.

30

IT IS STIPULATED that the oath of the stenographer be waived and also the signatures of witness or witnesses.

CLARENCE LINN,
 Supreme Court, Comm'r of N. J.

40

HERBERT CLARK GILSON, one of the plaintiffs, called on behalf of the defendants, being duly sworn, deposes and says:

Herbert Clark Gilson—Direct

By Mr. Hartshorne:

Q. You are one of the plaintiffs in this case?

A. I am.

Q. Elmer W. Demarest is the other plaintiff?

A. Yes.

Q. You and Mr. Demarest were appointed receivers of the J. C. Appleby Sand & Clay Company by the Court of Chancery?

A. Yes.

Q. And are you and Mr. Demarest, as receivers, the plaintiffs in a cause pending in the Court of Chancery against J. Charles Appleby and William R. Appleby and others, defendants?

Mr. Lane: I object to that on the ground that it is immaterial, and on the further ground that there is nothing in the affidavits presented to the Court warranting the order to show cause made herein, and under which these affidavits are being taken; and upon the further ground that the affidavit on which the writ was sued out is conclusive; and on the further ground that the testimony is irrelevant.

A. We are.

Q. That bill was filed last June, wasn't it?

Mr. Lane: All of this testimony is taken subject to those objections.

A. I think it was last June.

Q. You made the affidavits on which the writs of attachment were issued in the two attachment cases in this matter?

A. I did.

Herbert Clark Gilson—Direct

Q. The debt claimed in the affidavit in the attachment case against William R. Appleby consists of the full value of fifty shares of capital stock of the J. C. Appleby Sand & Clay Company, does it not?

10

Same objection.

A. Yes.

20

Mr. Hartshorne: I offer in evidence a copy of the bill of complaint in the above mentioned suit of Herbert Clark Gilson and Elmer W. Demarest, receivers of the J. C. Appleby Sand & Clay Company, against J. Charles Appleby and others, which is marked Exhibit P-1.

Mr. Lane: Objected to as irrelevant, immaterial and incompetent.

Proof of the record is waived.

30

Mr. Lane: I consent that a copy may be used with the same effect as if it were the original record. That fifty shares of stock on which your affidavit is based, issued to William R. Appleby, is part of the second issue of stock mentioned in the seventh paragraph of the bill of complaint, is it not?

Same objection.

A. Yes.

40

Q. Now the claim of the plaintiffs in attachment is that William R. Appleby is indebted to them for the full amount of the par of that 50 shares of stock upon the ground that it is unpaid stock and was issued in the circumstances stated in that paragraph of the bill?

Herbert Clark Gilson—Direct

Mr. Lane: I object to that on the grounds already stated; and on the further ground that it is immaterial what the state of the plaintiff's mind is as to the grounds upon which the writ is based, or upon which the liability of the defendant is based.

10

A. I think so; but, of course, I don't know the grounds upon which Mr. Lane brought the action.

Q. You consulted with him in bringing the action of attachment?

A. Yes.

Q. And discussed the ground upon which you could bring suit?

A. Some of the grounds, but he may have others.

Q. But the grounds that I have just stated was one of the grounds, was it not, that you discussed with him?

20

A. Yes.

Q. In the attachment case against J. Charles Appleby the indebtedness claimed in the affidavit on which the writ was issued consists of the full amount of the par of 490 shares of stock of that company—does it not?

Same objections as were made to previous questions are entered here.

30

A. Yes.

Q. And those 490 shares were issued to J. Charles Appleby?

A. Yes; together with others.

Q. The others have been either sold by him or cancelled on the books of the company, have they not?

A. According to the books they have.

43

Herbert Clark Gilson—Direct

Q. The 490 shares are all that he appears to own upon the books of the company?

A. Yes, sir.

Q. 130 of the 490 are part of the original issue of stock mentioned in the 5th and 7th paragraphs of the bill of complaint?

10

A. They are.

Q. And the remaining 360 shares is part of the second issue of stock mentioned in the 9th paragraph of the bill?

A. Yes, sir.

Q. You discussed with your counsel the subject of bringing this attachment suit against J. Charles Appleby?

A. Yes.

20

Q. And did you or your counsel decide to bring that suit upon the ground that the 490 shares of stock were unpaid stock?

Mr. Lane: I object to that on the grounds already stated, and on the further grounds that it endeavors to get into evidence the result of confidential communications.

30 A. That was one of the grounds; what other grounds Mr. Lane had in mind, of course, I knew nothing about.

Q. You approved of the bringing of the attachment suit upon the ground that that stock issued to J. Charles Appleby is unpaid stock—did you not?

A. I did.

Q. And the circumstances showing that it was unpaid are set out in the bill of complaint, are they not?

40

A. Partially so.

Herbert Clark Gilson—Direct

Q. So far as they are stated in the bill of complaint you believe them to be true?

A. Yes. I might state further that this was in my mind at that time, the starting of this suit fixed the amount of the liability the same as a call on those defendants might have fixed an amount.

10

Mr. Hartshorne: I offer in evidence copies of two orders of the Court of Chancery made in the case of Annie E. Dickinson against J. C. Appleby Sand & Clay Company, one dated February 15, 1909, and the other dated June 14th, 1909, which are marked Exhibits P-2 and P-3.

No objection is made to the copies.

20

Q. Has any other order been made by the Court of Chancery fixing, or purporting to fix, the liability of the defendants William R. Appleby and J. Charles Appleby, other than the two orders above offered?

A. I think not.

Q. Has any call or assessment been made by the J. C. Appleby Sand & Clay Company, or by the receivers upon the alleged unpaid stock of William R. Appleby or J. Charles Appleby?

30

A. Yes, I, as receiver, made calls by writing letters to them and starting suits.

Q. Did you make any other calls than by writings letters and starting suits?

A. No.

Q. What suits have you started other than the chancery suit and these attachment suits?

A. None.

Q. What letters have you written in which you made a call upon these defendants upon this stock as unpaid stock?

40

Herbert Clark Gilson—Direct

A. I remember that I wrote to all of the stockholders who held any of that stock and told them that I considered they were liable, and I would have to institute suit unless they settled that liability.

10 Q. How much money did you claim as due from each of these two defendants, Messrs. Appleby?

A. I think the full value of any stock which they held and had not paid for.

Q. In your letter did you claim any specific amount from either of the Messrs. Appleby?

A. I cannot remember that.

Q. As a matter of fact you did not, did you?

A. I cannot remember—that was almost two years ago, I think.

20 Q. Have you copies of those letters?

A. I have.

Q. Will you be kind enough to look at your copy book and produce them?

A. I will. I will get the book right away. From the copy of that letter I see that I did not mention any specific amount, but I did have a conversation with William R. Appleby after writing that letter and told him I thought that he and his father might be liable for the par value of the stock which they held.

30

Mr. Hartshorne: I offer in evidence copy of the letter to which the witness has just referred, dated November 11, 1908, addressed to J. Charles Appleby.

Marked Exhibit P-4.

Q. You wrote on the same day a letter to William R. Appleby in just the same terms, did you not?

40

Herbert Clark Gilson—Direct

A. I did. I wrote to all of the stockholders who held that stock.

Q. There was no other call by you or assessment upon the Messrs. Appleby than what can be found in those letters, was there, and the suits you have mentioned?

10

A. Yes, unless some legal effect may be given to some of the other actions of the receivers.

Q. What other actions?

A. Well, the conversations with the stockholders.

It is admitted subject to the objection that the evidence is irrelevant, that nine of the defendants in the Chancery suit above mentioned, have filed answers, namely: George R. Gardner, Isaac V. Pearson, Joel Dickinson, Annie E. Dickinson, James E. Pyle, Elmer J. Lawson, Emanuel Britten, Robert B. Morrison and Lillian C. Pitcher.

20

It is also admitted that each of those defendants denies liability in the answers.

It is also stipulated that either party may at the hearing on the return of the orders to show cause in these cases read their respective office copies of those answers in evidence at their option.

30

By Mr. Lane:

Q. Mr. J. Charles Appleby, according to the books of the corporation, received from what is known as the second issue of stock, which was issued on the 11th day of May, 1905, 800 shares, did he not?

A. He did.

40

Herbert Clark Gilson—Direct

Q. And took that stock in his own name, did he not?

A. Yes.

Q. Some of it he transferred afterwards?

A. Yes.

10 Q. Other parts of it, 193 shares of the stock, he delivered up to the company, which was afterwards upon the books of the company cancelled?

A. Yes.

Q. It is the receivers' claim, is it not, that J. Charles Appleby is liable for that entire 800 shares of stock?

A. It is.

Q. Whether cancelled or transferred?

A. It is.

20 Q. That is besides the stock which was issued to and which is now held by J. Charles Appleby of the first issue?

A. Yes.

Q. No declaration has yet been filed in this case, has it?

A. Not that I know of.

Q. And the receivers' claim against Mr. J. Charles Appleby in all this litigation is largely in excess of forty-nine thousand dollars, is it not?

30 A. It is.

I hereby certify and return to the Circuit Court of the County of Hudson, N. J., the foregoing examination of Herbert Clark Gilson, a witness produced on the part of the defendant in the stated cause, which was taken before me pursuant to the notice hereto annexed at the time and placed in said notice mentioned, and in the presence of the respective parties thereto.

Order Quashing Writ of Attachment

I further certify that said examination was taken stenographically in my immediate presence and hearing, and that the same was correctly taken and transcribed.

Witness my hand this second day of February, 1910. 10

CLARENCE LINN,
Supreme Court, Comm'r of N. J.

Order Quashing Writ of Attachment.

HUDSON COUNTY CIRCUIT COURT.

HERBERT CLARK GILSON and
ELMER W. DEMAREST, Receiv-
ers of J. C. Appleby Sand &
Clay Company,
Plaintiffs,
against

J. CHARLES APPLEBY,
Defendant.

On Attachment
and Petition
to quash Writ.

20

30

The order to show cause why the writ of attachment issued in the above stated cause should not be quashed, made January 20, 1910, having been duly served and returned with the depositions and exhibits taken under that order, and the Court having heard the arguments to Charles H. Hartshorne, of counsel for the defendant, and Merritt Lane, of counsel for the plaintiffs, and having inspected the

40

Order Quashing Writ of Attachment

record in the case and the said depositions and exhibits;

10 And the Court being of opinion upon the evidence so submitted that the claim demanded by the plaintiffs and sworn to in the affidavit on which the writ was issued is not for a sum certain or capable of ascertainment by calculation, but is rather in the nature of a claim for unliquidated damages;

IT IS ORDERED, that the order to show cause above-mentioned be made absolute, and that the writ of attachment issued in the above stated cause be quashed, and that the levy made thereunder by the sheriff be set aside.

20 IT IS FURTHER ORDERED, that the plaintiffs do pay to the defendant his costs upon this motion to be taxed.

On motion of Hartshorne, Insley & Leake, attorneys of defendant.

Dated May 13th, 1910.

(Actually entered in minutes May 13, 1910.)

30

WM. H. SPEER,
Judge.

Writ of Certiorari.

NEW JERSEY, SS.:



THE STATE OF NEW JERSEY, to the
Honorable William H. Speer, Judge of
the Hudson County Circuit Court
GREETING:

10

We being willing, for certain reasons, to be certified of and concerning a certain proceeding, writ, motion to quash, depositions and order quashing the writ of attachment, in a suit brought in the Hudson County Circuit Court by Herbert Clark Gilson and Elmer W. Demarest, receivers of the J. C. Appleby Sand and Clay Company, against J. Charles Appleby, as is said, do command you that the said writ, motion to quash, depositions, proceedings, and order aforesaid, with all things touching and concerning the same, together with this writ, you do distinctly and openly send, under your hand and seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the thirty-first day of May, nineteen hundred and ten, that our Justices may cause to be done thereupon what of right and according to the laws of this state should be done.

20

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our Supreme Court, at Trenton, this twenty-sixth day of May, one thousand nine hundred and ten.

30

WM. RIKER, JR.,
Clerk.

MERRITT LANE,
Attorney.

40

Writ of Certiorari

NEW JERSEY SUPREME COURT.

HERBERT CLARK GILSON and EL-
MER W. DEMAREST, Receivers
of the J. C. Appleby Sand and
Clay Company,
Prosecutors,

vs.

WILLIAM H. SPEER, Judge of the
Hudson County Circuit
Court; JOHN F. CROSBY,
Clerk of the Hudson County
Circuit Court, and J.
CHARLES APPLEBY,
Defendants.

Writ of Certiorari.

Returnable May 31st, 1910.

MERRITT LANE,
Attorney Prosecutors.

A motion having been argued upon notice to
J. Charles Appleby, this writ was allowed by me
in open Court. Let it be sealed. Let both sides
have leave to take depositions upon two days' no-
tice. Let it be argued at the June Term.

F. J. SWAZE,
J. S. C.

Return.

In obedience to the command of this writ to us directed, we, WILLIAM H. SPEER, Judge of the Hudson County Circuit Court, and JOHN F. CROSBY, Clerk of the Hudson County Circuit Court, do hereby certify and send to the Honorable, the Justices of the Supreme Court of Judicature of New Jersey within mentioned, in a certain schedule to this writ annexed, the proceedings, writ, motion to quash, depositions and order quashing the Writ of Attachment in the suit in the Hudson County Circuit Court of Herbert Clark Gilson and Elmer W. Demarest, receivers of the J. C. Appleby Sand and Clay Company against William R. Appleby, whereof mention is within made, together with all things touching and concerning the same as fully as before us they remain. 10

IN WITNESS WHEREOF, we have hereunto set our hands and seals this thirty-first day of May, A. D. nineteen hundred and ten. 20

WILLIAM H. SPEER,
*Judge of the Hudson County
Circuit Court.*

JOHN F. CROSBY,
*Clerk of the Hudson County
Circuit Court.* 30

(SEAL)

Schedule.

1. Affidavit upon which Writ of Attachment was obtained.
2. Writ of Attachment and Return to Writ.
3. Order to Show Cause and Petition.
4. Depositions (the depositions returned to this writ are the same depositions returned in the matter of Herbert Clark Gilson and Elmer W. Demarest, receivers of the J. C. Appleby Sand and Clay Company, against J. Charles Appleby).
5. Order quashing the writ.

Affidavit Upon Which Writ of Attachment was Obtained.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

20

HERBERT CLARK GILSON, of full age, being duly sworn according to law, upon his oath deposes and says:

30

That he is one of the receivers of the J. C. Appleby Sand and Clay Company; that Elmer W. Demarest is the other receiver; that this deponent and the said Elmer W. Demarest, as receivers of the J. C. Appleby Sand and Clay Company, are plaintiffs in this action; that deponent is the agent of the said receivers; that William R. Appleby, the defendant, is not, to deponent's knowledge or belief, resident in this state at this time, and that he owes to the said plaintiffs a debt in the sum of five thousand dollars, as nearly as this deponent can specify.

HERBERT CLARK GILSON.

Sworn and subscribed to before me
this 20th day of December, 1909.

40

CHARLES M. VREELAND,
Master in Chancery of N. J.

Writ of Attachment.

HUDSON COUNTY, SS.:

THE STATE OF NEW JERSEY, *to the Sheriff of the
County of Hudson aforesaid*, GREETING:

YOU ARE HEREBY COMMANDED to attach the rights
and credits, moneys and effects, goods and chattels, 10
lands and tenements of William R. Appleby; where-
soever, in your county, the same may be found,
so that the said William R. Appleby be and ap-
pear before our Circuit Court, to be holden at
Jersey City, in and for the said County of Hudson,
on the twenty-second day of January, 1910, to an-
swer unto Herbert Clark Gilson and Elmer W.
Demarest, receivers of the J. C. Appleby Sand and
Clay Company, in an action upon contract wherein 20
the plaintiff demands ten thousand dollars, as is
said: And have you then there this writ.

WITNESS, FRANCIS J. SWAYZE, Esquire, a Judge
of our said Circuit Court, at Jersey City aforesaid,
the seventh day of January, in the year one thou-
sand nine hundred and ten.

JOHN ROTHERHAM,
Clerk.

30

MERRITT LANE,
Attorney.

Return to Writ of Attachment.

HUDSON COUNTY CIRCUIT COURT.

HERBERT CLARK GILSON and
ELMER W. DEMAREST, Re-
ceivers of J. C. Appleby Sand
and Clay Company,

vs.

WILLIAM R. APPLEBY.

On Certiorari.

Returnable January 22, 1910.

MERRITT LANE,
Attorney,
260 Washington Street,
Jersey City.

Affidavit for Jersey City, five thousand dollars,
filed before issuing this writ.

JOHN ROTHERHAM,
Clerk.

I executed the within writ on Thursday, the 20th
day of January, 1910, at 3 o'clock in the afternoon
of that day, as appears in the schedule hereto an-
nexed.

JAMES J. KELLY,
Sheriff,
by JOHN CRUDDEN,
S. D. S.

Order to Show Cause.

HUDSON COUNTY CIRCUIT COURT.

HERBERT CLARK GILSON and
ELMER W. DEMAREST, Re-
ceivers of J. C. Appleby Sand
and Clay Company,

vs.

WILLIAM R. APPLEBY.

On attachment
and petition
to quash
writ.

10

On reading and filing the petition of William
R. Appleby in the above-stated cause, duly verified
by affidavit,

20

IT IS ORDERED, that the plaintiffs in the above-
stated cause do show cause before me, in the Court
House at Jersey City, on the twenty-eighth day of
January instant, at ten o'clock in the forenoon, why
the writ of attachment issued in the above-stated
cause should not be quashed.

IT IS FURTHER ORDERED, that both sides have leave
to take affidavits to be used on the return of this
order.

30

Dated January twentieth, 1910.

WILLIAM H. SPEER,
Circuit Judge.

Petition to Quash Writ.**HUDSON COUNTY CIRCUIT COURT.**

10	HERBERT CLARK GILSON and ELMER W. DEMAREST, Re- ceivers of J. C. Appleby Sand and Clay Company,	}	On Attach- ment.
	vs.		
	WILLIAM R. APPLEBY.		

*To the HONORABLE WILLIAM H. SPEER, Judge of the
Circuit Court of Hudson County:*

20 The petition of William R. Appleby respectfully
shows that:

1. He appears in the above-stated cause special-
ly for the sole purpose of moving to set aside the
writ of attachment issued therein.

2. He is a citizen and resident of the State of
Minnesota and is the owner of land in Hudson
County, New Jersey.

30 3. On January 7, 1910, a writ of attachment
was issued in the above-stated cause, returnable on
the 22d of that month, against the rights and cred-
its, moneys and effects, goods and chattels, lands
and tenements of this petitioner, wheresoever they
may be found. The affidavit on which that writ
was issued alleges that petitioner is not a resident
of New Jersey and that he owes to the said plain-
tiffs in said cause a debt in the sum of five thou-
40 sand dollars, as nearly as the affiant can specify.

Petition to Quash Writ

4. The said alleged debt mentioned in that affidavit consists of an unliquidated claim by the said plaintiffs against this petitioner for the full amount of the par value of fifty shares of capital stock (par of which is \$100) of the J. C. Appleby Sand and Clay Company, a corporation of New Jersey. Said corporation was adjudged insolvent by decree of the Court of Chancery and said plaintiffs were appointed receivers thereof. The Court of Chancery said stock. But the said bill alleges that part of which is hereto attached, ascertained and ordered that the sum of twenty thousand dollars was thereby adjudged to be the amount necessary for the receivers to collect from stockholders, in order to pay the debts of the insolvent corporation and the expenses of the receivership. But neither the said Court, nor the said corporation, nor any official representing the Court or the corporation, has at any time fixed or assessed any sum as the amount due from this petitioner upon stock alleged to be owned by him, or by any stockholder; nor has the Court or the corporation or any official representing either of them fixed or assessed any pro rata share in which this petitioner or any stockholder should be bound to contribute toward the payment of said debts and expenses, nor has the Court or corporation or any official representing either adjudged any liability of this petitioner or of any other individual stockholder to pay any sum whatever upon the said stock alleged to have been held by this petitioner or by any other stockholder.

5. The said receivers, as plaintiffs, have filed a bill in the Court of Chancery against this petitioner and other stockholders of the said corpora-

Petition to Quash Writ

tion, alleging that this petitioner and other stockholders of the said corporation received stock from said company which has not been paid in full, and alleging the said insolvency and charging that this petitioner and other stockholders are liable upon said stock. But the said bill alleges that part of the stock was unpaid stock or stock issued for property purchased, and it is the bill charged that the property for which said stock was issued was grossly overvalued. It also appears by said bill that much of the stock alleged to be unpaid stock has been transferred by those persons who first received it, to other persons, in whose names it now stands on the books of the company. The stock which is alleged to have been issued to this petitioner was, in fact, transferred on the books of the said company to other persons, and at the time of adjudication of insolvency was not owned by and does not stand on the books of the company in the names of petitioner, and that fact was stated in said bill of complaint. The said bill of complaint prays the Court to ascertain how much, if anything, has been paid by each stockholder on his stock, and how much is necessary to collect from stockholders to pay the debts of said corporation and the expenses of the receivership, and that an investigation be made of the financial responsibility of the parties to the said suit, and that the Court determine how much should be paid by the said different parties on their stock, and that the defendants in that suit be ordered to pay the balance due upon their stock until they shall have paid so much as shall be necessary to do equity between them and those of the stockholders who have paid the full par in cash for their stock and for their relief.

Answers have been filed by several of the defend-

Petition to Quash Writ

ants to that suit, but the suit has not yet been set down for hearing, nor has any evidence been taken in it, and the said suit is still pending.

Your petitioner prays that the said writ of attachment may be set aside and the lien thereof (if any there be upon any property of petitioner) may be discharged. 10

WILLIAM R. APPLEBY,
by HARTSHORNE, INSLEY & LEAKE,
Attorneys.

NEW JERSEY, }
HUDSON COUNTY, } ss.:

CHARLES H. HARTSHORNE, being duly sworn, on his oath says: That he is one of the firm of Hartshorne, Insley and Leake, who have signed the foregoing petition as attorneys of William R. Appleby. That he and his firm are authorized by said William R. Appleby to present to this Court the said petition and make application for the relief therein prayed for. That the said William R. Appleby is absent from this state and is now actually residing in Minneapolis, in the State of Minnesota. Deponent has read the bill of complaint mentioned in the foregoing petition and is personally familiar with all of the facts stated in the said petition. Deponent says that the statements contained in the said petition are true. 20 30

CHARLES H. HARTSHORNE.

Subscribed and sworn to before me this 20th day of January, 1910, at Jersey City.

EVA TALLMAN,
Notary Public of Jersey City. 40

Order.

HUDSON COUNTY CIRCUIT COURT.

10	HERBERT CLARK GILSON and ELMER W. DEMAREST, Re- ceivers of J. C. Appleby Sand and Clay Company, Plaintiffs,	} On Attachment and Petition to quash Writ.
	vs.	
	WILLIAM R. APPLEBY, Defendant.	

20 The order to show cause why the Writ of At-
 tachment issued in the above-stated cause should
 not be quashed, made January 20, 1910, having
 been duly served and returned with the depositions
 and exhibits taken under that order, and the Court
 having heard the arguments of Charles H. Hart-
 shorne, of counsel with the defendant, and Mer-
 ritt Lane, of counsel for the plaintiffs, and having
 inspected the record in the case and the said depo-
 sitions and exhibits;

30 And the Court being of opinion, upon the evi-
 dence so submitted, that the claim demanded by
 the plaintiffs and sworn to in the affidavit on which
 the writ was issued, is not for a sum certain or ca-
 pable of ascertainment by calculation, but is rather
 in the nature of a claim for unliquidated damages;

IT IS ORDERED, that the Order to Show cause above
 mentioned be made absolute and that the Writ of
 Attachment issued in the above-stated cause be
 quashed, and that the levy made thereunder by the
 Sheriff be set aside.

40 IT IS FURTHER ORDERED, that the plaintiffs do pay

Exhibit P. 1.

to the defendant his costs upon this motion to be taxed.

On motion of

HARTSHORNE, INSLEY & LEAKE.

10

Exhibit P 1.

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

*To His Honor, MAHLON PITNEY, Chancellor of the
State of New Jersey:*

20

HUMBLY COMPLAINING, sheweth unto your Honor, your orators, Herbert Clark Gilson and Elmer W. Demarest, receivers of the J. C. Appleby Sand and Clay Company:

FIRST: The J. C. Appleby Sand and Clay Company is a corporation of the State of New Jersey, incorporated under the general corporation act of said state, entitled "An Act Concerning Corporations, Revision of 1896," with a certificate of organization duly filed January fourth, nineteen hundred and four, with capital stock of one hundred thousand dollars (\$100,000), divided into one thousand shares of the par value of one hundred dollars (\$100) per share.

30

SECOND: That said corporation became insolvent some time prior to the thirtieth day of March, nineteen hundred and eight, and that proceedings

40

Exhibit P. 1.

were thereupon duly had in this Court on the bill of Annie E. Dickinson, complainant, against J. C. Appleby Sand and Clay Company, defendant, in which proceedings your orator, Herbert Clark Gilson, was, on the sixth day of April, nineteen hundred and eight, duly appointed receiver of the J. C. Appleby Sand and Clay Company, and your orator, Elmer W. Demarest, was, upon the thirtieth day of March, nineteen hundred and nine, duly appointed co-receiver of the J. C. Appleby Sand and Clay Company; that your orators were duly appointed receivers under the provisions of an Act Concerning Corporations, revision of 1896, with all the powers of a receiver under such act, and your orators have assumed the burden of the said trust, and have duly qualified as receivers, and are executing their duties as receivers, and have been since the time of their appointment under the orders of the Court of Chancery.

