INDEX.

	PAGE
Summons	1
Complaint	3
Schedule 1, Form of demand	15
Schedule 2, List of stockholders	16
Notice of Motion by Defendant, The Bobdon Company, to Strike Out Complaint	19
Notice of Motion to Strike Out Complaint	21
Opinion	23
Order	33
Judgment	36
Notice of Appeal and Grounds of Appeal	40

Summons.
(Filed Nov. 17, 1933)

THE STATE OF NEW JERSEY.
(L. S.)

To

Benjamin Abrams, et als. (totaling 557 in number, this appeal involving the following defendants).

Charles P. Anderson, Stephen R. Applegate, Hannah C. Bailey, Mrs. Maude A. Benkert, Samuel Berger, George Bierman, Arthur R. Brick, Herbert Cooper, James Mercer Davis, Nicholas W. D'Elia, Alfred R. M. Diggles, John Drewen, Howard Ewart, Frederick D. Fahrenbruck, Katherine L. Fahrenbruck, M. James Fine, Herman Geismar, Paul S. Goble, Henry J. Goodman, Benjamin Gorlin, Emanuel Gross, William J. Gruler, Kate Harris, Benjamin Heilbrun, Morris Herman, Charles Kanter, Mrs. Gertrude Kapralik, Richard E. Kohn, Eric Korman, Benjamin Levy, Mrs. Camilla Lowy, A. D. MacDougall, Clair MacFarland, J. Paul Neuwirth, Harry E. O'Mealia, Harry F. O'Mealia, Hamilton G. Pedrick, Mary Rosner, Andrew Schwarz, Raymond C. Staples, Alex Steinberger, Essie R. Stone, Frank W. Sutton, Jr., Howard C. Sylvester, Mrs. Mary A. VanNostrand, Dr. Ralph Waldron, Charles N. Warner, William J. Wells, Zulena Cook Woodward, George W. Bauer & George J. Alles, Arney-Sutton-Gruber Co., The Bobdan Co., The Farg Co., Inc., The Mart, Inc., Northern N. J. Investment Co., Omaco Securities Co., O'Mealia Outdoor Advertising Co., Sutton Brothers Co., Toms River Amusement Co.

Summons.

You are summoned to answer the annexed complaint of Joseph A. Broderick, as Superintendent of Banks of the State of New York, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (See notice.)

WITNESS, Honorable Thomas J. Brogan, Chief Justice of the New Jersey Supreme Court, at Trenton, this 13th day of November, Nineteen Hundred and Thirty-Three.

FRED L. BLOODGOOD,
Clerk.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys.

Complaint.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York,

Plaintiff,

against

BENJAMIN ABRAMS, *et als.* (totaling 557 in number, this appeal involving the following defendants) CHARLES P. ANDERSON, STEPHEN R. APPLEGATE, HANNAH C. BAILEY, MRS. MAUDE A. BENKERT, SAMUEL BERGER, GEORGE BIERMAN, ARTHUR R. BRICK, HERBERT COOPER, JAMES MERCER DAVIS, NICHOLAS W. D'ELIA, ALFRED R. M. DIGGLES, JOHN DREWEN, HOWARD EWART, FREDERICK D. FAHRENBRUCK, KATHERINE L. FAHRENBRUCK, M. JAMES FINE, HERMAN GEISMAR, PAUL S. GOBLE, HENRY J. GOODMAN, BENJAMIN GORLIN, EMANUEL GROSS, WILLIAM J. GRULER, KATE HARRIS, BENJAMIN HEILBRUN, MORRIS HERMAN, CHARLES KANTER, MRS. GERTRUDE KAPRALIK, RICHARD E. KOHN, ERIC KORMAN, BENJAMIN LEVY, MRS. CAMILLA LOWY, A. D. MACDOUGALL, CLAIR MACFARLAND, J. PAUL NEUWIRTH, HARRY E. O'MEALIA, HARRY F. O'MEALIA, HAMILTON G. PEDRICK, MARY ROSNER, ANDREW SCHWARZ, RAYMOND C. STAPLES, ALEX STEIN-

Action at Law.