THIRD: That your orators have administered the assets of said corporation, and have in their hands at the present time the sum of six thousand eight hundred and sixty-seven $\frac{6}{100}$ dollars, together with a mortgage for the sum of seventy-one hundred dollars (\$7100); that the total assets of said corporation liable for the payment of dividends upon claims and for the expenses of the receivership, is the sum of thirteen thousand nine hundred and sixty-seven $\frac{6}{100}$ dollars; that there have been filed and allowed by your orators preferred claims amounting to the sum of ten hundred twenty-six dollars and fifty-five cents (\$1026.55), and general claims amounting to the sum of twenty-four thousand eight hundred seventy-two dollars and ninety-eight cents (\$24,872.98); that there

Exhibit P. 1.

have been disallowed by your orators general claims to the amount of eight hundred seventy-three dollars (\$873), and that appeals have been taken from the determination of your orators, which appeals are pending and undetermined in this Court; that there will be a deficiency to pay debts and expenses of at least the sum of twenty thousand dollars (\$20,000). 10

FOURTH: That your orator, Herbert Clark Gilson, while acting as sole receiver of said corporation, presented to the Court of Chancery petitions, in which your orator set up all of the facts with respect to the conditions of the corporation, and asking for the instruction of the Court with respect to pursuing stockholders upon their stock subscriptions, upon which petitions notices were given, and all of the stockholders mentioned in this bill received notice, and most of them appeared, as will appear by the proceedings in said cause, which said proceedings are entitled Annie E. Dickinson, complainant, and J. C. Appleby Sand and Clay Company, defendant, in which said proceedings your orators beg leave to make a part of this bill of complaint; that after filing such petition, and after notice given to all the stockholders who appeared as defendants in this bill of complaint, an order was made by the Court of Chancery of the State of New Jersey, upon or about the fifteenth day of February, nineteen hundred and nine, wherein it was ordered that the sum of fifteen thousand dollars is hereby adjudged to be the amount of money necessary for the receiver to collect from the stockholders, in order to pay the debts of the insolvent corporation and the expenses of the receivership; and it was further ordered that the re- 20 30 40

Exhibit P. 1.

ceiver might, as he was advised, bring such suits at law or in equity to enforce any and all of the alleged liabilities arising out of the issuance, subscription to or holding of the stock of the insolvent corporation, and that each of the parties might be at liberty to apply to the Court in the premises upon two days' notice for further direction, which said order is made a part of this bill of complaint; that as a matter of fact your orators show that the sum of twenty thousand dollars will be necessary for the receivers to collect from the stockholders, in order to pay the debts of the insolvent corporation and the expenses of the receivership.

And your orator shows that they presented such facts aforesaid to this Court in said cause aforesaid, and after notice given to each of the stockholders and creditors of said corporation, the stockholders sought to be sued in this suit receiving notice, this Court did, upon the fourteenth day of June, 1909, order and adjudge that the sum of twenty thousand dollars was necessary for the receivers to collect in order to pay the debts of the insolvent corporation and the expenses of the receivership.

FIFTH: That when such corporation was incorporated upon the fourth day of January, nineteen hundred and four, its capital stock of one hundred thousand dollars was all issued to the following named persons, to wit: J. Charles Appleby, 835 shares; Julia M. Appleby, 50 shares; William R. Appleby, 50 shares; Lillian C. Pitcher, 20 shares; F. Clark Smith, 20 shares; George C. Smith, 20 shares; James E. Pyle, 5 shares; that all of this stock was issued in consideration of the check of J. Charles Appleby, dated January sixth, nine-

Exhibit P. 1.

teen hundred and four, for one hundred thousand dollars (\$100,000), which said check was deposited in the bank to the credit of the J. C. Appleby Sand and Clay Company, and thereupon, upon the twenty-first day of January, nineteen hundred and four, the said J. C. Appleby Sand and Clay Company gave to J. Charles Appleby its check for one hundred thousand dollars (\$100,000), in consideration of the purchase of certain real estate in the County of Middlesex and State of New Jersey, which said real estate so purchased, as aforesaid, was reasonably worth the sum of five thousand dollars (\$5,000); that the said thousand shares of stock held by the persons above mentioned was actually never paid for, except by the transfer to the corporation of the real estate hereinabove mentioned; that the checks of J. Charles Appleby for one hundred thousand dollars (\$100,000) to the order of the J. C. Appleby Sand and Clay Company, and the check of the J. C. Appleby Sand and Clay Company to the order of J. Charles Appleby, were delivered in the manner as above mentioned and set forth as a blind and for the purpose of concealing the real transaction hereinbefore mentioned and set forth, and was really a purchase of real estate by the corporation with the stock of the corporation; that the said persons above mentioned who held the stock of the said corporation knew that the transaction was really a purchase by the corporation of said lands and real estate, and knew that said lands were not reasonably worth more than the sum of five thousand dollars (\$5,000); that the directors of the corporation were under the control of J. Charles Appleby, and they and each of them knew that the value of such real estate was not in excess of the sum of five thousand dollars (\$5,000); and they, and each

Exhibit P. 1.

of the persons above mentioned, joined with the said J. Charles Appleby in purchasing the said property at a valuation of one hundred thousand dollars (\$100,000); that the directors of the said corporation did not exercise the judgment required to be exercised by them under the Act Concerning Corporations, revision of 1896; that the purchase of said property in the manner aforesaid was a fraud upon the corporation and upon its stockholders and creditors, and the stock issued therefor as aforesaid was not fully paid stock.

SIXTH: That thereafter and on or about the seventh day of June, nineteen hundred and six, J. Charles Appleby returned to the corporation four hundred ninety-five shares of the original issue of stock, as above mentioned and set forth, and the certificates therefor were cancelled upon the date aforesaid, but your orators show that the return by the said J. Charles Appleby of said stock, as aforesaid, does not in anywise release his liability on said stock, and even if such stock were returned and the amount thereof taken from the amount paid for said lands and real estate in Middlesex County, your orators show and insist that the purchase price of said property would then be a gross overvaluation, as fifty thousand dollars is to five thousand dollars.

SEVENTH: That the remaining five hundred five shares of the original issue of stock are still outstanding and are held by the following named persons: J. Charles Appleby, 130 shares; Julia M. Appleby, 50 shares; Lillian C. Pitcher, 20 shares; George C. Smith, 45 shares; James E. Pyle, 5 shares; William L. Pyle, 5 shares; Isaac V. Pear-

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son, 10 shares, Joel Dickinson, 235 shares; Immanuel Britten, shares.

EIGHTH: That said stock not being fully paid stock, the said persons holding said stock, as aforesaid, and the original subscribers to such stock and holders thereof, are liable to your orators for the difference between the face value of said stock, to wit, one hundred thousand dollars (\$100,000) and the value of the property given in exchange for said stock, to wit, the sum of five thousand dollars (\$5,000), and are liable to be called upon for the payment of such sum of ninety-five thousand dollars (\$95,000), as aforesaid, under such conditions as this Court may prescribe. 10

NINTH: That on the eleventh day of May, nineteen hundred and five, the capital stock of this company was increased to two hundred fifty thousand dollars (\$250,000), and that thereupon twelve hundred thirty-nine shares of the increased capital stock, as aforesaid, was issued; that one thousand shares of this increased capital stock was issued and distributed to the following named stockholders under a resolution adopted by the directors, a copy of which is as follows: 20 30

“Regularly moved and seconded that in payment to the stockholders as of March eleventh, nineteen hundred and five, for their gratuitous services in placing this company in its present position, be distributed to stockholders as of record on that date, in proportion to their holdings, one hundred thousand dollars (\$100,000) of the new stock, and that the balance, fifty thousand 40

Exhibit P. 1.

dollars, be sold at par, and the proceeds be used for the betterment of the company."

10 That such one thousand shares of stock was distributed as follows: J. Charles Appleby, eight hundred fifty shares; Julia M. Appleby, fifty shares; William R. Appleby, fifty shares; Lillian C. Pitcher, twenty shares; James E. Pyle, five shares; William L. Pyle, five shares; Isaac V. Pearson, five shares; George C. Smith, ten shares: Immanuel Britten, five shares.

20 That such stock has since been transferred into and now stands upon the books of the company in the names of the following persons: J. Charles Appleby, three hundred sixty shares; Julia M. Appleby, fifty shares; Lillian C. Pitcher, twenty shares; James E. Pyle, five shares; William L. Pyle, five shares; Isaac V. Pearson, forty shares; George C. Smith, seventy shares; Immanuel Britten, five shares; Julius C. Wittpenn, fifty shares; George A. Gardiner, one share; Isaac Smith, one share; Joel Dickinson, one hundred shares; Annie E. Dickinson, twenty-five shares; Emma W. Smith, twenty-five shares; Robert B. Morrison, forty shares; Elmer J. Lawson, ten shares.

30 That the said J. Charles Appleby returned one hundred ninety-three shares of this stock to the corporation, and such stock was cancelled upon or about the ninth day of May, nineteen hundred and six, but your orators show that the liability of the said J. Charles Appleby for the payment of said shares cannot be affected by such cancellation.

40 TENTH: That there was no consideration whatever given for the issuance of such stock; that there was nothing paid on account thereof, and that the stock is wholly unpaid.

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ELEVENTH: That there was two hundred thirty-nine shares of the capital stock which was paid for in cash, and that the following named persons now hold and possess the aforesaid fully paid stock, to wit: William L. Pyle, thirty shares; Charles A. Carpenter, thirty shares; Charles E. Putnam, twenty-five shares; Isaac V. Pearson, ten shares; C. Howard Slater, thirty-five shares; W. Drew Dittmas, five shares; Irene C. Slater, ten shares; Joel Dickinson, sixty-one shares; H. Otto Wittpenn, five shares; Leo A. Franklin, five shares; Robert B. Morrison, five shares. 10

That all of this fully paid stock was issued by the corporation after the issuance of the stock for property purchased and the issue for gratuitous services, and your orators show that this stock above mentioned is the only fully paid and valid stock of the corporation. 20

TWELFTH: That all of the persons who received the stock of the original issue, and who received stock issued for gratuitous services, and all who now hold said stock, knew that such stock had not been paid for either in cash or by the property purchased, and they knew that said stock was not fully paid stock at the time they received it or came into possession of it, as aforesaid; that your orators have been informed by the stockholders of such corporation, who have paid par for their stock, that they or some of them did not know at the time they secured their stock and paid par therefor, that the stock theretofore issued, to wit, the original stock and the stock issued for gratuitous services, had not been fully paid, but, on the other hand, they insist that they invested in said stock, and paid par therefor, upon the assumption that the stock theretofore issued, as aforesaid, had been 30 40

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10 fully paid, and the fact that such stock to the amount aforesaid had been issued and paid for, was an inducing cause for their investing in the stock that they bought and paid par for. And your orators have been informed that there was no knowledge on the part of the holders of said fully paid stock that the stock theretofore issued, to wit, that issued for gratuitous services and that issued for property purchased, had not been fully paid for, until the examination by the receivers of the books of the corporation and the investigation of the affairs of the corporation by your receivers in the course of this litigation.

20 THIRTEENTH: That they have been requested by the said Charles A. Carpenter, Charles E. Putnam and William L. Pyle that your orators, as receivers of the said corporation, in their capacity as representatives of stockholders, proceed against those stockholders who secured the original issue of stock, and the stock that was issued to gratuitous persons, and the persons who now hold such stock, for the purpose of compelling them to pay the par value of their shares or the amount necessary to do equity among the stockholders.

30 FOURTEENTH: That certain of the parties above mentioned, as your orators are informed and believe, are insolvent, and judgments against them would be of no avail, and it will be impossible for your orators to realize from them any part of the months due from them, as aforesaid; that the liability of certain of the defendants to pay to your orators the amount remaining unpaid on account of the capital stock issued, as aforesaid, and the equi-
40 ties to be adjusted between the several parties pri-

Exhibit P. 1.

marily or ultimately liable either to pay the debts of said corporation, or to pay to your orators funds to be applied for the purpose of doing equity among the stockholders, and the parties are so numerous and hold such varied relations to each other and to the said company, that to avoid multiplicity of suits and make possible a prompt and equitable settlement as between all parties interested of the rights and liabilities of each, that it is desirable and necessary that all the parties hereto be joined in one action; and your orators further show that in the premises there is no adequate remedy at law. 10

TO THE END, THEREFORE, that the said J. Charles Appleby, Julia M. Appleby, William R. Appleby, Lillian C. Pitcher, James E. Pyle, William L. Pyle, Isaac V. Pearson, George C. Smith, Immanuel Britten, Julius C. Wittpenn, George R. Gardiner, Isaac A. Smith, Joel Dickinson, Annie E. Dickinson, Emma W. Smith, Robert B. Morrison, Elmer J. Lawson, may, but without oath, full, true, direct and perfect answer make, to the best and utmost of their respective knowledge, remembrance, information and belief, to all and singular the matters aforesaid, and that as fully and particularly as if they were here again repeated, and they and each of them thereto particularly interrogated, and that it may be ascertained by this Court how much, if anything, has been paid by each of said stockholders upon the stock held by them and how much remains unpaid, and that an account may be taken, and that it may be ascertained by this Court what amount it is necessary to collect from the stockholders for the purpose of meeting the debts of the corporation and the expenses of the re- 20 30 40

Exhibit P. 1.

10 ceivership; that investigation may be made as to the financial responsibility of the parties aforesaid, and that it may be determined what amount, if any, should be collected from and paid by the various parties aforesaid, and that the said defendants may be ordered and directed to pay the balance due upon their stock until they have paid par upon the same (or to pay so much as may be necessary to do equity among the stockholders), or that an order may be made directing that they pay so much as may be necessary to pay the debt of the corporation if this Court shall determine that they are not liable for the par value of their stock (or to pay so much as may be necessary to do equity among the stockholders), and that the defendants, 20 and each of them, may be restrained from assigning or transferring any of the stock of the corporation held by them, and from demanding or receiving directly or indirectly any dividend or payment on account of any claims filed by them, and that your orators may have such other and further relief as the nature of the case may require, and as may be agreeable to equity and good conscience.

30 MAY IT PLEASE YOUR HONOR, the premises considered, to grant unto your orators not only the State's writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to said defendants hereinafter named, restraining them, and each of them, from assigning or transferring any of the stocks of the J. C. Appleby Sand and Clay Company held by them, or in their own name or otherwise, and from demanding and receiving directly or indirectly any dividend or payment on account of any claims filed with your orators, but also the State's writ of subpoena, issu- 40

Exhibit P. 1.

ing out of and under the seal of this Honorable Court, directed to the said J. Charles Appleby, Julia M. Appleby, William R. Appleby, Lillian C. Pitcher, James E. Pyle, William L. Pyle, Isaac V. Pearson, George C. Smith, Immanuel Britten, Julia C. Wittpenn, George R. Gardner, Isaac A. Smith, Joel Dickinson, Annie E. Dickinson, Emma W. Smith, Robert B. Morrison, Elmer J. Lawson, commanding them, and each of them, by a certain day and under a certain penalty, therein to be expressed, to be and appear before your Honor, in this Honorable Court, then and there to answer, stand to, abide by, and perform such order or decree as to your Honor shall seem meet.

And your orators, as in duty bound, will ever pray.

MERRITT LANE,
Solicitors of Complainants.

MERRITT LANE,
of Counsel with Complainants.

Order.

IN CHANCERY OF NEW JERSEY.

10	Between ANNIE E. DICKINSON, Complainant, and J. C. APPLEBY SAND AND CLAY COMPANY, Defendant.	} On Bill, etc. } On Reports } and Petitions } of Receiver.
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20 This matter coming on to be heard upon the reports and petitions, original and supplementary, of the receiver, and the various notices given thereunder, and the affidavits of the respective parties herein filed this day, in the presence of Herbert C. Gilson, Esquire, receiver, solicitor and counsel *pro se*; Pierre F. Cook, Esquire, solicitor of George R. Gardner, who is alleged to be a stockholder, and Isaac V. Pearson, who is alleged to be a stockholder, and who claims also as a creditor; Messrs. Tennant & Haight, solicitors of Elmer J. Lawson, who is alleged to be a stockholder; James E. Pyle, Esquire, solicitor of C. Howard Slater, Immanuel

30 Britten, Robert B. Morrison and James E. Pyle, individually and as trustee, all of whom are alleged to be stockholders and claim to be creditors; Joseph A. Duffy, Esquire, solicitor of Charles A. Coppinger, an intervening petitioner, and who is alleged to be a stockholder and also claims to be a creditor; and Charles H. Hartshorne, Esquire, solicitor of William R. Appleby, a former stockholder, and who is alleged to be liable; and it appearing to the Court that the only remaining as-

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Order

sets of said company are claims against certain stockholders and one parcel of real estate, and that it will be necessary for said receiver to collect, for the purpose of paying the debts and expenses of administration, the sum of fifteen thousand dollars, and the receiver reporting to the Court that there was issued to the following persons stock of this company in the amounts set opposite the name of each, to wit: 10

J. Charles Appleby	850 shares	
Julia M. Appleby	50 shares	
William R. Appleby	50 shares	
Lillian C. Pitcher	20 shares	
James E. Pyle	5 shares	
William L. Pyle	5 shares	20
Isaac V. Pearson	5 shares	
George C. Smith	10 shares	
Immanuel Britten	5 shares	

upon a resolution of the company as follows:

“Regularly moved and seconded, that in payment to the stockholders as of March 11th, 1905, for their gratuitous services in placing this company in its present condition, we distribute to stockholders as of record on that date, in proportion to their holdings, one hundred thousand (\$100,000) dollars of the new stock, and that the balance (\$50,000) be sold at par, and proceeds be used for the betterment of the company”; 30

and that such stock, or the part of it indicated, as stands opposite the names of the following persons, has been since transferred into and stands in their names on the books of the company, to wit: 40

Order

	J. Charles Appleby	360 shares
	Julia M. Appleby	50 shares
	Lillian C. Pitcher	20 shares
	James E. Pyle	5 shares
	William L. Pyle	5 shares
10	Isaac V. Pearson	40 shares
	George C. Smith	70 shares
	Immanuel Britten	5 shares
	Julius C. Wittpenn	50 shares
	George R. Gardner	1 share
	Isaac A. Smith	1 share
	Joel Dickinson	100 shares
	Annie E. Dickinson	25 shares
	Emma W. Smith	25 shares
	Robert B. Morrison	40 shares
20	Elmer J. Lawson	10 shares

and that such stock was not issued in accordance with the requirements of the statutes of this State in respect to the payment therefor, and it appearing to the Court that those liable thereon should be made to respond to the said receiver for the benefit of the trust; and it further being reported to the Court that at the time of the organization of the company, certain lands were conveyed to the company and one hundred thousand dollars of the stock of the company was issued, and all that was received for said one hundred thousand dollars of issued stock was said lands, and that the value of said lands was apparently much less than the par value of the stock aforesaid, and that such stock was issued to the following persons:

	J. Charles Appleby	835 shares
	Julia M. Appleby	50 shares
40	William R. Appleby	50 shares

Order

Lillian C. Pitcher	20 shares
F. Clark Smith	20 shares
George C. Smith	20 shares
James E. Pyle	5 shares

and that such stock or the part of it indicated, as
stands opposite the names of the following per-
sons, has been since transferred into and stands in
their names on the books of the company, to wit: 10

J. Charles Appleby	130 shares	
Julia M. Appleby	50 shares	
Lillian C. Pitcher	20 shares	
George C. Smith	45 shares	
James E. Pyle	5 shares	
William L. Pyle	5 shares	20
Isaac V. Pearson	10 shares	
Joel Dickinson	235 shares	
Immanuel Britten	5 shares	

and that the rights of the creditors or of the other
stockholders who have paid for their stock in full,
as against the persons responsible at law on in
equity in respect to the above issuance, should be
asserted by the said receiver as he may be advised;
and it appearing to the Court that the offer of com-
promise made on behalf of several of the said stock-
holders to the receiver, and by him reported to the
Court, is objected to by all of the creditors and
stockholders represented, and does not command
itself to the Court as a compromise which should
be accepted at this time, and the receiver is so ad-
vised. 30

It is, on this fifteenth day of February, nineteen
hundred and nine, on motion of the receiver, *pro se*,
in the presence of the solicitors above named, 40

Order

ORDERED, that the sum of fifteen thousand dollars is hereby adjudged to be the amount of money necessary for the receiver to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the receivership.

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AND IT IS FURTHER ORDERED, that the receiver may, as he is advised, bring such suits at law or in equity to enforce any and all of the alleged liabilities arising out of the issuance, subscription to or holding of the stock of the insolvent corporation, and that each of the parties is at liberty to apply to the Court in the premises, upon two days' notice, for further directions herein.

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Respectfully advised,

LINDLEY M. GARRISON,
V. C.

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Order.

IN CHANCERY OF NEW JERSEY.

Between	}	
ANNIE E. DICKINSON,		
Complainant,		On Bill.
and		On report and
J. C. APPLEBY SAND AND CLAY		petition of
COMPANY,		10
Defendant.		Receivers.

This matter coming on to be heard upon the report and petition of Herbert Clark Gilson and Elmer W. Demarest, receivers of the J. C. Appleby Sand and Clay Company, and it appearing that the Order to Show Cause made herein upon the ninth day of June, nineteen hundred and nine, has been served as in said order directed and prescribed, and in the presence of Merritt Lane, of counsel with the receivers; Pierre F. Cook, solicitor of George R. Gardner, who is alleged to be a stockholder, and Isaac V. Pearson, who is alleged to be a stockholder; Tennant & Haight, solicitor of Elmer J. Lawson, who is alleged to be a stockholder; James E. Pyle, solicitor for C. Howard Slater; Immanuel Britten, Robert B. Morrison, James E. Pyle, individually and as trustee, all of whom are alleged to be stockholders; and it appearing to the Court that the amount heretofore adjudged to be necessary for the receiver to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the receivership, should be increased from fifteen thousand dollars heretofore adjudged by this Court upon the fif-

Order

teenth day of February, nineteen hundred and nine, to twenty thousand dollars.

It is, on this fourteenth day of June, nineteen hundred and nine, on motion of Merritt Lane, of counsel with the receivers, in the presence of the solicitors above named,

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ORDERED, that the sum of twenty thousand dollars is hereby adjudged to be the amount of money necessary for the receivers to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the receivership.

Respectfully advised,

LINDLEY L. GARRISON,
V. C.

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Reasons.

NEW JERSEY SUPREME COURT.

HERBERT CLARK GILSON and
ELMER W. DEMAREST, Receiv-
ers of the J. C. Appleby Sand
and Clay Company,
Prosecutors,

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vs.

WILLIAM H. SPEER, Judge of the
Hudson County Circuit
Court; JOHN F. CROSBY, Clerk
of the Hudson County Circuit
Court, and J. CHARLES AP-
PLEBY,
Defendants.

On Certiorari.

20

And the said prosecutors, by Merrit Lane, their attorney, comes and prays that the order of the Hudson County Circuit Court brought up by this writ, may be reversed and set aside for the following reasons:

FIRST: The Hudson County Circuit Court had no jurisdiction upon the facts to make an order quashing the writ of attachment. 30

SECOND: The Hudson County Circuit Court erred in permitting depositions to be taken and in considering the depositions which were taken upon the motion to quash.

THIRD: The affidavit upon which the writ was obtained was sufficient and the Circuit Court erred in permitting depositions to be taken, and in con- 40

Reasons

sidering the depositions so taken, the affidavit being conclusive.

10 **FOURTH:** The Circuit Court erred in adjudicating upon the legality and validity of the plaintiffs' claim upon the motion to quash.

FIFTH: The claim of the plaintiffs as disclosed was a liquidated claim and the Circuit Court erred in quashing the writ.

SIXTH: The Circuit Court erred in awarding costs against the plaintiffs.

20 **SEVENTH:** The order of the Hudson County Circuit Court is in divers other respects illegal, unjust, oppressive and contrary to law.

MERRITT LANE,
Attorney for Plaintiffs.

NEW JERSEY
Court of Errors and Appeals.

HERBERT C. GILSON AND ELMER
W. DEMAREST, RECEIVERS OF
J. C. APPLEBY SAND AND CLAY
Co.,

Compl'ts and Respondents,

and

J. CHARLES APPLEBY,
Appellant and Defendant.

*Appeal from an
order over-
ruling plea
of J. Charles
Appleby.*

SAME COMPLAINANTS AND RE-
SPONDENTS,

and

WILLIAM R. APPLEBY,
Appellant and Defendant.

*Appeal from an
order overrul-
ing plea of
William R.
Appleby.*

Brief of Hartshorne, Insley & Leake for
Appellants.

STATEMENT OF THE CASE.

The question is whether the orders overruling the two pleas and vacating the previous orders which allowed those pleas, should be reversed.

The two defendants, J. Charles Appleby and William R. Appleby appeared separately and each filed a separate plea that he was a resident of another State and that no process had been served upon him in New Jersey.

The bill to which the pleas were filed sought to hold the pleading defendants liable as stockholders for alleged unpaid subscriptions upon their stock.

The pleas were set down for a hearing, and after argument, before his Honor, Vice Chancellor Garrison, he sent to counsel copies of a draft of his opinion sustaining the pleas upon the authority of *Wilson vs. American Palace Car Co.*, 65 N. J. E., 730, but reserving the question of the form of the order allowing the pleas for further argument. By direction of the Court, this opinion was not filed or published because it was incomplete in form. Counsel on both sides were heard upon the form of the order and after argument upon that point, orders were signed in the usual form that the pleas "do stand and be allowed" (Dick. Ch. Pr., 101).

Nine days after these orders were made, the learned Vice Chancellor wrote to counsel a letter of which the following is a copy.

"JERSEY CITY, N. J.

October 19, 1910.

Gilson, Receiver vs. Appleby et als.

Merritt Lane, Esq., 75 Montgomery Street,

Messrs. Hartshorne, Insley & Leake, 239 Washington Street,

Jersey City, N. J.

GENTLEMEN:

As soon as I began to prepare my additional memorandum on the day you last appeared in this case it occurred to me that I desired to amend the order which I hurriedly signed. Of my own motion, I desire to have this order amended so that it shall express exactly what I intend it to effect. Without now stopping to determine the phrase

ology, it is my intention to amend that order so that it allows the pleas to stand "to the end that no answer need be made by the defendants to prevent the entry of a personal decree against them, or a personal judgment affecting their life, liberty or property; but not to the end of dismissing them from the suit so that a decree may not be made against them in the matter of ascertainment or assessment upon stock binding upon them as defendants in this suit."

This is in the rough, and will require consideration before it is properly worded.

I write to counsel so that they may come before me, if they so desire, next Monday, my next motion day, and be heard as to the form of the amended order. If they do not choose to come, I will, of course, have to amend the order as I may myself be advised.

Very truly yours,

LINDLEY M. GARRISON."

Thereupon, counsel upon both sides were again heard in argument upon the form of the pleas, when the Court (for the first time) raised the question whether the pleas were defective for failure to state how jurisdiction over the defendants had been attempted to be acquired, *i. e.*, for failure to state the order of publication and the mailing and publication of the notice thereof.

Afterwards the Vice Chancellor signed the orders overruling the pleas. These orders annul the previous orders which had allowed the pleas.

At the time of the hearing upon the pleas there appeared, upon the files of the Court in the cause, the order of publication, which recited that it appeared to the Court that these defendants resided out of the State of New Jersey, and that process

could not be served upon them, and which directed that they appear, plead, answer or demur to the bill on or before January 20th, 1910, and that the notice required by the rules be published and mailed (case, p. 13).

On the files there also appeared the affidavit of the complainant's solicitor that was informed and believed that these defendants resided in other states, that he had mailed to them at their respective addresses the notice of the order, as required by the rules of the Court. The usual proof of publication was also filed (case, p. 14).

The pleas in question were filed on January 19th, one day before the expiration of the time limited by the order of publication for pleading.

ARGUMENT.

I. It is not necessary to plead the order of publication and the proceedings thereunder.

The order, with the proofs of mailing and of publication, are part of the record, and, as such, judicial notice must be taken of them. No fact of which judicial notice is taken should be alleged in the pleadings.

These rules of pleading, well established at law, are equally applicable to equity pleading.

In Beames "Pleas in Equity" (Amer. Ed., 1824), p. 25, 26, the author, after stating that "averments" are necessary in pleas in equity to intendments which would otherwise be made against the pleader, and after saying that "averments are familiar in pleadings at law" continues as follows:

"It is to be collected from the books that averments are unnecessary at law in the following cases, namely, where words admit or import a fact, or have relation to a thing apparent; where the

plea is, as we have already observed, a negative plea; and *where the matter be evident to the Court by necessary collection from the record.*"

Mr. Daniel says that a plea should state all facts necessary to render it a bar "in order that the plaintiff may take issue upon it." 1 Dan. Ch. Pl., 684.

But no issue could have been taken upon an averment that the order of publication had been taken and notice thereof mailed and published. For these facts appear in the record, and the Court would not permit a denial of their existence. No averment can be made against the record.

In *People vs. Harding* (1884), 53 Mich., 481, defendant had been twice tried upon an information for larceny. Then he pleaded two special pleas setting up those trials, which were demurred to by the state and the demurrer sustained. He was convicted upon a third trial and took a writ of error. The question was whether the first or second trial was a bar.

Judge Cooley, speaking for the Supreme Court, said, (p. 484):

"The two special pleas have no office to perform in the case and should have been stricken from the files. This is too plain to require either argument or illustration. The purpose of the plea is to tender an issue upon some fact not already in the case, that proof may be taken in respect to it if the issue is accepted. If the fact is already in the case, the plea is idle; and it becomes an absurdity when the fact is not only established by the record of the Court in the case in which the plea is tendered, but so conclusively established that no averment to the contrary could be listened to or received. And such was the case here. The proceed-

ings on the former trial were recited in the record as much at large as they were or can be in the pleas, and the respondent was entitled to all the benefit which the law could give him from the facts so appearing. The prosecutor should, therefore, have moved to strike the pleas from the files instead of taking an idle issue upon them."

In *Tweedy vs. Jarvis*, 27 Conn., 47, the question was upon the validity of a plea in abatement for non-joinder which failed to expressly state that the joint promissors were not made parties defendant. The plea set up the fact that the promise alleged in the declaration had been made by two persons jointly. But the Supreme Court, in a well considered opinion, held that by inspection of the writ, which was part of the record, it appeared to the Court that only one of these two joint promissors had been made a party and therefore that the fact need not be stated in the plea.

In *Guild vs. Richardson* (1828) 6 Pick., (23 Mass.), 364, the return to a writ of attachment stated a levy upon the right, title and interest of defendant in certain land. Defendant was named in the writ as a resident of Louisville, Ky. Defendant pleaded in abatement of the writ that he had no title in the property that could be attached. On demurrer the plea was sustained. It was objected that the plea did not allege that the defendant had no place of abode in Massachusetts (p. 365). But the Court said (p. 368): "It is not necessary to aver any fact already appearing on the record, for without oyer, the Court will take notice of the facts appearing on the record. It was not, therefore, necessary to aver that the defendant was not an inhabitant of the Commonwealth, if that fact were material."

"It is unnecessary to state matters antecedently alleged in the same record." 1 Chitty's Pl. (220).

7

“Matter apparent to the Court need not be stated.
* * And if a man avers contrary to that which
appears to the Court it is no avail but shall be re-
jected * * * * *”.

Archb. Pl., 96.

6 Comyns Dig. Title “Pleader” (C. 78, 79).

The Court below, in the opinion, says that the method by which complainants attempted to acquire jurisdiction should have been averred in the pleas, and that such an averment was necessary to negative the intendment that complainants had not yet issued process and attempted to serve it upon defendants within the State or to obtain service by some sufficient method of substituted service. But no such intendment can be made, because it would be contrary to the record (*i. e.* the order of publication) which shows that process was issued, that the defendants were non-resident and service could not be made upon them and (by the affidavits filed in the cause) that notice of the order was duly published and mailed.

It is only “intendments which would otherwise be made against the pleader” which it is necessary to negative by averments.

Story Eq. Pl., Sec. 665.

Mitford & Tyler, Eq. Pl., 386.

The Court below in its opinion also said, that “it is certainly bad pleading for a defendant to set up as a bar to a suit in New Jersey that he is a resident of another State and is not subject to service of process within the State of New Jersey.” But at most, this allegation of the plea is superfluous and should be disregarded. It does not vitiate the plea. Thus,

In *Forbes vs. Skelton*, 8 Sim., 335, 345, the bill was for an account. Defendants pleaded that if

there had been a cause of action it accrued more than six years before bill filed. *Held* that the averment was sufficient without denying that the account contained any item relating to any transaction within six years.

The plea also averred that plaintiffs had not been under any disabilities mentioned in the Statute of Limitations. *Held* that the averment was superfluous since the bill had not alleged such a disability; and that the averment in the plea did not vitiate it.

The plea also averred that there was no subsequent acknowledgment of the debt in writing to take the case out of the Statute of Limitations; but the bill had not alleged such an acknowledgment. *Held* that that averment was an anticipation of a "defence that might be set up to the plea, and consequently is superplusage."

II. The orders overruling the pleas and vacating the previous orders which sustained them denied the defendants the right to due process of law and substituted for that right a mere permission to apply to the discretionary power of the Court for leave to set up that right in amended pleas.

If the orders appealed from are allowed to stand it will rest in the discretion of the Court below whether or not the defendants may plead the fact that they have not been brought into Court by due process of law. If the Court, in the exercise of its discretion, should give leave to plead that fact but on conditions which aggrieved the defendants, they would have no redress; for an application to amend is addressed to the discretion of the Court and it is at least questionable whether the order embracing the terms upon which that discretion is ex-

exercised is appealable upon the ground that those terms are unreasonable.

In *Roller v. Holly*, 176 U. S., 398 (44 L. Ed., 520), the question was whether five days' notice to a non-resident of a suit to foreclose a lien on land was due process of law in the circumstances of that case. The suit was in Texas and the defendant notified was a resident of Virginia. It required four days to travel from his residence to the Court in which the suit was pending. A decree of foreclosure by default was entered. The Supreme Court of the United States held that the notice was not reasonable and was not due process of law. Upon the point that the Texan Court would, on application, have opened the decree entered by default, the Supreme Court, speaking through Justice Brown said: (p. 409).

"Very probably, too, the Court which rendered the judgment would have set the same aside and permitted him to come in and defend; but that would be a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

III. The orders appealed from are erroneous in that they direct a decree *pro confesso* to be entered unless the defendants apply for leave to file amended pleas.

It appears in the record of the case that the Court has not acquired jurisdiction of the persons of the defendant. The bill prays a personal decree against them upon the facts stated in it. The rule of law is that where the Court has not acquired jurisdiction of the person, no personal decree can be made against them. It was, therefore, error to order that a decree *pro confesso* be entered unless the de-

defendants should apply for leave to file amended pleas.

IV. The averment in the pleas that the defendants were not served with process within the State of New Jersey is sufficient. The word "process" includes any form of notice authorized by law for bringing the defendant into Court.

"But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it."

• 3 Blacks. Com. (279).

"It is entirely immaterial what is the means or method pointed out by statute, or used to acquire jurisdiction of defendants—whether by writ or notice, it is properly denominated process."

Wilson vs. St. Louis &c. Ry. Co., 108 Mo., 588.

"Process is the means whereby a Court compels the appearance of a defendant before it, or the compliance with its demands"

Neal-Millard Co. vs. Owens, 115 Ga., 959.

"Process, in the sense in which it is employed in the present title, means the writ, notice, or other formal writing, issued by authority of law, for the purpose of bringing defendant into a Court of law to answer the plaintiff's demands in a civil action; although in a more technical and limited sense the term is frequently applied only to those writs or writings which issue out of a Court."

32 Cyc., 419.

See also "6 Adjudged Words and Phrases," title "Process."

V. The orders allowing the pleas were rightly made and should stand.

The bill prays that the Court adjudge the liability of J. Charles Appleby and William R. Appleby upon the grounds that stock of the insolvent company was issued to them and that some of it has never been paid for at all and some of it has been paid for (if at all) in part only.

The bill also prays that the amounts respectively for which each of these two defendants, and all the other defendants named in the bill are liable, may be adjudged by this Court.

The pleas to the jurisdiction are upon the ground that no process has been served upon either of the pleading defendants within this State, and that they are citizens and residents of other States.

Neither the liability, nor the amount thereof can be adjudged against a non-resident stockholder who has not been served with process within the State or voluntarily submitted to the jurisdiction of the Court.

See vs. Heppenheimer, 3 Robbins, at p. 83.

Johnson vs. Tennessee Oil, etc., Co., 69 Atl., 790 (headnote 22), and at end of opinion.

American Palace Car Co. vs. Wilson, 20 Dick., 730.

Puster vs. Park & Merchantile Co., 4 Robb., 772.

A plea to the jurisdiction is the proper method of raising the objection to the jurisdiction of the Court.

Amer., Palace Car Co. vs. Wilson, *supra*.

Groel, vs. United Electric Co., 2 Robbins, 249.

S. C. 3 Robins, 397.

S. C. on plea and answer, 4 Robbins, 616.

Lanning vs. Twining, 54 Atl., 466.

Camden Rolling Mills vs. Swede Iron Co., 3 Vr., 15.

In Ewald vs. Ortynsky, 75 Atl., 577, affirmed 79 Atl., 270, the practice, established by Wilson vs. American Palace Car Company, of pleading to the jurisdiction in cases in which the defendant was non-resident and was not served with process, was recognized.

The orders allowing the pleas were rightly made in the usual form, that the pleas "do stand and be allowed." (Dick. Ch. Pr., p. 101). Thus in Wilson vs. American Palace Car Co., 65 N. J. E., 730, 733, the Court of Appeals: by Dixon, J., said, "It remains therefore only to determine whether the matters stated in this plea show the defendants to be beyond the compulsory jurisdiction of the Court, and if they do, then formally to dismiss the defendants from the controversy in which they declare themselves unwilling to participate."

The complainants contended below that an absentee, by becoming a stockholder, submits himself to the jurisdiction of the Court to administer the trust fund consisting of unpaid subscriptions for the purpose of determining its extent, and how much each one of the contributors owes.

But no case has gone so far. The utmost that the cases have decided toward supporting complainants' contention is to hold that *in the proceed-*

ings for the winding up the corporation the Court (or the receiver acting within his authority) may order *pro rata assessment* upon all unpaid stock. which assessment is "conclusive as to the fact that an assessment is necessary, as to the amount of money required to be raised by the assessment, and as to the *pro rata of each policy*."

Swing vs. Consolidated Fruit Jar Company,
45 Vr., 145, at page 148.

In *Hawkins vs. Glenn*, 131 U. S., 319, and *Bernheimer vs. Converse*, 206 U. S., 1170, cited by complainants, there had been a *pro rata* assessment of thirty per cent. and thirty-six per cent., respectively, on the unpaid stock held by all stockholders. In the *Swing* case "the percentages assessed on the various policies" and "the amount of the defendant's just proportion" had been ascertained by the insolvency court or by the receiver under its authority (p. 146). Yet in the latter case, Mr. Justice Swayze said that the stockholder "is not personally bound by the adjudication of the foreign tribunal; it is still open to him to show that he was not a policy holder; that he had paid in full; that he had been released; that he had an offset" (p. 148)

But the case at bar is distinguished from the above-cited cases by these marks:

1. This is not the original insolvency proceeding for administering the trust fund. It is a separate and distinct suit to establish alleged liabilities and to ascertain the amount of each liability. It is not a proceeding to administer the trust fund, but a separate suit in aid of that proceeding. The necessity for calling upon stockholders and the amount necessary to be raised from them, has already been fixed by orders made in the insolvency proceedings. (See par. 4 of the bill.)

2. It appears on the face of this bill that no pro rata assessment can be made against stockholders because the liability of each, or of some of them, must depend upon the result of a judicial investigation and determination of a number of disputable points. For example:

(a). Whether the price of the land for which stock was issued to J. Charles Appleby was excessive; and, if so, what was its fair value.

(b). Whether the surrender and cancellation of some of his (J. C. Appleby's) stock was before or after the claims of these creditors arose, and if before then, whether he is liable to assessment on that surrendered stock.

(c). Whether he, or his transferee, is liable on stock which has been transferred by him on the books of this company.

(d). Whether W. R. Appleby is liable at all, he having transferred all his stock on the books of the company.

(e). How much of the sums chargeable against insolvent stockholders (the bill alleges that some, but it does not say how many, are insolvent, Par. 14), is chargeable against the Applebys.

(f). How much is necessary to do equity "between the stockholders" (Par. 14 of bill).

In short, as to the *amount* claimed against the pleading defendants, the bill does not seek a pro rata assessment against them in common with other stockholders. It seeks to fix a sum which is indeterminate and cannot possibly be determined without a judicial investigation of a number of disputable facts. How can a judicial decree be made binding these defendants as to such amounts without giving them their day in Court?

The statement in the brief below for complainants that "if any of the relief asked for is proper, then this plea, of course, is bad," is erroneous. On the contrary—

"It has been repeatedly decided that a plea in equity may be bad in part and not in the whole, and the Court will allow it to so much of the bill as it is properly applicable to."

1 Dan. Ch. Pr., 611.

We respectfully submit that the orders appealed from should be reversed.

HARTSHORNE, INSLEY & LEAKE,
Of Counsel for J. C. Appleby
and W. R. Appleby.

A. nearctica (L.)
1891

New Jersey Court of Errors and Appeals.

HERBERT CLARK GILSON and EL-
MER W. DEMAREST, Receivers of
J. C. APPLEBY SAND AND CLAY
COMPANY,

Complainants and Respondents.

and

J. CHARLES APPLEBY,

Appellant and Defendant.

Same Complainants and Respond-
ents,

and

WILLIAM R. APPLEBY,

Appellant and Defendant.

Appeal from
Orders

overruling

pleas of J.

Charles Ap-

pleby and

William R.

Appleby.

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20

BRIEF FOR THE COMPLAINANTS AND RESPONDENTS.

Statement of the Case.

30

The J. C. Appleby Sand and Clay Company was incorporated under the Provisions of an Act Concerning Corporations (Revision of 1896) Jan. 4, 1904, with a capital stock of One hundred thousand dollars. J. Charles Appleby, one of the defendants herein was the promoter of the Company and transferred to the company property which he had theretofore owned, taking in exchange for the property a check of the corporation for One

40

hundred thousand dollars and immediately giving his own check to the corporation for One hundred thousand dollars and getting back the entire issue of stock which he divided among others, some of them his relatives, and retaining himself up to the time of the declaration of the insolvency of the company one hundred and thirty (130) shares; the Board of Directors at the time the property was transferred to the company, were the dummies

10 of J. Charles Appleby and the lands were not reasonably worth more than the sum of Five thousand dollars and the transfer of the property to the company was a fraud; on the eleventh day of May, 1905, J. Charles Appleby caused a resolution to be adopted by the Board of Directors of the Company, still his dummies, (p. 7) reciting that one hundred thousand dollars worth of stock should be distributed among the stockholders "for

20 their gratuitous services in placing this company in its present position" (the company being at that time insolvent) and that to him J. Charles Appleby there be issued 850 shares; this was done and J. Charles Appleby retained up to the time of the insolvency of the company 360 shares of this stock; William R. Appleby got 50 shares of this stock which he still holds; some stockholders paid par for their stock, fifty thousand dollars' worth of stock being issued upon the

30 eleventh day of May, 1905, and sold to the public; the whole scheme was an attempt on the part of J. Charles Appleby to manipulate the corporation for his own benefit and to secure its stock without value; upon the thirteenth day of March, 1908, proceedings were instituted in the Court of Chancery to declare the corporation insolvent and Herbert Clark Gilson was appointed Receiver, and subsequently and upon the thirtieth day of March, 1909 Elmer W. Demarest was appointed

40 with him as Receiver.

The Receivers reported the condition which they found to the Court and the Court thereupon, after notice to all the stockholders and creditors including J. Charles Appleby and William R. Appleby, adjudged that it was necessary to raise from the stockholders the sum of twenty thousand dollars in order to meet the debts of the company and the expense of the winding up proceedings and directed the Receivers to bring such suits at law and equity as they might be advised was proper. Thereupon the bill in the case at bar was filed setting up the facts before stated and praying that the defendants *who were all of the stockholders of the company* who had not paid par for their stock should answer the bill "and that it may be ascertained by this Court how much if anything has been paid by each of said stockholders upon the stock held by them and how much remains unpaid, and that an account may be taken and that it may be ascertained by this Court what amount it is necessary to collect from the stockholders for the purpose of meeting the debts of the corporation and the expenses of the receivership, an investigation may be made as to the financial responsibility of the parties aforesaid, and that it may be determined what amount if any should be collected from, and paid by the various parties aforesaid, and that the said defendants may be ordered and directed to pay the balance due upon their stock until they have paid par upon the same or to pay so much as may be necessary to do equity among the stockholders, or that an order may be made directing them to pay so much as may be necessary to pay the debts of the corporation, if this Court shall determine that they are not liable for the par value of their stock, or to pay so much as may be necessary to do equity among the stockholders, and that the defendants and each of

them may be restrained from assigning or transferring any of the stock of the corporation held by them and from demanding or receiving, directly or indirectly, any dividend or payment on account of any claims filed by them and for further relief."

It will be observed that the bill asks, so far as the prayer for relief is concerned, practically for an assessment against the stockholders and for
 10 such decree as might have been obtained in the insolvency proceedings and would have been binding upon the stockholders if taken in such proceedings.

To this bill both of the defendants filed pleas, each of which pleas is in the following form:

"The plea of
 one of the persons named as defendants in the bill of complaint in the above stated cause,
 20 who now appears specially for the sole purpose of objecting to the jurisdiction of the Court over him.

"The said not confessing
 any of the matters or things alleged in the said bill to be true, for plea to the whole of said bill says, that he has not been served with process in this case within the State of New Jersey, or at all; and that he is now, and was at the time when this suit was begun, a citizen and resident of the State of Virginia, and is not subject to service of process within
 30 the State of New Jersey.

"And he pleads Article XIV., Section One of the Constitution of the United States to the jurisdiction of this Court; and prays the judgment of this Court whether it has jurisdiction over him to require him to answer said bill or to make against him any order or decree in this cause; and he prays to be hence dismissed with his costs."

The pleas were supposed to be filed under the
 40 authority of the *American Palace Car Company*

vs. Wilson, 65 N. J., Eq. 730, and upon the authority of that case the Court at first was inclined to the opinion that he would sustain the pleas, but that he would in the order sustaining the pleas permit them to stand "to the end that no answer need be made by the defendants to prevent the entry of a personal decree against them or a personal judgment affecting their life, liberty or property, but not to the end of dismissing them from the suit so that a decree may not be made against them in the matter of ascertainment or assessment upon stock binding upon them as defendants in this suit". (Appellant's Brief, p. 2-3). 10

And see the Vice Chancellors memorandum printed and handed to the Court.

The complainants herein contend that for reasons subsequently to be considered the Vice Chancellor should have overruled the pleas even if proper in form or at least that his suggestion that the defendants need not answer to prevent the entry of a decree affecting their life, liberty or property, was too broad, it most it should have been affecting their life, liberty or property without the State, for as will be hereafter shown the court properly could subject the defendants property within the State to the satisfaction of such decree as might be made. 20

The defendants however, before the Vice Chancellor had determined as to the form of the decree, had secured the signing of an order in the usual form that the pleas do stand and be allowed. Upon subsequent argument asked for by the Vice-Chancellor with respect to the form of amendment to the order that he proposed to make, he came to the conclusion that the pleas were bad and so held them in an opinion (page 31) and upon that opinion the orders overruling the pleas 30 40

were entered,—and upon appeals from such orders the matter now comes before this court.

The orders of a Vice-Chancellor may be sustained upon several grounds:

First. Upon the ground stated in his opinion, that is, that the pleas were bad in form.

Second. That pleas are improper because they commence with a special appearance without leave of Court.

10

Third. The pleas are bad both in form and substance, because:

(a) The method of setting up by plea to the jurisdiction the fact of non-service of non-resident individuals is improper and the case may be distinguished from that of *American Palace Car Company vs. Wilson*.

20

(b) Because the method of setting up improper service by plea as permitted by the case of the *American Palace Car Company vs. Wilson* is improper and that case should be overruled.

30

(c) Because the defendants may be compelled to answer the Bill of Complaint at least as to part of the relief prayed for, to wit: the ascertainment or assessment upon the stock held by them and may be enjoined from transferring stock, and may be brought in the suit for such purpose by order of publication notwithstanding the Fourteenth Amendment of the Constitution of the United States.

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(d) Because the complainants may secure a decree that will be valid within the State and which the lands and property of the defendants within the State may be taken to satisfy, the Court having the power to subject in this suit property within the State of non-resident defendants, to the satisfaction of claims arising within the State.

I. Upon the ground stated in his opinion, that is that the pleas were bad in form.

The orders may be sustained upon the ground given by the Vice Chancellor. I can add but little to what has been said by the Vice-Chancellor in his opinion commencing on page 31 of the State of the Case. Each one of the pleas purports to be *to the whole of the bill* and says that the defendant has not been served with process in this cause within the State of New Jersey, not at all, and that he is now and was at the time when the suit was begun a resident of a foreign state and not subject to service of process within the State of New Jersey, and he pleads Article 14 of the Constitution of the United States to the jurisdiction of the Court and prays to be dismissed with his costs. If all the facts stated in this plea be true, the defendant would yet be subject to the jurisdiction of the Court of Chancery. He is a natural person and may come within the jurisdiction at any moment, and if he does he may be served with process and if served with process within the State of New Jersey, whether he be of foreign residence or not, a decree may be made against him in the suit which will bind him personally, as the Vice-Chancellor aptly put it:

"I know of no principal of law recognized in the State of New Jersey which exempts the citizens of another State of the Union from the service of process within the State of New Jersey; and therefore, it is certainly bad pleading for a defendant to set up as a bar to a suit in New Jersey that he is a resident of another State and is not subject to service of process within the State of New Jersey. As a matter of law and of fact, he is subject to the service of process within the State of New Jersey whenever he may

be found therein (subject to certain exemptions based upon his reason for being in the State, i.e., attendance at Court and the like). Nor is that part of the plea which sets up the fact that he has not been served with process in this case within the State of New Jersey, nor at all, a good plea because it does not appear from anything in the plea that the complainant has yet sought to serve him with process within the State of New Jersey or at all, and it does not, therefore, follow that if and when the complainant so seeks to obtain jurisdiction over the defendant he may not, in the first place, serve him within the State of New Jersey, nor, in the second place, obtain service by some other method of substituted service recognized as efficient by the Courts in this State and in the Federal Government."

It is necessary in a plea to set up every fact relied upon because the only record before the Court upon hearing on bill and plea is the bill and plea.