BERGER, ESSIE R. STONE, FRANK W. SUTTON, JR., HOWARD C. SYLVESTER, MRS. MARY A. VANNOSTRAND, DR. RALPH WALDRON, CHARLES N. WARNER, WILLIAM J. WELLS, ZULENA COOK WOODWARD,

(Defendants who are joint owners);

GEORGE W. BAUER & GEORGE J. ALLES,

(Corporate defendants);

ARNEY-SUTTON-GRULER CO.; THE BOBDAN CO.; THE FARG CO. INC.; THE MART, INC.; NORTHERN N. J. INVESTMENT CO.; OMACO SECURITIES CO.; O'MEALIA OUTDOOR ADVERTISING CO.; SUTTON BROTHERS CO.; TOMS RIVER AMUSEMENT CO.,

Defendants.

Plaintiff, Joseph A. Broderick, as Superintendent of Banks of the State of New York, complaining against the defendants, says that:

FIRST COUNT:

1. Plaintiff is a resident and citizen of the State of New York, and on and prior to the 11th day of December, 1930, was and now is the duly appointed and acting Superintendent of Banks of the State of New York.

2. The Bank of United States is a moneyed corporation, organized under the Banking Law of the

State of New York, and maintained its office and principal place of business in the Borough of Manhattan, City, County and State of New York.

On December 11, 1930, the capital of The Bank of United States amounted to the sum of $25,250,000, represented by 1,010,000 shares of the par value of $25.00 per share, all of which was at the times herein referred to and now is issued and outstanding. Said stock was owned by 20,843 stockholders residing in nearly every State of the United States, and also residing in Cuba, Greece, Switzerland, France, Monaco, Panama, Roumania, Jugo-Slavia and Italy.

3. On the 11th day of December, 1930, The Bank of United States could not with safety and expediency continue its business, and thereupon on said date, the plaintiff took possession of the business and property of said Bank, and has been and now is in possession and engaged in the liquidation thereof, which action was taken pursuant to Section 57 of an Act of the Legislature of the State of New York entitled "An Act in relation to banking corporations, and individuals, partnerships, unincorporated associations and corporations under the supervision of the banking department, constituting Chapter Two of the Consolidated Laws" (Laws 1914, Chap. 369) which provides as follows:

> "The superintendent may forthwith take possession of the business and property of any corporation to which this chapter is applicable, or any personal loan broker, or any private banker to which article four of this chapter is applicable whenever it shall appear that such corporation or banker:

1. Has violated its charter or any law;

2. Is conducting its business in an unauthorized or unsafe manner;

3. Is in an unsound or unsafe condition to transact its business;

4. Cannot with safety and expediency continue business;

5. Has an impairment of its capital;

6. Has suspended payment of its obligations;

7. Has neglected or refused to comply with the terms of a duly issued order of the superintendent;

8. Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the banking department;

9. Has refused to be examined upon oath regarding its affairs."

4. Prior to the 6th day of May, 1931, plaintiff determined to liquidate the affairs of The Bank of United States and thereafter pursuant to Section 72 of the said Banking Law of the State of New York and on or about said 6th day of May, 1931, plaintiff notified all creditors in writing, whose names appeared as creditors upon the books of such bank, to present their claims to him and make proper proof thereof on or before the 29th day of June, 1931, at various branch banks of The Bank of United States situate in the City of New York, the names and addresses of which were specified in such notice. Such notice designated June

29th, 1931, as the last day upon which claims could be presented and proved, and were enclosed in securely sealed envelopes, with postage prepaid, addressed to the creditors appearing on the books of such Bank, and were on or about May 6th, 1931, mailed to such creditors at the General Post Office in the Borough of Manhattan, City of New York. Thereafter such notice was inserted and published weekly, pursuant to the direction of the plaintiff, in thirty-nine newspapers designated by him and published in the City of New York, for more than three consecutive weeks and embracing a period of more than twenty-one days prior to the 29th day of June, 1931, the last day fixed in said notice for the presentation and making proof of claims as hereinbefore alleged.