In *Rawins vs. Moss*, 6 Hare, 604; 67 Full Eng., Reprint, 1304, there was a plea to a bill of revivor by the representatives of a deceased defendant, that the party whom they represented was never served with subpoena to appear and answer and did not appear to nor answer the original bill and the plea was overruled as insufficient in substance in not excluding the fact that the deceased party might by other means have been bound by the proceedings in the original cause.

It will be observed that this was a plea to a bill of revivor which is practically a supplemental pleading to a cause then pending in the Court of Chancery and yet the Court held that it would not look at its files to see what had taken place, but that it was essential for the pleader to set up in his plea every fact upon which he relied and to negative every intendment.

Under the title Pleas in Equity, 16 Ency. Pleading and Practice, p. 603, it is said:

"A plea must set up a complete defense so that issue may be taken upon it. It must be specific, distinct *and perfect in itself*, state facts which if true will make an end of the case, or that part of the case to which it is directed, and if all intendments inconsistent with the case made by the bill are not excluded by the averments of the plea it is held to be insufficient." 10

In *Meeker vs. Marsh* executors, 14 Eq. at p. 198, the syllabus "when all the allegations of the plea being taken as true do not make out a full defense; or when necessary facts are to be gathered by inference only; the plea cannot be sustained;" the Chancellor stated p. 202: "such is the peculiar nature of this kind of plea in equity that a Court should always be careful to see that it sets forth plainly and explicitly every matter necessary to constitute a complete defense and bar to the complainant's claim. For if the plea be allowed by the Court as correctly pleaded and is afterwards proved the cause is at an end. The allowance of a plea says Lord Redsdale, "is as complete a judgment against the claims of the plaintiff, as can be given on the most solemn and deliberate hearing of the cause on the pleadings and proofs provided the truth of the plea be established by evidence; 2 Scho. & Lef., 725, *Roche vs. Morgell*." 20 30

Mount vs. Manhattan Company, 14 Stew., 211; VAN FLEET, Vice-Chancellor said:

"A plea in equity in order to constitute a bar to the complainant's whole right of action must aver every fact essential to make out a complete defense," citing *McEwen vs. Broadhead*, 3 Stock 129; *Davison's Exr. vs. Johnson* 1 C. E. Gr., 112.

And the strictness of the rule was recognized 40

by this Court in *Fennimore vs. Wagner*, 73 Eq., 368, where the language of Judge Story in his work on equity pleading, Section 697, as follows is used:

10 "If the plea is upon argument held to be good or if the complainant admits it to be so by replying to it the truth of the plea is the only subject of inquiry remaining, so far as the plea extends, and nothing but the matters contained in the plea as to so much of the bill as the plea covers is in issue between the parties; * * * and, if the defendant proves the truth of the matters pleaded the suit, so far as the plea extends is barred."

And the language in 1 Dan. Ch. Pr. ch., 15, Sec. 4 where the rule is stated as follows is used:

20 "If the complainant reply to the plea he thereby makes as full an admission of its validity as if it had been allowed upon argument, so that if the defendant at a hearing proves his plea to be true, the bill must be dismissed."

And the rule was again recognized by this Court in *Ewald vs. Ortynsky*, 79 Atl. Rep., p. 270.

Upon an argument upon bill and plea it has always been held that nothing but the bill and plea is before the Court.

30 In the case of *Rawlins vs. Moss*, 6 Hare 604, the Court refused to yield to the insistment upon a plea to a bill of reviver setting up that the defendant's predecessor had not been served in the suit to be revived, that the court should look at the files; the records of that suit were before the Court which however, held the plea bad because it did not exclude the fact that the deceased party might have been brought into the suit by some other process.

40 A well known plea is that mentioned in 1 Dan. 6th Ed., P. 639, pleas of matters of record or as

of record in the Court itself or some other Court, and a great deal of attention is given commencing p. 659 to this class of pleas, and it is there held that all of the facts must be set up in the plea although the facts appear of record in the very Court in which the plea is filed and in a cause between the same parties and the reason of the rule is apparent. It is because if the facts stated in the plea, not the facts stated in the plea plus the facts appearing by some other papers filed in the cause but the facts stated in the plea alone, are true that this ends the suit and results as the Court has said in as complete a judgment against the claim of the complainant as can be given on the most solemn and deliberate hearing of the case on the pleadings and proofs. *Meeker vs. Marsh, executors*, 14 Eq., 202; *Ewald vs. Ortinsky*, 79 Atl. Rep., 270; *Fennimore vs. Wagner*, 73 N. J. Eq., 367. 10

If the pleas at bar are good in substance and in form and are true, not only are the defendants dismissed from the suit for the time being, but there is a judgment against the claims of the complainant which would bar a subsequent suit in this or any other state. It cannot be said for one moment that if it is true that the defendants have not been served with process in the cause and that they are now and were at the time when the suit was begun citizens of a foreign state, that they are not subject to service of process within the State of New Jersey as stated in the pleas, and therefore the pleas are false in this particular; nor is it law that if the facts stated in the pleas, to wit, that they had not been served with process in the State of New Jersey in the case, and that they are now and were at the time the suit was commenced residents of a foreign state that the Court cannot acquire jurisdiction over them so that a personal judgment may be rendered against them. So 20 30 40

that if you admit all of the facts stated in these pleas to be true the pleas must be overruled because those facts do not prevent the Court from acquiring jurisdiction over the defendants. If the plea, be held to be good in form and substance and these facts are true, then the Court cannot acquire jurisdiction over the defendant, in the cause, because the sustaining of the pleas will dismiss the cause and there will be no cause
 10 pending nor can a subsequent suit be brought upon the same cause of action within any other jurisdiction because the sustaining of the plea is a conclusive judgment as to the claims of the plaintiff.

This Court said in *Ewald vs. Ortinsky*, 79 Atl. Rep. P. 271, referring to the case of the *American Palace Car Co. vs. Wilson*, "we of course did not intend to say and did not say that a defendant in an equity suit who was a resident of the state and subject to be brought within the jurisdiction
 20 of the court by the compulsory process could after the bill was filed but before subpoena was served upon him successfully challenge the jurisdiction and obtain a dismissal by pleading that he had not been served. The mere statement of the proposition exposes its absurdity for if such was the situation a defendant could always defeat the complainant's claim if he could manage to forestall the service of subpoena by filing such a plea,
 30 and this was the identical situation disclosed by the proofs taken on the issue tried for service of process upon a person not an officer or agent of the defendant corporation is not a service upon the defendant at all, and the case stood in its legal effect as if no subpoena had been issued against it. Of course, if the complainant's solicitor had discovered the situation before the filing of the plea by the defendant he would have been entitled to set aside the return of the service made
 40 by the Sheriff and to the issuance of a new sub-

poena to the defendant. By the filing of the plea however, setting up facts which were alleged to be a bar to the complainant's right of relief, the joinder of issue thereon and the sustaining of these facts by proof the defendant was entitled to a decree dismissing the complainant's bill notwithstanding that the facts set out did not constitute a valid defense to the suit provided the plea and replication were permitted to remain upon the record."

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And so in the case at bar. If we admit for a moment that the Court may look at the files and find a subpoena returned against the defendants not served and order publication and service of publication upon them in a foreign state the reasoning of the Court of Errors in *Ewald vs. Ortinsky* is just as applicable to such a situation as it is to a case of a resident defendant. It must be admitted that a non-resident natural persons are as subject to the jurisdiction of the Court of Chancery of New Jersey as a resident and the only question is whether or not the Court has acquired jurisdiction over them. Whenever they come within the State except upon certain occasions when they are exempt they may be served with process. That the subpoena in the case at bar was not served upon them is no indication that a new subpoena cannot be issued and served upon them; that an order of publication has been made against them is no indication that they may not at some subsequent time during the pendency of this litigation come within the State and so subject themselves to the service of subpoena and that a new subpoena will then be issued and served upon them. Yet if the rule contended for by the appellants be correct, a non-resident person could after a bill filed but before subpoena was served upon him successfully challenge the jurisdiction and obtain a dismissal by pleading that he had not been served.

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In *Ewald vs. Ortinsky* the Court said that service of a subpoena upon a person not an officer of the corporate defendant was no service at all, so it is contended in the case at bar by the appellants that the service of the order of publication upon them is no service at all; yet if a plea similar to that here pleaded be permitted to stand such non-resident natural persons who may at any time become subject to the jurisdiction of the

10 Court can before process be served upon them (they at all times *contending that publication is not proper process and no service at all*) come into this Court and secure not the setting aside of the process but a formal judgment conclusive upon the complainant's claim and the language of the Court in *Ewald vs. Ortinsky* to wit: that the mere statement of the proposition exposes its absurdity applies, for if such was the situation the defendants could always defeat the

20 complainant's claim if they could manage to forestall the service of subpoena by the filing of such pleas.

The appellants in their brief state upon page 10, "the averment in the pleas that the defendants were not served with process in the State of New Jersey is sufficient; the word process includes any form of notice authorized by law for bringing the defendant into Court." This is not significant because the mere fact that they have not been served with process does not exclude the fact that they may be served with process and is clearly bad under *Ewald vs. Ortinsky*. A plea to the jurisdiction of a Court of General Jurisdiction must aver facts showing the absence of jurisdiction and must be certain in every particular.

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Dibley vs. Davison, 25 Ill., 486;
Moseley vs. Hunter, 3 Ired. L. N. C., 543;
Am. Eng. Ency. of Pleading and Practice,
 40 Vol. 12 p. 182.

They must exclude every conclusion against the pleader; they must show that the Court had, in no event, jurisdiction.

1 *Chitty Pleading*, 412;

2 *Wm. Saund* must be certain according to the most rigid rules of precision, 209 B. C.;

Horton vs. Tounes, 6 Leigh. 47;

They must be certain according to the most rigid rules of precision. 10

Heyman vs. Calwell, 36 Mich., 157;

Taylor vs. Picards, 9 Ark., 378.

II. The pleas are improper because they commence with a special appearance without leave of the Court.

An appearance in the Court of Chancery must be general and a defendant will not be permitted to take any steps in the cause until an appearance has been entered in his behalf. 20

Dan. Ch. Pleading & Practice, 4th Ed., p. 536.

Even though he denies the jurisdiction of the Court.

Felkin vs. Lord Herbert, 1 Dr. and S. M., 608.

Even if he desires to object to the regularity of the proceedings by which the plaintiff has sought to compel his appearance he must first enter what is called a conditional appearance 30

1 Dan. Ch. Pleadings & Practise, 536 and cases cited.

To enter such conditional appearance, he must obtain an order which order will not be granted except upon his entering into a stipulation to 40

abide by the result of the decision of the point raised by him.

1 Dan. Ch. Pleading & Practice, 537 and cases cited.

Hervey vs. Hervey, 78 Atl. Rep., p. 772.

The defendants in the cause at bar have interposed the plea that they were improperly served. The pleas have been set down for hearing. This amounted to a demurrer on the part of complainants. The Court has overruled the pleas. The defendants may now file their answers to the bill on the merits and after litigating upon the merits in the main cause may take the case to this Court, and upon a decision being handed down by this Court against them may then in case any of their property should be taken under such a decree litigate in the Courts of the United States the question as to whether or not they were properly served. Thus, after having litigated in the Court of Chancery and in this Court as to the legality of the service upon them, and that having been decided against them and having then litigated in the Court of Chancery and in this Court upon the merits of the cause, they would not be bound by any decree made by the Court of Chancery or by this Court, but, after years of litigation might still, in the Courts of the United States, question the legality of the service upon them. The question of service is wholly collateral and incidental and should have been definitely settled in the inception of the cause and before the time of the Court below and of this Court was taken up in deciding that which finally is absolutely ineffective. Such is the result of the practice of permitting the filing of pleas with special appearance.

Groel vs. United Elec. Light Co., 60 Atl. Rep., 824;

Harkness vs. Hyde, 98 U. S., 476.

This result would be avoided if when the defendant files its plea it commences with a conditional appearance to wit; a condition that in case the point be decided against him he will be bound by further proceedings, or at least a condition that if he litigates upon the merits of the case he will be bound by the decision as to the legality of the service against him. Such a conditional appearance was always required under the English practice.

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Dan. Ch. Pleading & Practice, 4th Ed.,
Vol. 1, p. 536.

Groel vs. Un. Elec. Light Co., 60 Atl.,
824;

Hervey vs. Hervey, 38 Atl. Rep., 772;

Romaine vs. Union Ins. Co., 28 Fed., 625.

That such an appearance is proper and that the State Courts may properly compel such a conditional appearance has been held by the Courts of the United States.

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York vs. Texas, 137 U. S., 15;

Kaufmann vs. Waters, 138 U. S., 285.

This defect in the plea is one of substance and can be taken advantage of upon the hearing.

Groel vs. Un. Elec. Light Co., 60 Atl.,
824;

Corlies vs. Corlies, 23 N. J. Eq., 197;

Davidson's Exrs. vs. Johnson, 16 N. J. 30
Eq., 112.

In *Romaine vs. Union Insurance Company*, 28 Fed. Rep., 632, the Court goes fully into the English Practice and says, that under the English practice it was always essential before any step could be made to vacate service of process to put in this conditional appearance, and that it was necessary with us holding that the general rules in equity bringing in the practice of the High

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Court of Chancery in England brought into the federal system of equity practice this conditional appearance and stated:

“With us we do not seek to compel appearance at all but only enforce a penalty of non-appearance by proceeding in the further progress of the case *ex parte* and upon a *pro confesso*. But, as before remarked, since the plaintiff may yet need the defendant in Court to compel an answer under our Equity Rule 18 and may not wish to proceed *ex parte* or *pro confesso*, it seems to me still essential to require that conditional undertaking as established under the orders of 1841.

III. The pleas are bad both in form and substance because—

(a) **The method of setting up by plea to the jurisdiction the fact of non-service of non-resident individuals is improper and the case may be distinguished from that of the American Palace Car Company vs. Wilson;**

Even if the Court should take notice of the fact that there was an order of publication made the case is distinguishable from that of the *American Palace Car Company vs. Wilson* because the defendants in the case at bar are natural persons and subject to the jurisdiction of the Court, and if at any time they come within the State of New Jersey may be served with compulsory process, to wit: a subpoena. It may be that a foreign corporation not being a natural person is confined so far as its existence is concerned to the State of its incorporation, or at least to such States as it has been authorized to transact business in so that properly it may be pleaded by a corporation not doing business within the State of New Jersey, not recognized by the laws of the State of New Jersey that the Courts of the State

of New Jersey have not nor ever may have jurisdiction over it in the suit then pending because if at the time of the filing of the bill the corporation is not a corporation doing business under the laws of the State of New Jersey nor recognized by its laws, it is not in existence so far as the State of New Jersey is concerned,—and a suit against a non-existent thing of course is defeated, and the mere fact that the thing against which the bill is purported to be filed subsequently comes into existence under the laws of the State of New Jersey does not relate back to the time of the filing of the bill so as to give the Court jurisdiction of it in that cause, and therefore, a plea that the non-resident corporation not having been served with process within the State and not being recognized by the laws of the State and not doing business within the State, is not subject to the jurisdiction of the Court may *possibly* be good; but a plea by a non-resident natural person who has an existence according to the laws of this state and who under the Constitution of the United States is entitled to all the privileges and immunities of a citizen of this state, including the right to hold and dispose of property, and who may become subject to the compulsory process of the state by coming within the state at any time, that the Court has no jurisdiction over it merely because up to date he has not been served cannot be good.

(b) Because the method of setting up improper service by plea as permitted by the case of the American Palace Car Company vs. Wilson is improper, and that case should be overruled.

The Court of Chancery has complete jurisdiction of the subject matter of the suit, and complete jurisdiction of the parties if properly served, and did have complete jurisdiction of the subject mat-

ter of the suit in the *American Palace Car Company vs. Wilson* and of the defendant corporation in that suit if it were found within the State. Actions may be brought against corporations domestic or foreign in this State for the same cause that actions may be brought against individuals either resident or non-resident, provided they be served according to our laws and the doctrine of due process of law.

10 *Mo. River Tel. Co. vs. 1st Ntl. Bank*, 74 Ill., 217.

Romaine vs. Union Ins. Co., 28 Fed., 626.

20 The question then is one not of jurisdiction but of power to enforce jurisdiction. The distinction between the two lies in this, that in a case of lack of jurisdiction appearance will not cure, but in a case lack of power to enforce jurisdiction appearance will cure. If the defendant here had submitted to the jurisdiction of the Court, the Court might make a binding decree. Lack of jurisdiction and lack of power to enforce jurisdiction are often confused, and such confusion results in conflicting opinions upon the point in issue.

Romaine vs. Union Ins. Co., Supra;

Drummond vs. Drummond, 2 Chan. Ap. Case 3543.

30 The Court therefore having jurisdiction of the subject matter and of the parties if properly before the Court, the question is one of regularity of service and cannot be taken advantage of by a plea.

The practice is settled that a plea to the jurisdiction in equity may be of only four kinds.

Story on Eq. Pleadings, Sect. 710;

Dan. Ch. Pleadings and Practise, Vol. I, 4th Ed., 628.

40 And both writers state that a plea "that the defendant is not properly served," is not a good plea

to the jurisdiction. The proper practice where the defendant objects to the manner of service is for the defendant to apply to the Court of Chancery for leave to enter conditional appearance, and that leave being granted to move to set aside the service as irregular, and that leave will never be granted except a stipulation be entered into that if the point be decided against the defendant he will cause a general appearance to be entered.

Dan. Ch. Pleadings and Practise 453 ¹⁰
and cases.

On page 537 it is stated that an order giving leave to enter conditional appearance is necessary; that it is obtained upon an ex parte motion, but the defendant must by his counsel consent to submit to any process which may be issued against him on such appearance.

Dawson vs. Marchioness of Hasting, 2
Keen, 509. ²⁰

The cases are fully considered in that of *Romaine vs. Union Insurance Company*, 28 Fed., 626, and the distinction between lack of jurisdiction and lack of power to enforce jurisdiction is plainly pointed out and the rule as applied to corporations is considered, page 629; and it is there laid down that plea to the jurisdiction because of improper service upon a corporation is ineffective. The corporation is entitled to the same exemptions as a natural person and the practice of setting aside improper service is the same; that the proper proceeding is to apply for leave to enter a conditional appearance, and that leave being granted to move to set aside the service, and the Court as a condition of granting such leave will always insist upon a stipulation being entered into that the defendant will immediately enter a general appearance if the point is decided against him and the reason of the rule is considered. ³⁰

In *Romaine vs. Union Insurance Co.*, page 628, the Court said:

10 "But if the fact be that the parties are of diverse citizenship or the case be one arising under the constitution and laws of the United States, there could be then no question whatever of jurisdiction; for under our modern acts of Congress, the Court may acquire jurisdiction by voluntary appearance and hence a demurrer or plea for want of jurisdiction would be out of place for non-constant, but that the defendants may appear thereafter, and at any time if not on that service on some other day, voluntarily and without any service at all. Hence it could not be proper to dismiss the bill for want of jurisdiction, but only to decline to proceed against their consent, by vacating the service, which is all the Court should properly do. Except, therefore, in that class of cases, peculiar perhaps to the Federal Courts, where, in certain situations of residence or citizenship, the power to proceed against the particular persons is wholly denied under all circumstances whatever, the objection that the defendants to a bill in equity have not been effectively served with process to bring them within the presence of the court for judgment, is not, as at law, one of jurisdiction to be pleaded by formal plea to the writ, but one of mere irregularity of process, properly cognizable on motion, according to a practice always prevailing for that special purpose; and when the case falls within the exception just mentioned, it is im-

20 material, perhaps save as a matter of convenience and permanency of record, how the objection be taken; because, however taken, it must prevail, as it is one that cannot be waived under any circumstances whatever. It is always safe, therefore, to appear specially and move to discharge the process in any case; for as will be presently seen, if the court has acquired power, by the disputed process, over the person of the objector, to proceed against him, it is a preliminary condition on which

30 he is allowed to make such appearance that if the objection be decided against him, he

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shall submit to defend the bill as if duly served with process, and he will not be allowed to depart from the Court without a more general appearance after having been permitted to appear specially to make his objection; and, if the service be effective, he must abide by it on that decision, and not challenge it again. But if the Court can have no jurisdiction,—that is to say, no power to acquire, by the legal service of process of any kind or anywhere, the authority over his person to proceed against him,—he is not precluded from making that defense by any demurrer, motion, plea or whatever method may be available to him after the one just mentioned has been decided against him, and he may at once proceed to make it. 10

“But, again, if the jurisdictional facts be undeniable,—as when the plaintiff and defendant are of diverse citizenship, or when the case is one arising under the constitution and laws of the United States,—it is all important that the personal privilege (*for it is nothing more than that*) of being exempt from suit elsewhere than in the Judicial District where the party resides, or is lawfully served with process, shall be so asserted as not to bring the party within the category of one who has voluntarily appeared to defend the suit; thereby waiving all irregularities of process, but never any strictly jurisdictional objection to the bill, either as to subject matter or its defect in the matter of parties improperly joined, or omitted to be joined, etc.” 20

“In the case of corporations like these defendants of course other complications arise, not now presented for decision, but as to which, in view of the suggestions of the argument, it is not improper to say that they are resolvable by the same principle precisely. Corporations are entitled to the same exemption as natural persons from suits elsewhere than in the Judicial District where they are domiciled or cormmorant, or where they may be found doing business under circumstances subjecting them to the service of process in that place; and they may voluntarily appear, 30 40

like other people, and waive this exemption or personal privilege."

The practice as settled by the English Court of Chancery was followed in this State in the case of *Hervey vs. Hervey*, 78 Atl., 772.

The Learned Justice writing the opinion for this Court in *American Palace Car Company vs. Wilson* based his conclusion upon Sections 712-714 of Story's Equity Pleadings. Upon an examination
 10 of that book it will be observed that Mr. Story is discussing in these sections a lack of jurisdiction of the Court and not a lack of power to enforce jurisdiction; that he does not recognize the right of the defendant to a bill in equity to file a plea raising the question of improper service. Unquestionably if there is a lack of jurisdiction it may be set up by plea. Realizing as we must that the judgment on a plea is conclusive of the plaintiff's right as forcibly pointed out by this Court in *Fennimore vs. Wagner*, 73 N. J. Eq., 367, and *Ewald vs. Ortinsky*, 79 Atl. Rep., 271, to permit a non-resident corporation or non-resident person who may at any time come within the State and become subject to the service of process within the State, to come in and plead that the process which has been issued in the State has been improperly served upon him or it, and upon that plea secure a judgment, **not staying the suit, not setting aside the service, but a judgment conclusive upon the**
 20 **plaintiff's rights which will forever bar the complainant either in this State or in the State of the defendant's domicile from securing a judgment against it based upon the same cause of action, would seem to be impossible.** If the pleas in this case were sustained the defendants might when they were sued in the State of their domicile upon the same cause of action plead that in the suit pending in this State upon the same cause of action the pleas at bar had been sustained and
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that judgment was *res adjudicata* as to the rights of the plaintiff to succeed, and in view of the authority of *McEwan vs. Broadhead*, 3 Stock, 131, *Meeker vs. Marsh*, 1 Eq., 202, *Fennimore vs. Wagner*, 3 Buchanan, 368, the Court of a foreign State would be obliged to hold that the judgment upon the plea was *res adjudicata* and that there should be no recovery upon the same cause of action in the State of domicile of the party. Is not this result absurd? And yet this is the result which must ensue if pleas similar to the pleas pleaded in the case at bar are to be sustained. 10

It is submitted, therefore, that the doctrine in the case of *American Palace Car Company vs. Wilson* is erroneous as applied to corporations and that case should be overruled. It certainly does not apply to non-resident natural persons.

III (c) Because the defendants may be compelled to answer the bill of complaint at least as to part of the relief prayed for, to wit: the ascertainment or assessment upon the stock held by them and may be enjoined from transferring stock and may be brought in the suit for such purpose by order of publication notwithstanding the Fourteenth Amendment of the Constitution of the United States. 20

As fully stated in the statement of facts, the Bill of Complaint was filed by the Receivers of the J. C. Appleby Sand & Clay Company against the stockholders of that company who had not paid par upon their stock. The Bill sets up that the company became insolvent prior to the 13th day of March, 1908; that proceedings were taken in the Court of Chancery under the corporation act and the company was there declared insolvent and a Receiver was appointed. That the Receivers 30 40

have administered the assets of the corporation, and have in their hands certain sums of money amounting to the sum of \$13,967.00. That there are general claims against the company of \$24,872.98, and that there will be a deficiency to pay these and expenses of at least the sum of \$20,000.00.

- That the Receivers represented to the Court of Chancery in the insolvency proceedings such facts and prayed for instructions with respect to proceeding against stockholders upon their stock subscriptions; that notices were given to the stockholders and that finally an order was made by the Court that the sum of Twenty Thousand (\$20,000) Dollars was necessary for the Receivers to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the Receivership. The order does not pretend to make an assessment against each stockholder, nor does it pretend to determine which stockholders are liable. It merely fixes the amount which it is necessary to raise from stockholders and directs the Receiver to bring such proceeding as may be necessary to collect such moneys from the stockholders. The Bill then sets up the facts with respect to the incorporation of the company and the issuance of its stock some of which it is alleged was issued for no value whatever; other of which it is alleged was issued for property purchased which was worth Five thousand (\$5000) Dollars, whereas the stock issued was One Hundred thousand (\$100,000) Dollars; that certain of the stockholders are insolvent; that in view of the difficulties to be adjusted between the several parties primarily or ultimately liable either to pay the debts of the corporation or to contribute for the purpose of doing equity among the stockholders, and the parties are so numerous and hold such varied relations to each other and to the company that to avoid multiplicity of suits and to make possible a prompt and equitable settlement as be-

tween all parties interested, of the rights and liabilities of each that it is desirable and necessary that all parties be joined in one action.

The prayer of the bill is (pages 10 and 11)

"that it may be ascertained by the Court how much, if anything, has been paid by each of said stockholders upon the stock held by them and how much remains unpaid, and that an account may be taken, and that it may be ascertained by this Court what amount it is necessary to collect from the stockholders for the purpose of meeting the debts of the corporation and the expenses of the receivership; that investigation may be made as to the financial responsibility of the parties aforesaid, and that it may be determined what amount, if any, should be collected from and paid by the various parties aforesaid, and that the said defendants may be ordered and directed to pay the balance due upon their stock until they have paid par upon the same, or to pay so much as may be necessary to do equity among the stockholders or that an order may be made directing that they pay so much as may be necessary to pay the debts of the corporation if the Court of Chancery shall determine that they are not liable for the par value of their stock, or to pay so much as may be necessary to do equity among the stockholders."

It will thus be seen that the relief asked for by the complainant is two fold, 1st, an ascertainment of the amount which each stockholder shall pay, or, in other words, an assessment; 2nd, a decree that they pay it.

If any part of the relief asked for by the complainant can be granted the pleas must be overruled in whole.

It will be observed by a consideration of the brief of counsel for the appellant that before objection was made that the pleas were bad for the reasons stated in the opinion of the Vice-Chancellor

lor he had concluded that he would let the pleas stand to the end that no answer need be made by the defendant to prevent the entry of a personal decree against them or a personal judgment affecting their life, liberty or property, but not to the end of dismissing them from the suit so that a decree may not be made against them in the matter of ascertainment or assessment upon stock binding upon them as defendants in this suit. In
 10 other words, the Vice-Chancellor intended to sustain the pleas to so much of the bill as he thought they were properly pleaded to and overruled them as to the rest.

Counsel for the appellant argues that pleas may be sustained in part and overruled in part, citing 1 Dan. Ch. Practice, 611, but it is insisted that where a plea purports to be to the whole bill and answers to a part of the relief sought the plea should be overruled in toto.

20 In

Hook vs. Dorman, 1 Sim. St., 227,
 57 Full English Reprint, 92,

the Court overruled the plea because it was pleaded to the whole bill where it was only an answer to a part.

In

Barker vs. Ray, 5 Madd., 64,
 30 56 Full Eng. Reprint, 819,

the Court said:

"The plaintiff according to the case made by the bill has a right to the aid of a Court of Equity for the production of this Will to support his title at law and the plea leaves this part of the case untouched," and overruled the plea.

In

Higgins vs. Crowford, 2 Vesey, Jr., 570,
 40 30 Full Eng. Reprint, 781,

the Court overruled the plea because it did not

appear with certainty to what part of the bill it applied.

In

Wood vs. Riker, 1 Paige, 617,

it was held that a plea of the statute to the whole of a demand is bad where it was good only as to part.

In

In re Van Hook, 3 Paige, at pp. 418-419, ¹⁰

the Court said:

"Whenever a plea or demurrer does not extend to the whole bill or there is a demurrer as to one part and a plea to another part or separate pleas to different parts of the bill, the plea or demurrer should clearly express what part of the bill it is intended to cover or the particular parts to which each defence is intended to be pleaded," and overruled the plea.

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In

Jarvis vs. Palmer, 11 Paige, at p. 659,

the Court said:

"This plea, however, is defective in point of form because it does not state with sufficient certainty the part of the discovery sought by the bill which it was intended to cover."

The same rule applies to pleas as to demurrers in this respect; that where the plea or demurrer do not go to the whole bill but only ³⁰ to a part of the discovery or relief sought, it must clearly and distinctly point out the particular parts of each which said plea or demurrer is designed to cover, that is, the part of the discovery and relief intended to be covered by the plea or demurrer must be set out in the words of the bill or by such a description that the Court will not be obliged to look into the whole bill to find the part that is covered by the demurrer or plea."

And the matter is settled in our own State in ⁴⁰

Emley vs. Mount, 5 Stew., page 469, where a bill was filed to foreclose a mortgage for both principal and interest, and the plea thereto purporting to be a plea to the whole bill but setting up a defense to the principal of the mortgage only, was held bad and overruled, the Court saying,

10 “The plea is to the whole of the bill; it does not extend to the whole, however, but only to the right to recover the principal of the mortgage. It does not cover the right to the interest. It is therefore bad. It will be overruled.”

It is insisted, therefore, that if there is any relief asked for in this bill that could be properly obtained against the defendants upon the service as made the pleas would be bad and should be overruled in whole and not allowed to stand as to part of the bill and overruled as to the balance as was suggested by the Vice-Chancellor.

20 It is unquestionably true that a decree may be made marshalling the assets of the corporation, determining the value of the property transferred to the corporation and adjudging what money is necessary to be raised from the stockholders and making an assessment upon the stock. The purpose is to permit the Court to determine how much of a call it shall make upon each stockholder,—such an order might have been made in the insolvency proceedings and if made would have been binding upon the stockholders whether served with
30 process or brought in by notice.

In *Hood vs. McNaughton*, 25 Vroom, 427, the Supreme Court said:

40 “the insistment that it was unnecessary and therefore illegal to require the defendant to pay the full amount unpaid on his shares in order to satisfy the debts of the company cannot be entertained in this Court. The decree of the Court of Chancery requires the payment of the entire amount and the validity of that decree cannot be drawn in question

in this suit which is collateral to it. The Receiver stands in the place of the stockholders as their representative *and all the rights of the company reside in him*. The company before insolvency could have called the whole amount unpaid and such a call could not in the absence of fraud have been questioned by the stockholders."

In *Cumberland Lumber Company vs. Clinton Hill Lumber Mfg. Co.*, 57 Eq., 627 this Court said:

"The proper tribunal to ascertain the amount necessary for these purposes is a Court of Equity since Courts of Law have no procedure directed to the marshalling of assets and liabilities requisite in such a calculation. The ascertainment *may* be made on a petition filed by the Receiver against the stockholders in the suit wherein the corporation was adjudged to be insolvent for it seems to be settled that a stockholder is so far an integral part of the corporation that, in the view of the law he is to that extent privy to those proceedings and when in such a suit an assessment on the stock has been ordered by the Court to meet corporate liabilities and an action is brought against a stockholder to collect *his quota* he cannot thereafter question the propriety of the assessment. Citing:

Hawkins vs. Glenn, 131 U. S., 319;

Hood vs. McNaughton, 25 Vroom, 425.

"In the former case it was also held that the lack of notice to the stockholder individually would not deprive the assessment of its conclusive character against him in the suit brought to enforce it. This, however, does not necessarily imply that a Court of Equity when asked to order such an assessment should not see that the individual stockholders have a reasonable opportunity to be heard on the application. On the contrary these decisions seems to indicate that the order *is the result of an exercise of judicial power and, therefore that it should be made only in observance of those rules which are designed to insure the administration of justice.*"

A consideration of this case indicates that the Court does not hold that the assessment *must* be made in the insolvency proceedings or that the assets *must* be marshalled in that proceeding. It held that the action of the Court in making the assessment was judicial and must be taken so that the individual stockholders would have a reasonable opportunity to be heard and should be made only in observance of those rules which are de-

10 signed to insure the administration of justice. There is no case holding that the assessment cannot be made upon a bill filed by the receivers against the individual stockholders and it would seem that upon principle such a bill is maintainable.

It may well be that the matters to be considered are such as should not be considered upon a mere petition in the insolvency proceedings. It is necessary in the case at bar in order that a proper

20 assessment may be made to determine the value of the property transferred by the individual stockholders to the company so that it may be determined how much each stockholder owes.

In *See vs. Heppenheimer*, 69 Eq. at p. 80, the Court said:

30 "No question has ever been raised but that the receiver of an insolvent corporation in this State has always by his appointment been vested *instantly* with all the rights and property of the corporation and that he is in truth and fact Receiver both for the stockholders and creditors and in a great majority of cases practically of the creditors only. It has always been the practice of this Court, first to ascertain the whole amount of the unpaid debts; Second in case of unpaid stock subscriptions or stock issued without payment, to determine the names of such stockholders and the amount due from each; and third to

40 make an assessment against these stockholders, which in case an action at law is brought

based upon that assessment is conclusive against the stockholders."

"But the power and duty of this Court in the premises is distinctly upheld by the Court of Errors and Appeals in *Cumberland Lumber Co. vs. Clinton Hill Mfg. Co.*, 57 Eq. 627, where it was distinctly declared that it was the province of this Court to determine the amount necessary to be raised *and to distribute the same among the stockholders liable* and that when such determination and assessment has been made by this Court it is binding upon the stockholders and that its action in that behalf *was judicial* and therefore must be taken according to the fundamental principles of justice and reasonable notice be given to the parties to be affected thereby." 10

And the Court proceeds to state that it is necessary to take into consideration the solvency of the various stockholders whether they are within or without the State, whether it is probable that moneys can subsequently be collected from them 20 and then to make an assessment and determination of how much *should be paid by each stockholder*, and it is important to state that this suit was not the insolvency proceedings, but a spit brought by the Receiver as is the case at bar.

In *Bernheimer vs. Converse*, 206 U. S., at page 532 it was said:

"It is said that the stockholder is liable to a proceeding to which he is not a party. 30 Under a prior act he could only be held if service had been had upon him personally, but if we are right in the proposition just announced that additional remedies may be provided by legislation then the validity of such additional enactments depends not necessarily upon the personal service upon the stockholder, but upon the fact of whether the remedies provided is a well recognized means of enforcing such obligations and not in violation of constitutional rights. It is true that the stockholder is not necessarily served with 40

process in an action wherein the assessment is made under the act of 1899 but no personal judgment is rendered against him in that proceeding and it has reference to a corporation of which he is a member by virtue of his holding stock therein and the proceeding has for its purpose the liquidation of the affairs of the corporation the collection and application of its assets and other liabilities which may be administered for the benefit of creditors. In such case it has been frequently held that the representation that a stockholder has by virtue of his membership in a corporation is all that he is entitled to. It was so held in a well considered case in Massachusetts that of *Howarth vs. Lombard*, 175 Mass., 570; 49 L. R. A. 301."

In *Hawkins vs. Glenn*, 131 U. S., 319, the case disclosed that upon a general creditor's bill against the company and its President and Directors the Court by a decree adjudicated the indebtedness of the company and required an assessment of 30% of the unpaid subscription for the payment of the debits. It did not appear that this was an insolvency proceeding, yet the Court held:

"the stockholder is so far an integral part of the corporation that in view of the law he is privy to the proceeding touching the body of which he is a member."

The relief prayed for in *Wilson vs. American Palace Car Company*, 65 Eq. 730 and *Puster vs. Parker Mercantile Company*, 70 Eq. 772, was not similar to the relief prayed for in the case at bar, and these cases can have no application to the case at bar. In the case at bar the Court is asked to deal with a corporation as an entity and with a trust fund, created under the statute, of the unpaid subscriptions to the stock. Becoming a stockholder each stockholder becomes a contributor and a party to the trust fund. The Court is asked in the present bill to administer that trust

fund, to determine its extent and to determine how much each one of the contributors owes. By becoming a stockholder of the company each stockholder submits himself to the jurisdiction of the Courts of this State to determine those questions. The questions can be determined in no other State. They must be determined in a proceeding in which all the stockholders and contributors are considered as parties. This suit is as much a dealing with the body corporate as *a res* as is the original insolvency proceeding. It is supplemental to the insolvency proceedings and so far therefore as the relief asked for is a mere ascertainment of the amount for which an assessment should be made against each stockholder the defendants may be brought in by publication and the pleas are bad because they go to the whole relief sought. The only point upon which there can be any question is whether or not the court, having determined how much of an assessment is to be made against each stockholder, may go further and decree that the defendant stockholder shall pay this amount. 10 20

It is insisted that the Court may for two reasons: 1st, it may be that such a decree will merely amount to a call and the question as to whether or not there is proper service under the Fourteenth Amendment of the Constitution cannot be raised until proceedings are taken to take life, liberty or property. 2d, if the decree is more than a call and a personal judgment, it is valid. 30

I.

It may be that such a decree will merely amount to a call and the question as to whether or not there is proper service under the fourteenth amendment of the constitution cannot be raised until proceedings are taken to take life, liberty or property.

- 10 The bill prays that the stockholders who may be found not to have paid par on their capital stock may be directed to pay the amount due from them. An assessment and call may be made by the Court.

Hood vs. M'Naughton, 54 N. J. Law, 426;

Sanger vs. Upton, 91 U. S., 58;

Hawkins vs. Glenn, 131 U. S., 328-334,

or it may direct the Receiver to make it.

20

Scoville vs. Thayer, 105 U. S., 146;

Barkalow vs. Totten, 53 N. J., Equity 573.

A call by the Court is a direction to pay. It is time enough for the defendants to raise the question of the Fourteenth Amendment of the Constitution when some attempt is made to take their property.

- 30 The matter is considered in the case of *Kirkpatrick vs. Post*, 8 Dick., 591 where the court said:

"This provision by its language relates only to the protection of property and can be properly invoked only where the record shows that the taking of property is a direct issue on the record."

- The Court also cited *Kauffman vs. Weotters*, 138 U. S., 285, where Mr. Justice Brewer writing
40 the opinion said:

"But the mere entry of a judgment for money which is void for want of proper service touches neither person nor property. It is only when process is issued thereon or the judgment sought to be enforced that liberty or property is in present danger. If at that time of immediate attack protection is afforded the substantial guarantee of the amendment if preserved and there is no just cause of complaint."

"The state has full power over remedies and procedure in its own Courts and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants." 10

And further the Court in *Kirkpatrick vs. Post* said (p. 600):

"If the non-resident defendant in the present case should fail to appear and final decree should be eventually entered against him then, or perhaps not until the attempt to enforce the decree by process against his property, the question of his right to protection under the Fourteenth Amendment may properly arise—but I can not hold that it has arisen by virtue of making the order of publication for the purpose of acquiring jurisdiction of the non-resident defendant, and allowing him to come in to defend if he wishes. 20

Kirkpatrick vs. Post was affirmed by this Court in 53 Equity, 641, where Chief Justice Beasley writing the opinion of the Court of Errors and Appeals said: 30

"Why should the appellant object to a notice that cannot be followed by a decree against him? Plainly it is not to be assumed that the Court of Chancery will pronounce a decree founded on this process that would be contrary to the Federal Constitution, as a mere notice to the appellant of the pending litigation thus affording him an opportunity of coming in and taking part in it if he sees 40

fit. It cannot be a subject of complaint as it can do him no harm. The Court, therefore, does not feel called upon to speculate with respect to the force, if any, that would be inherent in a personal decree against the appellant founded on this proceeding in question. To do so would be in the language of an old report 'to jump before we come to the stile.'"

10 And so in the case at bar at least to so much of the prayer as asks also for an ascertainment of the amount which will be necessary to make an assessment for from each of the stockholders, it having been universally held that such an ascertainment binding upon the stockholders may be made when they are given a reasonable opportunity to come in and be heard and that such opportunity may be given by order to show cause or by notice in any form.

20 But it is not at all certain that a personal de-

II.

If the decree is more than a call and a personal judgment it is valid.

(a) Because of the nature of the suit.

(b) Because the defendants may have property within the State they not having excluded this fact by their pleadings.

30

But it is not at all certain that a personal decree cannot be rendered against the defendants for the payment of money in a cause such as is at present before the Court, to wit: a bill by the receivers of an insolvent corporation against all its stockholders to enforce the statutory liability of its stockholders.

40 The cases upon the question as to what constitutes due process of law all hold that notice is the object of process and where notice is given in

no matter what way so long as it is reasonable the defendant will be bound and the judgment will be good, at least in the State where the judgment is rendered.

An examination of the case of *Goldey vs Morning News*, 156 U. S., 519, discloses the fact that in that case, although it was held service of summons upon a foreign corporation, upon an officer who was not within the State of New York upon business of the corporation was ineffectual in the United States Court, yet the contrary view of the New York Court is recognized and it is not intimated that the view of the New York Court comes in conflict with the doctrine in *Pennoyer vs. Neff*, 96 U. S., p. 714; the case proceeds upon the theory that the two Courts are separate and distinct and that although such service might be good in the New York Court it would not be good in the U. S. Circuit Court when the case had been removed to the Circuit Court by an order of removal. 10 20

The same doctrine is applied in the case of *Conley vs. Mathieson Alkali Works*, 190 U. S., 406. Neither of these cases hold that such service would be ineffective for all purposes. In fact in the case of *Goldey vs. Morning News*, *supra*, Mr. Justice Gray says, citing cases:

"Whatever effect a constructive service might be allowed in the Courts of the same government it cannot be recognized as valid by the Courts of any other government; and further so a judgment rendered in a Court of one State against a corporation neither incorporated nor doing business within the State must be recognized as of no validity in the Courts of another State or of the United States unless service of process was made in the first State upon an agent appointed to go there for the corporation and not merely upon an officer or agent residing in another 30 40

state and only casually within the State and not charged with any business of the corporation there."

I do not find a case where the United States Supreme Court has reversed a judgment of the State Court founded upon service of process in the manner herein made as being contrary to the Fourteenth Amendment to the Constitution. Upon principle it would appear that the doctrine of the
 10 New York Court is the better and that service in the manner here made is good, and the doctrine laid down by the New York Court has been followed and applied in this State in the cases of *Kirkpatrick vs. Post supra*, and *Markey vs. Gordon*, 5 Vroom, 286 to 291.

The Fourteenth Amendment of the Constitution gave no new rights; it merely perpetuated old ones. It did not require any additional proceedings to be instituted to constitute due process of
 20 law; what was due process of law before the adoption of the amendment remained due process of law after the amendment. (Am. Encyl. of Law, Vol. 10, p. 305).

The defendants in the case at bar have been served in strict accordance with the statute.

In *Kirkpatrick vs. Post*, 8 Dick., 597, the Court in a case of a Receiver of an insolvent corporation against its directors to enforce the statutory lia-
 30 bility of the directors, where the defendants had been brought in by publication and refusing to set aside the order of publication said,

"The rule limiting by construction the words of a statute sometimes applies in cases where the construction of the statute is not clear, and where the statute as enacted is within the authority of the legislature. That the clear language of the act should be followed was the rule of construction applied in the Court of Appeals in Chancery on a similar
 40

question in *Drummond vs. Drummond*, L. R., 2 Ch. App., 32."

"The Court of Appeals there held that the rule of Court authorizing the Court to order service out of the jurisdiction of a copy of a bill on a defendant 'in any suit' and which rule had by statute the effect of an act of parliament could not be restricted to suits relating to land, stock or shares in England as provided by previous acts of parliament. Lord Westbury's decision in *Cookney vs. Anderson*, 1 D. G., J. & S., 365, limiting the operation of the rule of court to the cases mentioned in the previous statute was overruled. Mr. Justice Lindley says, in re *Anglo African S. S. Company*, 32 Ch. Div., 348 to 351, that the question of service out of the jurisdiction depends upon the statute or rules having the force of statute."

"It is to be noted also that since the decision of Chancellor Halstead, the legislature has by several acts expressed its intention, and policy of making non-residents and foreign corporations parties by publication to suits founded on personal demands recoverable in Common Law Courts. * * *"

"The legislative intention evidenced by these latter acts negatives the idea that in any of the cases upon this subject it was intended to leave to the Courts the power to limit their express language by constructive additions, confining their operations to the cases where the Court might make a final decree or judgment. It was not intended, I think, that the question of the power to enter an ultimate decree or judgment should enter into the question of a right to give notice of the suit to a non-resident or that this question of jurisdiction should be settled on the motion to discharge the order of publication. The plaintiff is entitled to have the question of jurisdiction settled by a final decree."

And in *Mutual Life Ins. Company vs. Pinner*, 16 Stew. 52, Van Fleet, V. C. sustained a decree against a non-resident defendant brought in by publication for a deficiency, a personal decree and said:

10 "The Court at the time it made the decree in question had acquired full and complete jurisdiction over him by other means than the appearance. He had been proceeded against as an absent defendant and such notice of the suit had been given to him as the statute directs. Jurisdiction thus acquired invested this Court with full power to make such decree as it should think equitable and just. While it is a fundamental principle of every civilized code of laws, that no person shall be deprived of his rights, either of person or property, by judicial sentence, without an opportunity of being heard in his defense, yet the method by which a defendant shall be notified of a suit instituted against him so that the Court may acquire a jurisdiction over him whether the notice shall be actual or constructive is a subject over which the law making part of each government has supreme control."

20 *Hess vs. Cole*, 3 Zab., 116;
Moulin vs. Ins. Company, 4 Zab., 222.

In the language of Chief Justice Beasley:

"Every independent government is at liberty to prescribe its own methods of judicial process and declare by what means parties shall be brought before its tribunals."

Markey vs. Gordon, 5 Vroom, 286.

30 "A decree pronounced against an absent defendant who has been notified of the suit in the manner prescribed by the statute is in all respects just as valid and effectual for all legal purposes as a decree made against a defendant who had been brought into Court by personal service of process. The defendant is not entitled to a decree vacating the decree of deficiency."

The case of *Pennoyer vs. Neff*, 95 U. S., 714 has been given a much wider application than the decision in that case warrants. The crux of the decision in that case is found in the prevailing opin-

ion, where after referring to the fact that the courts of some states had held that personal judgments rendered against a defendant brought within the jurisdiction by publication were valid within the state, and that other states had held to the contrary, says:

"Be that as it may the Courts of the United States are not required to give effect to judgments of this character when any right is claimed under them; whilst they are not foreign tribunals in their relation to the State Court they are tribunals of a different sovereignty exercising a distinct and independent jurisdiction and are bound to give to the judgments of the State Courts only the same faith and credit which the Courts of another State are bound to give to them." 10

This was also the doctrine upon which the case of *Goldy vs. Morning News*, 156 U. S., 519 and *Conley vs. Matthieson Alkali Works*, 190 U. S. 496 were decided, and the Supreme Court of the United States has never held that property of a non-resident debtor within the State may not be taken in execution upon a judgment rendered against him upon a personal decree where he has received notice of the suit by publication. 20

Such a method of procedure could have been followed and such property could have been taken before the adoption of the Fourteenth Amendment—and as stated in all of the cases the Fourteenth Amendment of the Constitution created no new rights but perpetuated old ones, and what was due process of law before the adoption of that amendment remained due process of law after it. 30

Judge Cooley in his Work on Constitutional Law, p. 404, citing Mr. Justice Field in *Galpin vs. Page*, 3 Sawyer, 93, said:

"The fact that process was not personally served is a conclusive objection to the judgment as a personal claim unless the defend- 40

ant caused his appearance to be entered in the attachment proceedings. Where a party has property in a State and resides elsewhere his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

Commenting upon this language, Justice Hunt
 10 of the U. S. Supreme Court in *Pennoyer vs. Neff*,
 said:

"The Learned author does not make it a condition that there should be a preliminary seizure of the property by attachment but lays down the rule that all a person's property in a state may be subject to all valid claims there existing against him."

And further cites with approval in the matter of the *Empire City Bank*, 18 N. Y., 199, which
 20 will be more fully hereafter considered, *Hopper vs. Mosher*, 48 N. Y., 313, where the Court said:

"A brief definition of due process of law is 'law in its regular administration through Courts of Justice.' It may not be a legal proceeding according to the course of the common law; neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable
 30 that the party proceeded against will be apprised of what is going on against him and an opportunity afforded him to defend"

The same language is used in *Westervelt vs. Gray*, 12 N. Y., 202 and *Campbell vs. Evans*, 45 N. Y., 356.

Campbell vs. Evans and *Empire City Bank* are cases not of proceedings against property to enforce a lien or claim; but in each of them a personal judgment in damages was rendered against
 40 the party complaining.

In *Jarvis vs. Barrett*, 14 Wis. 591, the Court said:

"The essential fact on which the publication is made to depend is property of the defendant in the State *and not whether it has been attached* * * * there is no magic about the Writ of Attachment which can make it the exclusive remedy; the same legislative power which devised it can devise some other, and declare that it shall have the same force and effect. The particular means to be used are always within the control of the legislature so the end be not beyond the scope of the legislative power."

From the cases above cited and from the cases in our own state of the *Mutual Life Insurance vs. Pinner* 16 Stew., 57 and *Kirkpatrick vs. Post*, S Dick., 598, it is apparent that it was competent for a state, prior to the adoption of the 14th Amendment of the Constitution of the United States to provide that the lands of a non-resident within the State might be subjected to be taken for his debts upon a personal judgment rendered against him in the State, notice being given to him by publication or by some other way which would give him reasonable notice to come in and defend.

And as has been often reiterated by the Courts the 14th Amendment of the Constitution of the United States created no new rights.

The pleas, therefore *not alleging that the defendants have no property within the State are defective in form and substance and should be overruled*, inasmuch as it is necessary in a plea to aver all the facts which would exclude the right of the Court to proceed in the case in which the plea is filed.

If the defendants have property within the state, the Court of Chancery cannot proceed by

Writ of Attachment. The legislature has not provided for proceedings to be commenced in the Court of Chancery by attachment, but it has provided for proceedings to be commenced in the Court of Chancery by publication. And the property which the non-resident defendant has within the State may be reached after the suit has been started and publication had, by sequestration, which is, in a sense, equitable attachment.

- 10 Suppose the complainants, after the pleas have been overruled and the defendants failed to answer did issue a Writ of Sequestration have they not secured a lien upon the property of the non-resident defendant within the State, and can they not subject that property to the performance of the decree rendered against the defendants in this suit?

- 20 The Writ of Sequestration is employed in the United States both by the Federal courts and by probably all those state courts that have full chancery jurisdiction. It is a mesne process of attachment to create a lien upon property of every description.

- 30 *Stearn Stone Cutter Co. vs. Sears*, 9 Fed. Rep., 8; 23, Fed. Rep., 313; 13 Fed. Rep. 567; 21 Blatchford U. S., 138
Schianwal dvs. Lewis, 6 Fed. Rep., 766;
Reed vs. Northwestern R. R. Co., 33 Pa. State, 257;
Whitney vs. Belden, 6 Edw. Chy. N. Y., 386;
Kughler vs. Ward, 8 Md., 254;
Parker vs. Grammer Phillips, Eq. N. C. 28;
McDonald vs. Sloker, 5 Iredell's Eq. (N. C.) 274;
Griffin vs. Carter, id., 413;
40 *Walker vs. Sanchez*, 13 Louisiana Annual, 505;

Louisville Water Co. vs. Hamilton, 81

Kentucky, 517;

Clymer vs. Willis, 3 Cal., 363.

But under the practice in equity sequestration cannot issue until after the suit has been started and some notice given to the defendant and if the defendant can come in and plead in an equity suit that he has been served by publication and that he is a non resident and not subject to the jurisdiction of the Court and secure a judgment dismissing the bill upon such a plea being sustained, he may prevent the Court of Chancery from doing that which all of the courts have held the courts of a state may do, to wit, subject the property of a non-resident defendant within the state to the claims of citizens of the State. It is, therefore, apparent that the objection of the 14th Amendment of the Constitution of the United States cannot properly be made until it is ought to take some property by virtue of a personal judgment rendered against the defendant in the State and only then can it be decided, because it may be that if the complainants have not proceeded against the property of the defendant within the State by sequestration a decree cannot be made effective against such property, but if the complainants in the course of the suit have proceeded against this property by sequestration or equitable attachment as they may do, but not until this order of publication has been made and the defendants brought in by publication, it is certainly subject to the performance of the decree. ,

Only in this way does the Court of Chancery in an original action acquire jurisdiction over particular property. If the Court of Chancery cannot proceed in this way then in no case can this court to subject the property of a non-resident defendant to the equitable claims of resident of the State.

That the legislature had in mind at the time the act concerning publication against non-residents was passed the fact that primarily the decree could be operative only against such property of the defendant as could be found within the State and that the legislature intended that publication should extend to all classes of cases is indicated by Section 17 of the Act Concerning Court of Chancery, Revision of 1902 (Laws of 10 1902, page 516), which is as follows):

“When a decree shall be made against an absent defendant, the Chancellor before issuing process to compel the performance of such decree against such absent defendant, may, if he deems it equitable so to do, require the complainant to give bond with such security and in such sum as he may direct to abide such decree or order touching the restitution of the estate and effects of such absent defendant or the repayment of any sums of money 20 which the complainant may receive by virtue of such decree but which shall afterwards be made to appear as hereinafter provided not to have been due and owing to him; and in case no such security shall be given, no process or execution shall issue to compel the performance of the decree so made against such absent defendant *but the estate and effects of such absent defendant may by order of the Chancellor be sequestered and remain under the direction of the Chancellor to abide such order as he shall think just and proper respecting the same.*” 30

Under the most rigid interpretation of the doctrine enunciated in *Pennoyer vs. Neff* this method of procedure upon a final decree is proper because *it only pretends to subject the property of the non-resident within the State to the satisfaction of the decree and as the Court said in Jarvis vs. Barrett, 14 Wis., 591, there is no magic about the Writ of Attachment which should make*

it the exclusive remedy; the same legislative power which devised it can devise some other and declare that it shall have the same force and effect. The particular means to be used are always within the control of the legislature so that the end be not beyond the scope of the legislative power.

It is clear from this section of the statute that the legislature intended publication to apply to all kinds of suits in equity.

Stockholders of corporations have always been 10 held to be subject to decrees against them rendered in the court of the domicile of the corporation and assessments against them based upon notice by publication are conclusive.

In the matter of the *Empire City Bank*, 18 N. Y., p. 206, there were proceedings by the Receiver of an insolvent corporation against stockholders upon a liability fixed by statute similar to that in this state and the decree asked was that the amount necessary to be raised from stockholders 20 should be determined and a judgment entered against them for the amounts. The defendants were proceeded against by publication and it was sought to raise the question that there was not due process of law.

The Court said:

"The winding up and settling of the affairs of insolvent corporations fell within the jurisdiction of courts of equity from the nature 30 of the case, the forms used in courts of laws not being adapted to such controversies, and we accordingly find that it was the constant practice of the Court of Chancery to entertain suits for that purpose and by its decree to determine *who were stockholders and contributors and in what proportions they were to contribute and to cause an account to be taken of the unsatisfied debts and liabilities and to decree a distribution accordingly.* *Slee vs. Bloom*, 19 Johns, 456 and *Briggs vs. Penniman*, 8 Cow., 387 are examples of suits 40

of that character and the jurisdiction was afterwards and before the adoption of the Constitution regulated by statute" and further;

10 "We have not been referred to any adjudications holding that no man's right of property can be affected by a judicial proceeding unless he has personal notice. It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon a purely ex parte proceeding without a pretense of notice or no provision for defending would be a violation of the constitution and would be void but where the legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceeding illegal."

20 In our own case of *Kirkpatrick vs. Post* 8 Dick. at p. 600 the Court said:

30 "In the view I take of the case it is not necessary to decide the question whether the non resident defendant, by becoming a director in the New Jersey company and thereby becoming subject to the duties and liabilities of a director expressly imposed on him by the act of incorporation of the company, has impliedly consented, so far as relates to the enforcement of these duties and obligations to the provisions of the New Jersey law authorizing service of non resident by publication. I therefore express no opinion on the subject."

Changing the word directors to stockholders makes the opinion an authority in the case at bar and is to the effect that the Court will not set aside an order of publication in a case similar to the one at bar and if the Court would not set aside an order of publication, then the plea setting up the same facts is bad. *Kirkpatrick vs.*
40 *Post* did not go off upon the ground that the defect should be raised by plea and not by motion.

In *Pennoyer vs. Neff* the Court said:

"Nor do we doubt that a state on creating corporations or other institutions for pecuniary or charitable purposes may provide a mode in which their conduct may be investigated, their obligations enforced or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law and further, neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits or making contracts enforceable there to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association or contracts or to designate a place where such service may be made and notice given, and provide upon their failure to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose or in some other prescribed way, and that judgment rendered upon such service may not be binding upon the non residents both within and without the state."

It is insisted that a person becoming a stockholder in a New Jersey corporation agrees to the provision of the statute that he shall be liable for all the debts of the corporation to the extent of the amount unpaid upon his stock and that he must be held to agree that such liability may be enforced against him by the methods provided for in suits in equity by the legislature in this State and that he has agreed that suits may be commenced against him by publication; at least it must be held that where a suit is commenced as in the case at bar by the Receiver of a corporation *against all of the stockholders bringing the trust fund into court, this trust fund being the res in which he, the*

stockholder, has an interest, that in such a proceeding which is ancillary to the proceeding in insolvency and which is a necessary proceeding to enforce the statutory liability under the doctrine of See vs. Heppenheimer, he must be considered as having agreed to be brought into such proceedings by publication as authorized by the statutes of this State and to be bound by any decree which may be made therein.

- 10 It is said that in order to reach the property of a defendant non-resident within the State attachment proceedings may be instituted and that this is due process of law. The reason given is that seizure of the property is notice to the defendant non-resident to come in and defend, otherwise his property will be taken to satisfy the claims of citizens within the State.

The ground upon which an attachment proceeding is sustained is that the attachment is a form
20 of notice.

- As a matter of fact the writ of attachment is merely an antedated execution; after a judgment is obtained execution is issued upon it and under that execution the property within the jurisdiction is taken and made to respond to the claims of citizens. By a writ of attachment the State merely says we will hold this property pendente lite and if judgment be rendered sell it.
30 The effect therefore is merely forwarding the execution. If an attachment may be sustained against a non resident defendant upon the ground that it is notice, then why is not any reasonable form of notice which is given by legislative sanction equally as efficacious? Suppose instead of issuing an attachment the legislature prescribed that there shall be a notice issued to non resident defendants that unless they shall come in and defend the suit their property within the jurisdiction
40 will be taken to satisfy the claims of the

plaintiff in that suit, cannot the legislature authorize such process? The purpose of process is notice. Attachment is sustained because it is notice. Then why is not any notice sanctioned by the legislature which is reasonable proper? I cannot see the distinction between an action commenced by attachment which results, after final judgment in the property of this non resident being taken to satisfy the claim of the plaintiff and an action commenced by any other kind of notice to the non resident which will result in his property within the state being taken to satisfy the claim of the plaintiff. 10

The end is the same, to wit, subjecting all the property within the jurisdiction to the claims of citizens within the jurisdiction and this end being within the scope of the legislative power as the Court said in *Jarvis vs. Barrett* 14 Wis. 491, the particular means to be used are always within the control of the legislature. If the legislature shall think that the publication and deposit in the post office are likely to give notice, there seems to be nothing in the nature of things to prevent their adoption in lieu of the attachment. The point of power cannot be thus controlled. 20

"That a State can subject land within its limits belonging to non resident owners to debts due to its own citizens as it can legislate upon all other matters; that it can prescribe the mode and process by which it is to be reached seems to me" says Mr. Justice Hunt, "plain." 30

Mr. Justice Miller in *Hurlings vs. Caw Valley R. R.*, 130 U. S., 559, 32 Lawyers Edition, 1045, says:

"The owner of real estate who is a non resident of the State within which the property lies cannot evade the debts and obligations which the law imposes upon him in re- 40

gard to said property, by his absence from the State. Because he cannot be reached by some process of the courts of the State which of course have no efficacy beyond their own borders, he cannot therefore hold his property exempt from liabilities, debts and obligation which the State has the right to impose upon such property and in such cases *some substituted form of notice has always been held to be sufficient warning to the owner*, of the proceedings which are being taken under the authority of the State to subject his property to these demands and obligations. * * * It is therefore the duty of the owner of real estate who is a non resident, to take measures that in some way he shall be represented when his property is called into requisition and if he fails to do this and fails to get notice by the ordinary publications, which have usually been required in such cases, it is his misfortune and he must abide the consequences. Such publication is due process of law as applied to this class of case."

In *Louisville and No. R. R. vs. Schmidt*, 177 U. S., 236, 44 Lawyers Edition page 747, in the head note the following appears:

"The mere fact that a proceeding to hold a party liable to a judgment is by rule to show cause does not conflict with due process of law under U. S. Constitution, 14th amendment, for forms of procedure in the State Court are not contrary to that amendment provided the fundamental rights secured by the amendment are not denied."

And Mr. Justice White said:

"It is no longer open to contention that the due process clause of the 14th amendment of the Constitution of the United States does not control mere forms of procedure in State Courts or regulate practice therein; all its requirements are complied with provided in the proceedings which are claimed

not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

Iowa Central R. R. Co. vs. Iowa, 160, U. S., 389, 40 Lawyers Edition, 467;
Wilson vs. N. C., 169 U. S., 586, 42 Lawyers Edition, 865.

The proceeding in the Court of Chancery by order of publication is sufficient notice to the defendant that his property within the jurisdiction is going to be taken in satisfaction of the claims of the citizens of this State and that end is within the scope and power of the legislature. 10

In *Weeks vs. Weeks*, 75 Atl. p. 479 the Supreme Court held that after judgment had been obtained in an attachment proceeding, the writ of attachment might be amended and additional land might be included in the writ and that this procedure was not in conflict with the 14th amendment of the Constitution of the United States. It would seem that this indicates that it is not because of the lien acquired upon any particular property at the beginning of the suit that the attachment proceeding is valid, but because the attachment is notice; if it were because the sheriff had taken certain property and seized it and held it that the attachment proceedings could be sustained, then certainly after the judgment and the writ had become exhausted no more property could be included within the writ. The fact of including additional property in the writ of attachment, after judgment is merely to subject additional property belonging to the defendant within the State, not covered by the original writ to execution, because after judgment, the writ of attachment is nothing but an execution. Attachment being due process of law because it is considered as notice, it would seem to be clear that 20 30 40

any other method of notice which would be reasonable, which would be sanctioned by the legislature is proper. I think that the legislature might provide that summons should be published and that a judgment rendered upon such published summons might be executed against lands of the defendant within the State.

19 "The essential fact upon which the publication is made to depend is property of the defendant and within the State and not whether it has been attached. * * * There is no magic about the writ of attachment which should make it the exclusive remedy."

20 It has been said that attachment is a proceeding *in rem* such as foreclosure, partition and the like. This hardly can be so. A proceeding in partition or in foreclosure presupposes a lien or interest in property and an assertion of that lien or interest. Not so in attachment. A writ of
30 attachment is but the commencement of an ordinary action in contract or tort between the parties, the result of which is a judgment against the defendant to satisfy which judgment only the property of the defendant within the state can be taken. It is no more a proceeding *in rem* than any other proceeding against a defendant to obtain a judgment against him which will result in the taking of all his property within the State
for that is all that any judgment can effect within the State.

The suit at bar will result in a judgment under which the lands of the defendant within the State may be taken in satisfaction. If this suit were commenced by attachment it would be no more a proceeding *in rem* than it is at the present time. The result of this suit would be the same, to wit, the application of the property of the defendant non resident within the State
40 to his debts within the State. It seems to be im-

material whether the plaintiff says to the defendant non resident that he is going to take his property within the State to apply to the claims within the State by means of a writ of attachment or by means of any other notice sanctioned by the legislature. It is fit and proper that all of the property of a defendant non resident within the State should be made to respond to his obligations within the State and the Court ought not to hold unless it is obliged to that the property 10 of a non resident defendant within the State can only be made subject to such obligations as may be proceeded upon by writ of attachment, to wit, at least before the amendment of the practice act with respect to attachment, litigated claims on contract. It must be borne in mind that in this very case the Supreme Court has held that the receivers cannot proceed by attachment. In actions in tort, in actions upon equitable claims in actions for nuisances, in all other claims 20 except actions upon liquidated claims in contract, the citizens within the State would be remediless, notwithstanding the non resident defendant might own a large amount of property within the State as is the fact in the case at bar. But the legislature has not left the citizens of this State in any such predicament; it has provided that in all actions in equity the defendants may be proceeded against by publication as a substitute 30 for a writ of attachment and the result of a decree in any such suit would be the sequestration and the taking of the defendant's property within the State in satisfaction of his equitable obligations.

It is suggested in the brief of counsel for the Appellant that because the orders overruling the pleas provide that in case the defendants do not answer within a certain time, then decrees pro confesso be made against them unless the defendants should within a certain time apply for leave 40

to file amended pleas, that therefore these orders are bad. There is no force in this objection. The order overruling the plea is the ordinary form and it has been universally held that where there is a plea to the jurisdiction the defendant will in no case be permitted to file an amended plea.

1 Dan. Chy. Pleading, Practise 6 Ed. p. 630.

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That the order directs that a decree pro confesso be entered against them does not alter the situation. A decree pro confesso is merely an adjudication that the defendant has not answered the bill and that the Chancellor may make such decree as may be proper. The decree pro confesso is not a decree which effects life, liberty or property nor is it a decree which establishes any right. It is merely a judicial

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declaration that the defendant has not answered the bill. An appeal cannot be taken from a decree pro confesso unless the defendant has answered the bill; neither can an appeal be taken from an order directing the allowance of a decree pro confesso unless the defendant has answered the bill because it is elemental that an appeal will not lie from a decree which does not affect substantial rights.

30 Bearing in mind that the defendants may, if judgment be against them, appeal to the Supreme Court of the United States, but that the complainants can not, this Court should be slow in sustaining the pleas.

It is respectfully submitted that upon all of the foregoing grounds, the pleas are had both in form and substance and were properly overruled.

June Term, 1911.

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Of Counsel with Respondents.
MERRITT LANE,

NEW JERSEY
Court of Errors and Appeals.

HERBERT CLARK GILSON & AN-
OTHER, Receiver of J. C. APPLE-
BY SAND & CLAY COMPANY,
Complainants & Respondents,

and

J. CHARLES APPLEBY,
Appellant & Defendant,

On Appeal.

HERBERT CLARK GILSON & AN-
OTHER, Receivers of J.C. APPLE-
BY SAND & CLAY COMPANY,
Complainants & Respondents,

and

WILLIAM R. APPLEBY,
Appellant & Defendant.

**Supplemental Brief for Appellants, the
Applebys.**

June 27th, 1911.

Mr. Lane, counsel for complainants, has served upon us his brief. The only points which seem to require a reply are the following:

1. As to the case presented in the bill, It is need-
lee to say that the pleading defendants do not admit
the statements made in the complainants' brief,
going to show fraud in the first issue of stock, nor

the statement that the second issue of stock was made "without any consideration whatever." The statements in the bill (not those in the brief, except so far as they are also in the bill) must, of course, be taken as true for the purpose of determining the validity of the pleas; but when the proper time comes, if ever it does come, the defendants will have their own story to tell respecting the merits of the case; and their story will be a very different one from that of the complainants.

1. The brief states that William R. Appleby still holds fifty shares of the one thousand shares of stock (second issue) which the bill alleges was issued without consideration (case, p. 7). That statement in the brief is a mistake. It appears in the bill that he does not hold any part of that stock. The bill states that the one thousand shares were distributed among the persons named therein, of whom William R. Appleby was one, and then continues, that "said stock has since been transferred unto and now stands upon the books of the company in the names of the following persons" adding a list of names in which the name of William R. Appleby does not appear. The same thing is true respecting the 50 shares of the first issue once held by him (case p. 4. l. 20, p. 6, l. 15). There is no statement in the bill that said William holds any stock whatever. In fact, he does not own or hold any of the stock. All that he had was transferred on the books of the company to another person before the proceedings in insolvency were begun.

The statement in the brief (p. 2, l. 28), that \$50,000 worth of stock was issued and sold to the public is not supported by the bill.

The whole of the stock issued is accounted for in the bill as follows:

First issue of stock 1,000 shares

Surrendered by J. Chas.

Appleby and cancelled

(case, p. 5, l. 25) 495 shares

Still outstanding and held

by said Charles 130 “

Now held by eight other

persons named in Sec. 7

of the bill (case, p. 6, l.

20) 375 “

1,000

Second issue of stock (case,

p. 6, l. 40)

1,239 shares

of which 1,000 shares

was “gratuitous” issue

accounted for thus:

Outstanding in the names

of persons named in the

bill, viz., J. Charles Ap-

pleby 360 shares

15 other persons named in

bill (case, p. 7, l. 30) . . . 447 “

807 “

Surrendered by J. C. Ap-

pleby and cancelled

(case, p. 8, l. 10) 193 “

1,000 “

Paid for in cash and now

held by 11 persons

named in bill (case, p.

8, l. 20) 239 “

1,239

The bill charges, respecting the first issue of 1,000 shares, that the “persons holding said stock, and

the original subscribers to such stock and holders thereof" are liable for \$95,000, being the difference between the par of the stock and the alleged true value of the property sold by J. Charles Appleby to the company for the stock (case, p. 6, l. 25).

It also charges that J. Charles Appleby is not released from his liability on the 495 shares of the first issue of stock to him, by reason of his having surrendered it (case, p. 6, l. 3).

It also charges that said Charles is not released from his liability upon the 193 shares of the second issue of stock, which he surrendered (p. 8, l. 10).

The bill charges that some of the stockholders liable on unpaid stock are insolvent (case, p. 10, l. 10). And that the stockholders who hold fully paid stock claim that they are entitled to be reimbursed from those stockholders who have not paid for their stock, until the amount paid on stock shall be equalized among all stockholders; that is, "to do equity between the stockholders" (case, p. 9).

The bill contains the following prayers, that the Court may—

1. Ascertain how much, if anything, has been paid by each stockholder upon his stock.

2. Ascertain what amount is necessary to collect from stockholders to pay the debts.

3. Investigate the financial responsibility of the parties.

4. Determine what amount, if any, should be collected from and paid by "the various parties."

5. Order the defendants to pay "the balance due upon their stock" until they have paid par or "so much as may be necessary to do equity among the stockholders."

2. The brief cites *Rawlins vs. Moss*, 6 Hare, 604 (67 Eng. Reprint, 1304), in support of his contention that the pleas ought to state the order of publication and other proceedings for bringing the defendants into Court. That case does not support Mr. Lane's argument. The bill there was for revivor, and stated that the original bill was for an accounting against a trustee; that the defendants were served with subpoena; that certain solicitors named were the solicitors of the defendant Jackson (there were other defendants); that a decree for an account was made, and several other interlocutory orders were made in the cause, but that before the report of the Master came in the defendant Jackson died and an administrator was appointed who was made defendant to the bill of revivor. The bill prayed revivor against the administrator. The administrator pleaded that the defendant Jackson had not been served with subpoena nor appeared to the original suit and that all proceedings therein were taken without appearance by her; that no subpoena was ever served on her and no answer put in; that she was within the jurisdiction, but that the decree taken was made in her absence, and that the solicitors named as her solicitors were not her solicitors and were not authorized by her to act. It appeared, however, that she had corresponded with the solicitors in question.

The report of the case says: "The Vice-Chancellor (Wigram), without expressing any opinion on the objections as to the form of the plea, said that the fact that the late defendant Mary Jackson had not appeared in the suit, was not of itself conclusive on the question whether the deceased party was bound by the proceedings in the cause. In order to sustain a plea the defendant should have shown not only that deceased defendant had not

entered an appearance but that there had been neither act nor acquiescence on her part, nor any other circumstance by which she was bound by the former suit. The averments in this respect were very imperfect."

This is very far from holding that it is necessary to aver in a plea matters which appear in the record of the same cause.

3. Complainants' brief argues that if the pleas in this case are sustained the decree will be a bar to any other suit brought in any jurisdiction on the same cause of action. It is hardly necessary to reply to this. The final order or decree upon the pleas will be only to dismiss the suit as to these defendants, and a decree of dismissal for want of jurisdiction of the person is no more a bar to another action in which jurisdiction exists than is a judgment of non suit for the same cause.

The order allowing a plea does not end the suit as to the pleading defendant; for the plaintiff still has the right to reply to it. The final order of dismissal can be made only after hearing, in case of a reply, or after plaintiff has failed to reply within time.

4. The brief argues that the practice of setting up want of jurisdiction of the person of a defendant in a case such as this, is bad practice.

It is the established practice in this State. The decision of this Court in *American Parlor Car Company vs. Wilson*, 65 N. J. E., 730, has been followed repeatedly in the Court of Chancery.

Groel vs. United Electric Co., 68 N. J. E. (2 Robb), 249.

S. C., 69 N. J. E. (3 Robb), 407.

Lanning vs. Twining, 64 Atl., 466.

And the Court again allowed such a plea in *Puster vs. Park, &c., Co.* 4 Robb., 772. The point that a special appearance may be entered only upon conditions imposed by the Court was decided adversely to complainants in *Groel vs. United Elec. Co.*, 3 Robb., 397, 407.

5. The brief argues that the pleas are defective in not alleging that the defendants have no property within this State. The argument is that if the defendants have property within this State, the Court of Chancery may proceed by sequestration to seize it. That is, complainants contend that they may take the defendants' property by sequestration before decree.

The writ of sequestration is merely a form of execution. As such, its use is authorized *after decree* by the Chancery Act (L. 1902, p. 525, Sec. 17 and 46). If the use of this writ will give jurisdiction to adjudge liability against an absentee, then the use of any other kind of execution should confer like power. The writ was used in England ordinarily as execution.

2 Dan. Ch. Pr. (1050).

Its use was, apparently, rare and doubtful as mesne process to compel answer.

1 Id. (494, 496).

As mesne process its use is confined to enforcing orders against defendants who are in contempt.

We can find no instance of its use in this State as mesne process.

And see, Aspinwall vs. Aspinwall, 53 N. J. E. (8 Dick.), 684.

There is no authority in England for its use (like

that of attachment against property) to give the Court jurisdiction of the property of an absent defendant; and we believe no such authority can be found in America unless given by statute or some peculiar local custom. See 19 Am. and Eng. Ency. Pl. and Pr. title, "Sequestration," p. 540.

To enable complainants to enforce a claim against the property of absent defendants, it is necessary that they should have a lien upon the property or that it should be seized under the process of the Court. It is the hold upon the property within the jurisdiction of the Court, either by way of lien or by way of seizure, which gives to the Court power to adjudicate the liability of an absent defendant with respect to that property.

6. The brief argues that the pleas are bad in the whole if they are bad in part. But the brief confuses two different rules of equity pleading. If any part of a particular defence made by plea is bad, the whole must be overruled; as if a defendant pleads one thing which is a legal bar and also another thing which is an equitable bar, these two making the defence; if either should appear not to be a bar the whole must be overruled; but if defendant plead a fact which is a complete bar to a part of the defendant's claim and in his plea allege that he pleads it to the whole of the relief claimed, the Court will allow the plea to so much of the bill as it applies to.

1 Dan. Ch. Pl. (611). Story Eq. Pl., Sec. 692, 693.

"When a plea is to the whole of a bill, but does not extend to, or as it is technically expressed, cover the whole, the plea is bad."

Bearnes, Eq. Pl, 42.

"But a plea may be bad in part and not in the

whole, and the Court will allow it to so much of the bill as it is properly applicable to; though there does not appear any case in which two defenses offered by a plea have been separated, and one allowed as a bar. It seems, therefore, that a plea can be allowed in part only with respect to its extent, or the quantity of bill covered by it; but that if any part of the defense made by the plea is bad the whole must be overruled."

Coopers' Eq Pl., 230.

Thus, Lord Hardwicke said, "where there is a plea which covers too much, the Court will allow it to stand for a part and overrule it for a part, but as to demurrer it is otherwise."

Dormer vs. Fortesque, 2 Atk. (284).

And in French vs. Shotwell, 5 Johns. Ch. (555) (affirmed 20 Johns. 667 without opinion), the bill was filed to set aside a judgment and for other relief. Defendant pleaded an arrangement amounting to a recognition of the judgment and the plea concluded "to all the relief prayed for." Chancellor Kent sustained the plea. He said: "In this respect the plea was more extensive than the subject matter to which it related, but the remedy for such a defect is mild and liberal. It is only to order the plea to stand for so much of the bill as it properly covers, and no more, and to require the defendant to answer to the residue of the bill."

7. The brief argued that the pleas are bad as to that part of the bill which prays an ascertainment of the amount which each stockholder shall pay. But we have shown in our original brief that in order to fix the amount against the pleading defendants it is necessary, upon the facts stated in the bill, to make

judicial investigation of a number of disputable facts stated in the bill which are peculiar to the cases of these two defendants and not common to these defendants and all other defendants against whom the same relief is prayed. Such a case is quite different from the case of an ordinary *pro rata* assessment upon all unpaid stock.

We amplify the argument of our original brief upon this point, as follows:

(a). The pleading defendants are parties as individuals and not as members of a class. That is, in respect of this claim against them they are not represented by the other stockholders.

The bill raises separate distinct and particular issues against each of these pleading defendants. It seeks a decree against each for a different sum and upon different grounds. It seeks a decree personal to these defendants, and not common to all.

When, in an insolvency suit, a decree is made fixing the *pro rata* assessment against all stockholders holding unpaid stock, the absentees are represented by the stockholders who are brought in by process. In such case the relief given is against the defaulting stockholders as a class, upon grounds common to all of them. The points adjudged are points in which all have a common interest, namely the amount of the corporate debts and the *pro rata* of assessment on unpaid stock necessary to be levied to pay the debts.

In *Hawkins vs. Glenn*, 131 U. S., 319, the Court said, respecting an assessment against stockholders, including an absentee, * * * "the stockholder is bound by a decree of a Court of Equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company."

And in *Bernheimer vs. Converse*, 206 U. S., 516, the Court said, referring to the judicial order which had made a *pro rata* assessment against an absent defendant and other stockholders (p. 519), * * * but no personal judgment is rendered against him in that proceeding, and it has reference to a corporation of which he is a member by virtue of his holding stock therein, and the proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and other liabilities which may be administered for the benefit of creditors. In such case, it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to" (p. 532).

(b). The assessment against the pleading defendants attempted to be made in this case is not made in the exercise of a legal duty of the corporation. The corporation, as such, has no power or right to make such an assessment, for it is bound by its contract with the stockholder, by which it issued the stock as full paid. The assessment can be made only by creditors, acting through the receiver, and after the contract has been set aside.

That is, an assessment, in this case, presupposes an adjudication by the Court that the contract made by the corporation with the stockholder, in issuing to him his stock as full paid, was invalid and should be set aside. How can such an adjudication be made without hearing him? This distinguishes the case from the case in which the assessment is made against stockholders who agreed to take their stock subject to future call. All of the cases cited as holding the absentee stockholders liable upon a *pro rata* assessment are cases in which the stock was not issued as full paid.

In *Hawkins vs. Glenn* the Court referred to the

unpaid subscription on the stock and said: * * *
 “and in the situation of the company’s affairs it was a duty to make it (the assessment), failing the discharge of which by the President and Directors, creditors could set the powers of a Court of Equity in motion to accomplish it.”

And again, “We think it cannot be doubted that the decree against the corporation in respect to corporate matters, such as the making of an assessment, in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, and that this is involved in the contract created in becoming a stockholder.”

And again, “And as between a stockholder and the corporation it does not lie in the mouth of the stockholder to say, in response to the attempt to collect his subscription for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier.”

In such case it was the duty of a corporation to collect admitted debts in the shape of unpaid subscriptions to stock. In the case at bar the attempt is to set aside the contract made by the corporation with the stockholder without hearing him upon the question of its validity, and to collect from him an alleged unpaid subscription in spite of his contract which acknowledged it to have been fully paid. In the case at bar there was no duty of the corporation to set aside the contract which it had made with the stockholder. It could not do so. The right to attack it was an equitable right resting in the creditors and the receiver who represents them, to be exercised upon a judicial investigation, and a hearing of those claiming the benefit of the contract.

(c). The power of the Court to make a binding

assessment against an absentee is limited to adjudging the necessity for making the assessment and to adjudging the *pro rata* share of the stockholders against whom the assessment is ordered.

In *Great Western Telegraph Co. vs. Purdy*, 162 U. S., p. 329, an assessment had been ordered by the Court "of thirty-five per cent. of the par value of the shares of said stock subscribed for" (p. 332). In a suit against a stockholder who had not been brought before the Court in the making of that assessment it was objected that it did not bind him, also that the suit was barred by the statute of limitations. Respecting the assessment, the Supreme Court said "it was such as the directors might have made before the appointment of a receiver and in making it the Court having by that appointment assumed the charge of the assets and affairs of the corporation, took the place and exercised the office of the directors" (p. 336). The Supreme Court held the assessment to be conclusive evidence of the necessity for making such an assessment and to that extent bound every stockholder without personal notice to him. The Court also said: "But the order was not, and did not purport to be, a judgment against anyone. It did not undertake to determine the question *whether any particular stockholder was or was not liable in any amount*. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, *to rely on any defense which he might have to an action upon that contract*."

"The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine

the present defendant, or any other particular stockholder, was liable for anything, the Iowa Court, by sustaining the defense of the statute of limitations, did not deny to the judicial proceeding of Illinois the full faith and credit to which it was entitled" (p. 337).

By the words "to fix the amount" the Court meant, of course, to fix it by fixing the total sum to be raised and the *pro rata* of the assessment.

But the bill in our case claims that J. C. Appleby is liable for \$95,000 on the first issue of stock; that he is liable on all the stock which he surrendered; that the land which the company contracted to take for \$100,000 was worth only \$5,000; that he is liable on stock which he transferred on the books of the company to other persons; that W. R. Appleby is liable though he is not a stockholder. An answer to these claims is demanded of the pleading defendants, and it is in reference to these claims that the bill prays the Court "to determine what amount, if any, should be collected from and paid by the various parties."

8. Complainant's counsel argues that it is a hard case to allow these defendants exemption from the decree of this Court in this cause, they being stockholders in the insolvent corporation and having property of their own (as he alleges) in this State. But the obvious answer is that the Constitution of the United States protects these defendants from the inconvenience of coming from their residence in a distant State to defend in this Court a suit which seeks to charge them with a personal liability by a decree *in personam*. The complainants have their remedy (if they are entitled to any) by bringing suit against the defendants in the States in which they respectively reside.

In *Hill vs. Nelson*, 70 N. J. L. (41 Vr.), 376, the Court sustained a plea to the jurisdiction where the action was for trespass upon land in Pennsylvania, saying "nor do we overlook the possibility that, if we have no jurisdiction the plaintiff may be remediless, since elsewhere no Court may be able to reach the defendants or their property" p. 738.

HARTSHORNE, INSLEY & LEAKE.

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BILL

In Chancery of New Jersey.

*To His Honor, Mahlon Pitney, Chancellor of the
State of New Jersey:*

10

Humbly complaining, sheweth unto your Honor, your orators, Herbert Clark Gilson and Elmer W. Demarest, Receivers of the J. C. Appleby Sand & Clay Company.

First—The J. C. Appleby Sand & Clay Company is a corporation of the State of New Jersey, incorporated under the general corporation act of said State entitled, “An Act Concerning Corporations, Revision of 1896,” with a certificate of organization, duly filed January fourth, nineteen hundred and four, with capital stock of one hundred thousand dollars (\$100,000), divided into one thousand shares of the par value of one hundred dollars (\$100) per share.

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Second—That said corporation became insolvent sometime prior to the thirtieth day of March, nineteen hundred and eight, and that proceedings were thereupon duly had in this Court on the bill of Annie E. Dickinson, complainant, against J. C. Appleby Sand & Clay Company, defendant, in which proceedings your orator, Herbert Clark Gilson, was, on the sixth day of April, nineteen hundred and eight, duly appointed Receiver of the J. C. Appleby Sand & Clay Company, and your orator, Elmer W. Demarest, was, upon the thirtieth day of March, nineteen hundred and nine, duly appointed co-Receiver of the J. C. Appleby Sand & Clay Company. That your orators were duly appointed Receivers under the provisions of an Act

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BILL

Concerning Corporations, Revision of 1896, with all the powers of a Receiver under such act, and your orators have assumed the burden of the said trust and have duly qualified as Receivers and are executing their duties as Receivers, and have been since the time of their appointment under the
10 orders of the Court of Chancery.

Third—That your orators have administered the assets of said corporation, and have in their hands at the present time the sum of six thousand eight hundred and eighty-seven 06/100 dollars, together with a mortgage for the sum of seventy-one hundred dollars (\$7,100). That the total assets of said corporation liable for the payment of dividends upon claims and for the expenses of the Receivership is the sum of thirteen thousand nine hundred
20 and sixty-seven 06/100 dollars. That there have been filed and allowed by your orators preferred claims amounting to the sum of ten hundred twenty-six dollars and fifty-five cents (\$1,026.55), and general claims amounting to the sum of twenty-four thousand eight hundred seventy-two dollars and ninety-eight cents (\$24,872.98). That there have been disallowed by your orators general
30 claims to the amount of eight hundred seventy-three dollars (\$873), and that appeals have been taken from the determination of your orators, which appeals are pending and undetermined in this Court. That there will be a deficiency to pay debts and expenses of at least the sum of twenty thousand dollars (\$20,000).

Fourth—That your orator, Herbert Clark Gilson, while acting as sole Receiver of said corporation, presented to the Court of Chancery petitions in which your orator set up all of the facts with
4 respect to the conditions of the corporation and

BILL

asking for the instructions of the Court with respect to pursuing stockholders upon their stock subscriptions, upon which petitions notices were given and all of the stockholders mentioned in this bill received notice, and most of them appeared, as will appear by the proceedings in said cause, which said proceedings are entitled: Annie E. Dickinson, complainant, and J. C. Appleby Sand & Clay Company, defendant, and which said proceedings your orators beg leave to make a part of this bill of complaint. That after filing such petition, and after notice given to all the stockholders who appeared as defendants in this bill of complaint, an order was made by the Court of Chancery of the State of New Jersey upon or about the fifteenth day of February, nineteen hundred and nine, wherein it was ordered that the sum of fifteen thousand dollars is hereby adjudged to be the amount of money necessary for the Receiver to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the Receivership. and it was further ordered that the Receiver might, as he was advised, bring such suits at law or in equity to enforce any and all of the alleged liabilities arising out of the issuance, subscription to or holding of the stock of the insolvent corporation, and that each of the parties might be at liberty to apply to the Court in the premises upon two days' notice for further direction, which said order is made a part of this bill of complaint. That as a matter of fact your orators show that the sum of twenty thousand dollars will be necessary for the Receivers to collect from the stockholders in order to pay the debts of the insolvent corporation and the expenses of the receivership.

And your orator shows that they presented such facts aforesaid to this Court in said cause aforesaid,

BILL

and after notice given to each of the stockholders and creditors of said corporation, the stockholders sought to be sued in this suit receiving notice, this Court did upon the fourteen day of June, 1909, order and adjudge that the sum of twenty thousand dollars was necessary for the receivers to collect in order to pay the debts of the insolvent corporation and the expenses of the receivership.

Fifth—That when such corporation was incorporated upon the fourth day of January, nineteen hundred and four, its capital stock of one hundred thousand dollars was all issued to the following named persons, to wit: J. Charles Appleby, 835 shares; Julia M. Appleby, 50 shares; William R. Appleby, 50 shares; Lillian C. Pitcher, 20 shares F. Clark, 20 shares; George C. Smith, 20 shares; James E. Pyle, 5 shares; that all of this stock was issued in consideration of the check of J. Charles Appleby, dated January sixth, nineteen hundred and four, for one hundred thousand dollars (\$100,000), which said check was deposited in the bank to the credit of the J. C. Appleby Sand & Clay Company, and thereupon, upon the twenty-first day of January, nineteen hundred and four, the said J. C. Appleby Sand & Clay Company gave to J. Charles Appleby its check for one hundred thousand dollars (\$100,000) in consideration of the purchase of certain real estate in the County of Middlesex and State of New Jersey, which said real estate so purchased, as aforesaid, was reasonably worth the sum of five thousand dollars (\$5,000); that the said thousand shares of stock held by the persons above mentioned was actually never paid for, except by the transfer to the corporation of the real estate hereinabove mentioned; that the checks of J. Charles Appleby for one hundred thousand dol-

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lars (\$100,000) to the order of the J. C. Appleby Sand & Clay Company, and the check of the J. C. Appleby Sand & Clay Company to the order of J. Charles Appleby were delivered in the manner as above mentioned and set forth as a blind and for the purpose of concealing the real transaction hereinbefore mentioned and set forth and was really a purchase of real estate by the corporation with the stock of the corporation; that the said persons above mentioned who held the stock of the said corporation knew that the transaction was really a purchase by the corporation of said lands and real estate, and knew that said lands were not reasonably worth more than the sum of five thousand dollars (\$5,000); that the directors of the corporation were under the control of J. Charles Appleby, and they and each of them knew that the value of such real estate was not in excess of the sum of five thousand dollars (\$5,000), and they, and each of the persons above mentioned, joined with the said J. Charles Appleby in purchasing the said property at a valuation of one hundred thousand dollars (\$100,000)—that the directors of the said corporation did not exercise the judgment required to be exercised by them under the Act Concerning Corporations, Revision of 1896; that the purchase of said property in the manner aforesaid was a fraud upon the corporation and upon its stockholders and creditors, and the stock issued therefore as aforesaid was not fully paid stock.

Sixth—That thereafter and on or about the seventh day of June, nineteen hundred and six, J. Charles Appleby returned to the corporation four hundred ninety-five shares of the original issue of stock, as above mentioned and set forth, and the certificates therefor were cancelled upon the date

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aforesaid, but your orators show that the return by the said J. Charles Appleby of said stock, as aforesaid, does not in anywise release his liability on said stock, and even if such stock were returned and the amount thereof taken from the amount paid for said lands and real estate in Middlesex County,

10 your orators show and insist that the purchase price of said property would then be a gross over-valuation, as fifty thousand dollars is to five thousand dollars.

Seventh—That the remaining five hundred five shares of the original issue of stock are still outstanding and are held by the following named persons:—J. Charles Appleby, 130 shares; Julia M. Appleby, 50 shares; Lillian C. Pitcher, 20 shares; George C. Smith, 45 shares; James E. Pyle, 5

20 shares; William L. Pyle, 5 shares; Isaac V. Pearson, 10 shares; Joel Dickinson, 235 shares; Immanuel Britten, 5 shares.

Eighth—That said stock not being fully paid stock, the said persons holding said stock, as aforesaid, and the original subscribers to such stock and holders thereof are liable to your orators for the difference between the face value of said stock, to wit, one hundred thousand dollars (\$100,000) and

30 the value of the property given in exchange for said stock, to wit, the sum of five thousand dollars (\$5,000), and are liable to be called upon for the payment of such sum of ninety-five thousand dollars (\$95,000), as aforesaid, under such conditions as this Court may prescribe.

Ninth—That on the 11th day of May, nineteen hundred and five, the capital stock of the company was increased to two hundred and fifty thousand dollars (\$250,000), and that thereupon twelve hundred thirty-nine shares of the increased capital

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BILL

stock, as aforesaid, was issued; that one thousand shares of this increased capital soock was issued and distributed to the following named stockholders under a resolution adopted by the directors, a copy of which is as follows:

“Regularly moved and seconded that the payment to the stockholders as of March eleventh, nineteen hundred and five, for their gratuitous services in placing this company in its present position be distributed to stockholders as of record on that date, in proportion to their holdings, one hundred thousand dollars (\$100,000) of the new stock, and that the balance, fifty thousand dollars be sold at par, and the proceeds be used for the betterment of the company.” 10

That such one thousand shares of stock was distributed as follows: J. Charles Appleby, eight hundred and fifty shares; Julia M. Appleby, fifty shares; William R. Appleby, fifty shares; Lillian C. Pitcher, twenty shares; James E. Pyle, five shares; Isaac V. Pearson, five shares; William L. Pyle, five shares; George C. Smith, ten shares; Immanuel Britton, five shares. 20

That such stock has since been transferred into and now stands upon the books of the company in the names of the following persons: J. Charles Appleby, three hundred and sixty shares; Julia M. Appleby, fifty shares; Lillian C. Pitcher, twenty shares; James A. Pyle, five shares; William L. Pyle, five shares; Isaac V. Pearson, forty shares; George C. Smith, seventy shares; Immanuel Britten, five shares; Julia C. Wittpenn, fifty shares; George A. Gardiner, one share; Isaac Smith, one share; Joel Dickinson, one hundred shares; Annie E. Dickinson, twenty-five shares; Emma W. Smith, twenty- 30 40

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five shares; Robert B. Morrison, forty shares; Elmer J. Lawson, ten shares.

10 That the said Charles Appleby returned one hundred and ninety-three shares of this stock to the corporation, and such stock was cancelled upon or about the ninth day of May, nineteen hundred and six, but your orators show that the liability of the said J. Charles Appleby for the payment of said shares cannot be affected by such cancellation.

Tenth—That there was no consideration whatever given for the issuance of such stock; that there was nothing paid on account thereof, and that the stock is wholly unpaid.

20 *Eleventh*—That there was two hundred and thirty-nine shares of the capital stock which was paid for in cash, and that the following named persons now hold and possess the aforesaid fully paid stock, to wit, William L. Pyle, thirty shares; Charles A. Carpenter, thirty shares; Charles E. Putnam, twenty-five shares; Isaac V. Pearson, ten shares; C. Howard Slater, thirty-five shares; W. Drew Ditmar, five shares; Irene W. Slater, ten shares; Joel Dickinson, sixty-one shares; H. Otto Wittpenn, five shares; Leo A. Franklin, five shares;
30 Robert B. Morrison, five shares.

That all of this fully paid stock was issued by the corporation after the issuance of the stock for property purchased and the issue for gratuitous service; and your orators show that this stock above mentioned is the only fully paid and valid stock of the corporation.

40 *Twelfth*—That all of the persons who received the stock of the original issue, and who received stock issued for gratuitous services, and all who now hold said stock, knew that such stock had not

BILL

been paid for either in cash or by the property purchased, and they knew that said stock was not fully paid stock at the time they received it or came into possession of it, as aforesaid, that your orators have been informed by the stockholders of such corporation, who have paid par for their stock that they or some of them did not know at the time they secured their stock and paid par therefor that the stock therefore issued, to wit, the original stock and the stock issued for gratuitous services, had not been fully paid but, on the other hand, they insist that they invested in said stock and paid par therefor upon the assumption that the stock theretofore issued, as aforesaid, had been fully paid, and the fact that such stock, to the amount aforesaid, had been issued and paid for, was an inducing cause for their investing in the stock that they bought and paid par for. And your orators have been informed that there was no knowledge on the part of the holders of said fully paid stock that the stock theretofore issued, to wit, that issued for gratuitous services and that issued for property purchased, had not been fully paid for until the examination by the Receivers of the books of the corporation and the investigation by the affairs of the corporation by your Receivers in the course of this litigation.

Thirteenth—That they have been requested by the said Charles A. Carpenter, Charles E. Putnam and William L. Pyle that your orators, as Receivers of the said corporation, in their capacity as representatives of stockholders, proceed against those stockholders who secured the original issue of the stock and the stock that was issued to gratuitous persons, and the persons who now hold such stock for the purpose of compelling them to pay the par

BILL

value of their shares or the amount necessary to do equity among the stockholders.

10 *Fourteenth*—That certain of the parties above mentioned as your orators are informed and believe, are insolvent, and judgments against them would be of no avail, and it will be impossible for your
20 orators to realize from them any part of the moneys due from them, as aforesaid; that their liability of certain of the defendants to pay to your orators the amount remaining unpaid on account of the capital stock issued, as aforesaid, and the equities to be adjusted between the several parties primarily or ultimately liable either to pay the debts of said corporation, or to pay to your orators funds to be applied for the purpose of doing equity among the stockholders, and the parties are so numerous and hold such varied relations to each other and to the said company that to avoid multiplicity of suits and make possible a prompt and equitable settlement as between all parties interested of the rights and liabilities of each, that it is desirable and necessary that all the parties hereto be joined in one action; and your orators further show that in the premises there is no adequate remedy at law.

30 To the end therefore, that the said J. Charles Appleby, Julia M. Appleby, William R. Appleby, Lillian C. Pitcher, James E. Pyle, William L. Pyle, Isaac V. Pearson, George C. Smith, Immanuel Britten, Julius C. Wittpenn, George R. Gardner, Isaac A. Smith, Joel Dickinson, Annie E. Dickinson, Emma W. Smith, Robert B. Morrison, Elmer J. Lawson, may, but without oath, full, true, direct and perfect answer make, to the best and utmost of their respective knowledge, remembrance, information and belief, to all and singular the matters aforesaid, and that as fully and par-

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ticularly as if they were here again repeated, and
 they and each of them thereto particularly inter-
 rogated, and that it may be ascertained by this
 Court how much, if anything, has been paid by
 each of said stockholders upon the stock held by
 them and how much remains unpaid, and that an
 account may be taken, and that it may be ascer- 10
 tained by this Court what amount it is necessary
 to collect from the stockholders for the purpose of
 meeting the debts of the corporation and the ex-
 penses of the Receivership; that investigation may
 be made as to the financial responsibility of the par-
 ties aforesaid, and that it may be determined what
 amount, if any, should be collected from and paid
 by the various parties aforesaid, and that the said
 defendants may be ordered and directed to pay the
 balance due upon their stock until they have paid 20
 par upon the same, or to pay so much as may be
 necessary to do equity among the stockholders or
 that an order may be made directing that they pay
 so much as may be necessary to pay the debts of
 the corporation if this Court shall determine that
 they are not liable for the par value of their stock,
 or to pay so much as may be necessary to do equity
 among the stockholders, and that the defendants,
 and each of them, may be restrained from assign- 30
 ing or transferring any of the stock of the corpo-
 ration held by them, and from demanding or re-
 ceiving directly or indirectly any dividend or pay-
 ment on account of any claims filed by them, and
 that your orators may have such other and further
 relief as the nature of the case may require, and as
 may be agreeable to good equity and good con-
 science.

May it please your Honor, the premises consid-
 ered, to grant unto your orators not only the State's
 writ of injunction, issuing out of and under the 40

BILL

seal of this Honorable Court, to be directed to said
 defendants hereinafter named, restraining them,
 and each of them, from assigning or transferring
 any of the stocks of the J. C. Appleby Sand and
 Clay Company held by them, or in their own name
 or otherwise, and from demanding and receiving
 10 directly or indirectly any dividend or payment on
 account of any claims filed with your orators, but
 also the State's writ of subpoena, issuing out of and
 under the seal of this Honorable Court, directed to
 the said J. Charles Appleby, Julia M. Appleby,
 William R. Appleby, Lillian C. Pitcher, James E.
 Pyle, William L. Pyle, Isaac V. Pearson, George
 C. Smith, Immanuel Britten, Julia C. Wittpenn,
 George R. Gardner, Isaac A. Smith, Joel Dickinson,
 Annie E. Dickinson, Emma W. Smith, Robert B.
 20 Morrison, Elmer J. Lawson, commanding them,
 and each of them, by a certain day and under a
 certain penalty therein to be expressed, to be and
 appear before your Honor, in this Honorable Court,
 then and there to answer, stand to, abide by, and
 perform such order or decree as to your Honor shall
 seem meet.

And your orators, as in duty bound, will ever
 pray.

30

MERRITT LANE,

Solicitor of Complainants.

MERRITT LANE,

Of Counsel with Complainants.

Filed June 24th, 1909.

ORDER OF PUBLICATION
IN CHANCERY OF NEW JERSEY.

BETWEEN

HERBERT CLARK GILSON AND EL-
MER W. DEMAREST, RECEIVERS
OF THE J. C. APPLEBY SAND AND
CLAY COMPANY,

Complainants,

and

J. CHARLES APPLEBY ET AL.,
Defendants.

10

*On Bill, etc.
Order of Pub-
lication.*

The complainants having filed their bill of com-
plaint in the above-entitled matter, and process of 20
subpoena having been issued and returned accord-
ing to law, and it appearing by affidavit that the
defendants, J. Charles Appleby and William R.
Appleby, reside out of the State of New Jersey, and
that process could not be served upon them;

It is, on this nineteenth day of November, nine-
teen hundred and nine, on motion of Merritt Lane,
of counsel with the complainants, ordered, that the
said absent defendants, J. Charles Appleby and 30
William R. Appleby, do appear, plead, answer or
demur to the complainants' bill on or before the
twentieth day of January next, or that in default
thereof such decree may be made against them as
the Chancellor shall think equitable and just.

And it is further ordered, that notice of this order
prescribed by law and the rules of this Court shall,
within ten days hereafter, be served personally on
the absent defendants by delivery of a copy thereof 40
to them, or be published within the said ten days in

PROOF OF PUBLICATION

the Jersey City Evening Journal, a newspaper published at the City of Jersey City, in the County of Hudson and State of New Jersey, for four weeks successively, at least once in each week, and in case of such publication that a copy thereof be also mailed within the same time to the said absent defendants, directed to their post-office addresses, if the same can be ascertained, in the manner prescribed by law and the rules of this Court.

MAHLON PITNEY, C.

Filed Nov. 19th, 1909.

PROOF OF PUBLICATION.

STATE OF NEW JERSEY, }
HUDSON COUNTY, } ss.

JOHN L. JOHNSON, being duly sworn according to law, upon his oath saith, that he is the book-keeper of the Jersey Journal, a newspaper printed and published in Jersey City, County and State aforesaid, and that a notice, of which the annexed is a true copy, was published in the said newspaper for five times successively, at least once in each week, commencing on the 27th day of November, 1909, and continued thereafter on November 27th, Dec. 4th, 11th, 18th and Dec. 24th, 1909.

JOHN L. JOHNSON.

Sworn and subscribed before me this }
24th day of December, A. D. 1909. }

[L. S.] FRANK D. COVEY,
Notary Public, N. J.

Filed Jan. 19, 1910.

NOTICE

IN CHANCERY OF NEW JERSEY.

*To J. Charles Appleby and William A. Appleby,
absent defendants:*

By virtue of an order of the Court of Chancery,
made on the day of the date hereof in a cause
wherein Herbert Clark Gilson and Elmer W. Dem- 10
arest, Receivers of the J. C. Appleby Sand and Clay
Company are complainants, and J. Charles Appleby
and William R. Appleby and others are defendants,
you are required to appear, plead, answer to or de-
mur to the bill of the said complainants on or before
the 20th day of January, nineteen hundred and
ten, or the said bill will be taken as confessed
against you.

The said bill is filed against you as stockholders
of the J. C. Appleby Sand and Clay Company for 20
the purpose of having the Court of Chancery ascer-
tain how much, if anything, has been paid by you
and each of the stockholders mentioned in the bill
of complaint upon the stock held by them and how
much remains unpaid, and for an account to be
taken under the direction of the Court of Chancery,
and for the ascertainment by the Court of Chancery
of the amount that it is necessary to collect from
such stockholders for the purpose of meeting the 30
debts of the corporation and the expenses of the
receivership and for an investigation of the finan-
cial responsibility of the parties defendant to the bill
and for the ascertainment of what amount, if any,
to be collected from and paid by you and the other
defendants to the bill, and for an order directing
you and the other defendants to the bill to pay the
balance due upon the stock held by you in the
J. C. Appleby Sand and Clay Company until you
and each of you have paid par upon the same, or
paid so much as may be necessary to do equity 40

NOTICE

among the stockholders. And that an order may be made directing you and the other stockholders of the J. C. Appleby Sand and Clay Company to pay so much as may be necessary to pay the debts of the corporation if the Court of Chancery should determine that the stockholders are not liable for the par value of their stock, or to pay so much as may be necessary to do equity among the stockholders, and that you and the other stockholders of the J. C. Appleby Sand and Clay Company, mentioned in the bill of complaint, may be restrained from assigning or transferring any of the stock of the corporation held by them, and from demanding or receiving, directly or indirectly, any dividend or payment on account of any claims filed by you and the other stockholders of the J. C. Appleby Sand and Clay Company, and for such other and further relief as may be proper, and you are made parties defendant because, it is alleged, that you are the holder of some of the unpaid stock of the J. C. Appleby Sand and Clay Company.

MERRITT LANE,

Solicitor for Complainants.

Office and Post Office address, 260 Washington street, Jersey City, N. J.

Dated November 19, 1909.

PROOF OF MAILING
IN CHANCERY OF NEW JERSEY.

BETWEEN HERBERT CLARK GILSON
AND ELMER W. DEMAREST, RE-
CEIVERS OF J. C. APPLEBY SAND
AND CLAY COMPANY,

Complainants,

and

J. CHARLES APPLEBY ET ALS,
Defendants.

On Bill.

Affidavit.

10

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.

20

MERRITT LANE, of full age, being duly sworn according to law, on his oath deposes and says:

That he is an attorney at law and that he is the solicitor for the complainants in the above entitled cause. That he has, in good faith, made diligent and careful inquiry for the residence and post office address of J. Charles Appleby and William R. Appleby, two of the defendants, and has ascertained that the address of William R. Appleby is "C/r of the School of Mines, Minneapolis, Minn., and that the address of J. Charles Appleby is "808 12th street, Norfolk, Va.," and that the information came to this deponent in the manner disposed by the affidavits of Herbert Clark Gilson, hereto attached.

30

That deponent, on the twenty-seventh day of November, A. D. nineteen hundred and nine, mailed a copy of the notice hereto annexed to William R. Appleby, C/r School of Mines, Minneapolis, Minn.,

40

PROOF OF MAILING

and a similar copy of said notice to J. Charles Appleby, 808 12th street, Norfolk, Va., both of which notices had postage prepaid.

MERRITT LANE.

10 Sworn and subscribed to before me this 27th day of November, A. D. 1909. }

ELIZABETH COONS,

Notary Public,

Hudson Co., N. J.

Filed Jan. 19, 1910.

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PROOF OF ADDRESS
IN CHANCERY OF NEW JERSEY.

BETWEEN

HERBERT CLARK GILSON AND EL-
MER W. DEMAREST, RECRS., ETC.,

Complainants,

and

J. CHARLES APPLEBY ET ALS.,
Defendants.

On Bill, &c. 10
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.

HERBERT CLARK GILSON, of full age, being duly 20
sworn according to law, upon his oath deposes and
says:

That he is an attorney and counsellor-at-law and
that he has personal knowledge of the facts here-
inafter mentioned and described; that he has, in
good faith, made diligent and careful inquiry for
the residence and post-office address of J. Charles
Appleby and William R. Appleby, two of the de-
fendants, in the manner required by the rules of
this Court and in the following manner: 30

The books of J. C. Appleby Sand & Clay Co.
contained the addresses as follows: J. Charles Ap-
pleby, No. 808 Twelfth street, Norfolk, Virginia;
and William R. Appleby, School of Mines, Min-
neapolis, Minnesota. That J. Charles Appleby is
the father of William R. Appleby, and on Janu-
ary 12, 1909, William R. Appleby called at depo-
nent's office and deponent asked him if the said
addresses were correct, and Mr. Appleby said that
they were, and that he and his father received 40

PLEA OF J. C. APPLEBY

several letters written by deponent directed to them at their said addresses.

10 Deponent further says, that he did on the sixteenth day of November, 1909, ask Charles H. Hartshorne, Esquire, the attorney and solicitor of the said Applebys in other matters, whether he would acknowledge service of process for the said Applebys in the above entitled cause, and Mr. Hartshorne told deponent that he did not have authority to acknowledge such service and that they would have to be proceeded against as absent defendants, because they still resided in Virginia and Minnesota.

20 That he has ascertained, as above mentioned, that the residence and post office address of the said J. Charles Appleby is No. 808 Twelfth street, Norfolk, Virginia, and that the post-office address of the said William R. Appleby is c/o School of Mines, Minneapolis, Minnesota.

HERBERT CLARK GILSON.

Sworn and subscribed to before me }
this 27th day of November, A. }
D. 1909.

30 CLARENCE LINN,
Master in Chancery of N. J.
Filed Jan. 19, 1910.

Plea of J. Charles Appleby.

The plea of J. Charles Appleby, one of the persons named as defendants in the bill of complaint in the above stated cause, who now appears specially for the sole purpose of objecting to the jurisdiction of the Court over him.

40 The said J. Charles Appleby not confessing any

PLEA OF J. C. APPLEBY

of the matters or things alleged in the said bill to be true, for plea to the whole of said bill says, that he has not been served with process in this case within the State of New Jersey, or at all; and that he is now, and was at the time when this suit was begun, a citizen and resident of the State of Virginia, and is not subject to service of process within the State of New Jersey. 10

And he pleads Article XIV., Section One of the Constitution of the United States to the jurisdiction of this Court, and prays the judgment of this Court, whether it has jurisdiction over him to require him to answer said bill or to make against him any order or decree in this cause; and he prays to be hence dismissed with his costs.

HARTSHORNE, INSLEY & LEAKE, 20
Solicitors of J. Charles Appleby.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.

CHARLES H. HARTSHORNE, being duly sworn on his oath says: That J. Charles Appleby named in the foregoing plea is now, and has been ever since the beginning of the suit mentioned in said plea, absent from this State, and that he has been during all of that time, and for a long time preceding, an actual resident of the State of Virginia. Deponent says that he is the agent of the said J. Charles Appleby for the purpose of filing the foregoing plea in this suit, and that he is authorized by the said Appleby to file the same. Deponent says that the said plea is not interposed for delay but in good faith. 30 40

ORDER ALLOWING PLEA

Subscribed and sworn to before me this
nineteenth day of January, 1910.

CHARLES H. HARTSHORNE.

EVA T. ALLMAN,
Notary Public
of New Jersey.

10

I certify that I have perused the complainants' bill referred to in the foregoing plea, and also the said plea, and I certify that in my opinion the said plea is well founded in point of law.

CHARLES H. HARTSHORNE,
Of Counsel.

Filed Jan. 19, 1910.

20

Order Allowing Plea of J. Charles Appleby.

This cause coming on to be heard in the presence of Merritt Lane, Esquire, counsel with complainants, and Charles H. Hartshorne, counsel for the defendants J. Charles Appleby, and the Court having heard the arguments of counsel of the respective parties and being of opinion that the plea to the jurisdiction of this Court filed by the
30 said J. Charles Appleby is good and sufficient;

It is, on this tenth day of October, nineteen hundred and ten, ordered, that the said plea stand and be allowed and that the complainants pay to the said defendant his costs of his plea.

MAHLON PITNEY, C.

Respectfully advised,
LINDLEY M. GARRISON,
V. C.

40 Filed Oct. 11, 1910.

ORDER OVERRULING PLEA

Order Overruling Plea of J. Charles Appleby.

This matter being opened to the Court by Merritt Lane, of counsel with the complainants, in the presence of Charles H. Hartshorne, of counsel with the defendant, J. Charles Appleby, and it appearing to the Court that argument was heretofore had on the plea filed herein, and that an order was entered sustaining the plea, and the Court having upon its own motion directed a reargument, and a reargument having been had, and it now appearing to the Court that the order previously made herein sustaining the plea was improvidently entered, and that the plea should be overruled with costs; 10

It is, on this ninth day of February, nineteen hundred and eleven, ordered, that the order of this Court sustaining the plea of the defendant, J. Charles Appleby, be vacated, and that the plea of the said defendant, J. Charles Appleby, be overruled with costs, and that (unless the said defendant shall within ten days of the date of this order apply for leave to file an amended plea), the said defendant answer the bill of the complainants within twenty days of the date hereof and if he fail so to do a decree *pro confesso* may be taken against him. 20

MAHLON PITNEY, 30

Respectfully advised,
LINDLEY M. GARRISON,
V. C.

Filed Feb. 10th, 1911.

PETITION OF APPEAL
COURT OF ERRORS AND APPEALS OF
NEW JERSEY.

BETWEEN

10 HERBERT CLARK GILSON AND EL-
MER W. DEMAREST, RECEIVERS,
ETC.,

Appellees and Complainants,

and

J. CHARLES APPLEBY,
Appellant and Defendant.

*Petition of Ap-
peal.*

20 *To the Honorable Court of Errors and Appeals:*

The petition of J. Charles Appleby, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor the Chancellor of New Jersey, bearing date February 9th, 1911, wherein the said Herbert Clark Gilson and Elmer Demarest, Receivers of the J. C. Appleby Sand and Clay Company were complainants and this appellant and others were defendants, in this
30 respect, to wit, that the said order adjudged that the order of that Court previously made sustaining the plea of this petitioner, J. Charles Appleby, be vacated and that the plea of the said J. Charles Appleby be overruled with costs, and that (unless the said defendant, J. Charles Appleby, should, within ten days of the date of said order, apply for leave to file an amended plea) the said defendant answer the bill of the complainants within twenty days of the date of said order, and if he fail so to
40 do a decree *pro confesso* might be taken against him.

PLEA OF W. R. APPLEBY

And your petitioner appeals from said order, and from every part thereof, upon the ground that the same is erroneous, for that no such order should have been made, and for that the order previously made, and which was thereby vacated, was regularly and properly entered and was in accordance with equity and good conscience.

10

Your petitioner prays that the said order of February 9th, 1911, may be reversed and set aside and that your petitioner may have such relief in the premises as this Court shall deem just.

HARTSHORNE, INSLEY & LEAKE,
Solrs. and Counsel for Appellant.

Filed Feb. 25th, 1911.

The usual formal answer on appeal was duly filed.

20

PLEA OF WILLIAM R. APPLEBY.

The plea of William R. Appleby, one of the persons named as defendants in the bill of complaint in the above stated cause, who now appears specially for the sole purpose of objecting to the jurisdiction of the Court over him.

The said William R. Appleby, not confessing any of the matters or things alleged in the said bill to be true, for plea to the whole of said bill says, that he has not been served with process in this case within the State of New Jersey, nor at all; and that he is now, and was at the time when this suit was begun, a citizen and resident of the State of Minnesota, and is not subject to service of process within the State of New Jersey.

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And he pleads Article XIV., Section One of the Constitution of the United States, to the jurisdiction of this Court; and prays the judgment of this

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PLEA OF W. R. APPLEBY

Court whether it has jurisdiction over him to require him to answer said bill or to make against him any order or decree in this cause; and he prays to be hence dismissed with his costs.

HARTSHORNE, INSLEY & LEAKE,
Solicitors of Wm. R. Appleby.

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STATE OF MINNESOTA, }
COUNTY OF HENNEPIN, } ss.

WILLIAM R. APPLEBY, being duly sworn on his oath says, that he is the person named in the foregoing plea and that the said plea is not interposed for delay but in good faith.

WM. R. APPLEBY.

20 Subscribed and sworn to before
me, a Notary Public in and
for the County and State
aforesaid, this seventeenth
day of January, 1910. }

D. W. SPRAGUE,
Notary Public,

Hennepin County, Minn.

My commission expires Nov. 23, 1910.

30 I certify that I have perused the complainants' bill referred to in the foregoing plea, and also the said plea, and I certify that in my opinion the said plea is well founded in point of law.

CHARLES H. HARTSHORNE,
Of Counsel.

Filed January 19, 1910.

ORDER ALLOWING PLEA

Order allowing plea of William R. Appleby.

This cause coming on to be heard in the presence of Merritt Lane, Esquire, counsel with complainants, and Charles H. Hartshorne, counsel for defendant, William R. Appleby, and the Court having heard the arguments of counsel of the respective parties, and being of opinion that the plea to the jurisdiction of this Court, filed by the said William R. Appleby, is good and sufficient, 10

It is, on this tenth day of October, nineteen hundred and ten, ordered, that the said plea stand and be allowed, and that the complainants pay to the said defendant his costs of his plea.

MAHLON PITNEY,

C.

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Respectfully advised,

LINDLEY M. GARRISON,
V. C.

Filed Oct. 11, 1910.

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ORDER OVERRULING PLEA

Order overruling plea of William R. Appleby.

10 This matter being opened to the Court by Merritt Lane, of counsel with the complainants, in the presence of Charles H. Hartshorne, of counsel with the defendant, William R. Appleby, and it appearing to the Court that argument was heretofore had on the plea filed herein, and that an order was entered sustaining the plea, and the Court having upon its own motion directed a re-arrangement having been had, and it now appearing to the Court that the order previously made herein sustaining the plea was improvidently entered, and that the plea should be overruled with costs,

20 It is, on this ninth day of February, nineteen hundred and eleven, ordered, that the order of this Court sustaining the plea of the defendant, William R. Appleby, be vacated, and that the plea of the said defendant, William R. Appleby, be overruled with costs, and that, unless the said defendant shall, within ten days of the date of this order apply for leave to file an amended plea, the said defendant answer the bill of the complainants within twenty days of the date hereof and, if he fail so to do, a decree *pro confesso* may be taken against him.

MAHLON PITNEY,
C.

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Respectfully advised,

LINDLEY M. GARRISON,
V. C.

Filed Feb'y 10, 1911.

PETITION OF APPEAL
COURT OF ERRORS AND APPEALS OF
NEW JERSEY.

BETWEEN

HERBERT CLARK GILSON AND EL-
MER W. DEMAREST, RECR'S, &C.

Appellees and Complainants,

and

J. CHARLES APPLEBY,

Appellant and Defendant.

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*Petition of
Appeal.*

To the Honorable Court of Errors and Appeals:

The petition of William R. Appleby, the appel- 20
lant in the above stated cause, respectfully shows
that your petitioner finds himself aggrieved by an
order made in the Court of Chancery by his Honor
the Chancellor of New Jersey, bearing date Febru-
ary 9th, 1911, wherein the said Herbert Clark Gil-
son and Elmer Demarest, Receivers of the J. C.
Appleby Sand and Clay Company, were complain-
ants, and this appellant and others were defend-
ants, in this respect, to wit, that the said order ad-
judged that the order of the Court previously made 30
sustaining the plea of this petitioner, William R.
Appleby, be vacated, and that the plea of the said
William R. Appleby be overruled with costs, and
that, unless the said defendant, William R. Ap-
pleby, should, within ten days of the date of said
order, apply for leave to file an amended plea, the
said defendant answer the bill of the complainants
within twenty days of the date of said order, and
if he fail so to do, a decree *pro confesso* might be
taken against him. 40

PETITION OF APPEAL

And your petitioner appeals from said order, and from every part thereof, upon the ground that the same is erroneous, for that no such order should have been made, and for that the order previously made, and which was thereby vacated, was regularly and properly entered, and was in accordance with equity and good conscience.

10 Your petitioner prays that the said order of February 9th, 1911, may be reversed and set aside, and that your petitioner may have such relief in the premises as this Court shall deem just.

HARTSHORNE, INSLEY & LEAKE,
Solrs. and Counsel for Appellant.

Filed Feb. 25, 1911.

20 *The usual formal answer on appeal was duly filed.*

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OPINION.

On bill and pleas.

The pleas of the respective defendants, J. Charles Appleby and William R. Appleby are identical, excepting that one of such defendants alleges himself to be a resident of the State of Virginia, and the other of the State of Minnesota. The form of the plea is as follows: 10

"The plea of _____, one of the persons named as defendants in the bill of complaint in the above stated cause, who now appears specially for the sole purpose of objecting to the jurisdiction of the Court over him;

"The said _____ not confessing any of the matters or things alleged in the said bill to be true, for plea to the whole of the said bill, 20
 "says, that he has not been served with process in this cause within the State of New Jersey nor at all; and that he is now and was at the time when this suit was begun a citizen and resident of the State of _____, and is not subject to service of process within the State of New Jersey.

"And he pleads Article XIV., Sec. 1 of the Constitution of the United States to the jurisdiction of this Court, and prays the judgment of this Court 30
 "whether it has jurisdiction over him to require him to answer said bill, or to make against him any order or decree in this cause; and he prays to be hence dismissed with his costs."

MERRITT LANE, Esq., for complainants.

HARTSHORNE, INSLEY & LEAKE, for pleading defendants.

GARRISON, V. C. (After stating facts):

When the argument was held upon the bill and 40

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pleas many difficult and interesting questions were debated, and the Court announced to counsel its views upon certain of those questions, with the result that an order was made allowing the pleas to stand with qualifications as stated in the Court's opinion. Upon the Court's own motion a re-hearing
10 was had upon the subject matter, and after such re-hearing the Court is convinced that, by reason of questions now for the first time raised and considered, the pleas, in their present form, cannot be allowed to stand.

A plea is in effect an answer which reduces the issue between the parties to a single point. The facts which produce this result may be numerous, and are not for that reason necessarily inappropriate
20 to be set up in a plea; but the effect of such facts must be to reduce the issue between the parties to a single point. All the facts necessary to sustain the defendants' contention must be set forth in the plea, or it is bad in form. Daniell's Ch. Pl. & Pr., 6th Am. Ed., p. 682, p. 683, et seq.

The pleas in this case are, in my view, bad in form. A plea, to be good, must set up facts which, if proven, constitute a complete defense, either to
30 the whole bill, or to so much of the bill as they purport to be an answer or defense to.

The only facts set up in this plea are that the pleading defendant has not been served with process in this cause within the State of New Jersey, nor at all; and that he is now and was at the time when this suit was begun a citizen and resident of another State of the Union, and is not subject to the service of process within the State of New Jersey. I know of no principle of law recognized in the State of New Jersey which exempts the citizens of any State of
40 the Union from service of process within the State

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of New Jersey; and, therefore, it is certainly bad pleading for a defendant to set up as a bar to a suit, in New Jersey that he is a resident of another State, and is not subject to service of process within the State of New Jersey. As a matter of law and of fact, he is subject to the service of process within the State of New Jersey whenever he may be found therein (subject to certain exceptions based upon his reason for being in the State, *i. e.*, attendance at Court, and the like). Nor is that part of the plea which sets up the fact that he has not been served with process in this cause within the State of New Jersey, nor at all, a good plea, because it does not appear from anything in the plea that the complainant has yet sought to serve him with process within the State of New Jersey, or at all; and it does not therefore, follow that, if and when the complainant so seeks to obtain jurisdiction over the defendant; he may not, in the first place, serve him within the State of New Jersey; nor, in the second place, obtain service by some method of substituted service recognized as efficient by the Courts of this State and of the Federal Government.

The omission to set up these facts, if any such exist, which show how the complainants have sought to obtain jurisdiction over the defendant, is in my view, fatal to the plea. To hold otherwise would be to hold that any person named in a bill in Chancery as a defendant could immediately, upon the bill being filed, come into this Court with just such a plea as the one in hand and obtain a judgment in his favor, with costs, which would be a palpable absurdity; because, until the complainant has sought to get the defendant into Court, it is true that the defendant has not been served with process in the State of New Jersey, nor at all; but

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that does not give him a right, because of that fact, to come into the Court protesting that it has not jurisdiction over him until it has sought by some means or process to obtain jurisdiction over him.

10 Upon this view being suggested to the counsel for the pleading defendants at the time of the re-argument before mentioned, their reply was that this Court should look at the files and see, first, that there was no subpoena returned, served upon the pleading defendants; and, second, that there was an order of publication made herein. In my view, this would be entirely improper practice. The only things which the Court should look at upon bill and plea are the bill and plea; and unless the facts which the defendants rely on as a bar are set up either in the bill or plea, they are not, in my
20 view, properly before the Court upon bill and plea.

I have not looked at the files, as suggested by the defendants' counsel that I should; but, for the purpose of illuminating my view, let us suppose that the files disclose that an order of publication has been issued and has been served in some other State of the Union upon the defendants. If such a condition be found to exist, it seems clear to me that the defendants have failed to raise the point or issue which they seek to raise. The point or
30 issue which they seek to raise is that this particular suit is one calling for a personal judgment against the defendants, and must be based upon a personal service upon the defendants, within the State of New Jersey; and that a service under an order of publication made outside of the State of New Jersey, is not such service as, under the Constitution of the United States, will support a personal judgment against the defendants.

40 It seems to me too clear to require further eluci-

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dation that the defendant must wait, in any case, until there has been some attempt made by the Court to exercise its jurisdiction over him by some form of process; and that when such an attempt has been made, and is, in his view, ineffective, he must, if this form of procedure is to be allowed at all, set forth in his plea the facts concerning the attempted bringing of him into the jurisdiction of the Court by process, and the reason why the same is ineffectual. 10

As I have just above pointed out, to hold otherwise would be to permit defendants to come in before the Court had even attempted to obtain jurisdiction over their person by any form of process; and it is too clear to require argument that defendants have no such right. Their utmost right to object that the Court has not jurisdiction is to come in after there has been an attempt to obtain jurisdiction over them, not before. For all that appears on the face of this plea, no attempt at all has been made to obtain any jurisdiction over the pleading defendants; and they, like all other natural persons, are unquestionably amenable to the jurisdiction of our Courts in transitory actions if they are found within the State and are not within the exceptions of the character noted above. In every other case of this character where pleas to the jurisdiction of the Court have been interposed, and the plea has been printed in the opinion, it will be found that the practice which I herein state to be the proper one has been followed. In each of these cases the plea sets out the means by which the complainant attempted to bring the defendant within the jurisdiction of the Court, and sets up facts or reasons why such attempted service or means of bringing the defendant within the juris- 20 30 40

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diction of the Court was ineffective. *Puster vs. Parker Mercantile Co.*, 70 N. J. Eq., 771 (Ct. of Er., 1905); *Groel vs. United Electric Co.*, 70 N. J. Eq., 616 (Garrison, V. C., 1905); *Ewald vs. Ortynsky*, 75 A. R., 577 (Garrison, V. C., 1910).

10 The result is that I shall hold the pleas bad, with leave, however, to the pleading defendants to apply for leave to file amended pleas.

20 I am aware that under the old English practice there are cases that hold that where a plea to the jurisdiction has been overruled leave would not be given to again raise the question; but since the class of pleas that we are dealing with called pleas to the jurisdiction of this Court were never known in England, and are entirely the product
of our own practice in our own State, it is per-
haps not proper to apply the same rules to them
which obtain in the English Court of Chancery.
In any event, I will entertain such an application
and pass upon it, if made.

The order heretofore made herein allowing the pleas to stand will, of course, be vacated. The form of the order herein will be made upon notice.

Filed Jan. 5, 1911.

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