5. Subsequent to the 29th day of June, 1931, and prior to July 1st, 1932, plaintiff, after an examination of its affairs, determined and ascertained that the reasonable value of the assets of The Bank of United States was not sufficient to pay its creditors in full, and that there was due and owing by such Bank to its depositors and creditors for moneys received and due and unpaid upon deposit accounts and other moneys owing, for value received, upon its contracts, debts and engagements a sum in excess of $30,000,000 over and above the reasonable value of such assets. Upon information and belief at the time of such determination such insufficiency of assets, as so fixed and ascertained, existed and has since continued.

The creditors of The Bank of United States aggregate over four hundred thousand and are scattered throughout the United States and foreign

countries and beyond the reach of process of the Courts of this State.

6. Article VIII, Section 7 of the Constitution of the State of New York, provides as follows:

> "The stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind."

7. Section 80 of the said banking law of the State of New York provides as follows:

> "Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists, and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in part. In case he determines to enforce such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid, to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address

appears in said ledger. Such demand shall state the total amount assessed by the superintendent against the stockholders and the equal and pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholder shall be required to pay such assessment to the superintendent. In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated."

8. Subsequent to such determination and prior to the 1st day of July, 1932, plaintiff decided that an assessment of $25.00 against each stockholder for each share of stock held by him was required

and necessary to provide moneys toward the payment and satisfaction of the sums due and owing to the creditors of such Bank.

9. Thereafter and on or about July 1st, 1932, plaintiff made demand in writing upon all the stockholders of The Bank of United States appearing upon its stock ledger for the payment on August 8th, 1932, of $25.00 for each share of stock appearing upon such stock ledger to be held by each stockholder. A form or sample copy of such demand, except as to the name and address of the stockholder and the total amount assessed against him, is hereto annexed, marked Schedule 1, and made a part hereof. Such demand stated the total amount assessed by the plaintiff against all of the stockholders, the equal and pro rata share assessed against each stockholder for each share of stock held by him, and the total amount of the assessment for all shares held by each such stockholder. Such demands were enclosed in securely sealed postpaid envelopes, addressed to each of such stockholders (including all named as defendants herein) at his, her or its last known place of residence appearing upon the stock ledger of the Bank, and where no address appeared thereon, the last known address of such stockholder. Such demands so sealed and addressed and postage paid thereon were on July 1st, 1932, mailed to each said stockholder at the General Post Office in the Borough of Manhattan, City of New York.

10. Section 120 of said banking law of the State of New York, provides as follows:

"The rights, powers and duties of stockholders of banks shall be as prescribed in the gen-

eral corporation law and the stock corporation law; but the individual liability of such stockholders for the contracts, debts, and engagement of the bank and the time within which an action may be instituted to enforce such liability shall be governed exclusively by the provisions of this section and section eghty of this chapter.

The stockholders of every bank shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. An action to enforce such liability must be brought within six years after the cause of action has accrued. The term 'stockholder' as used in this section shall apply to:

1. Such persons as appear by the books of the bank to be stockholders;

2. Every owner of stock, legal or equitable, although the same may be on such books in the name of another person, provided, however, that such term shall not apply to a person holding stock as collateral security for the payment of a debt and not appearing by the books of the bank to be the owner and holder thereof in his own right, or to a person holding stock in a bona fide fiduciary capacity and not appearing by the books of the bank to be the owner and holder thereof in his own right unless such fiduciary shall have invested the funds in his care in violation of law or of the terms under which said funds are held by him,

in which case he shall be personally liable as a stockholder.

No person who has in good faith, and without any intent to evade his liability as a stockholder, caused his stock to be transferred on the books of the bank when such bank is solvent to any resident of this State of full age previous to any default in the payment of any debt or liability of the bank, shall be subject to any personal liability for any contracts, debts or engagements of the Bank.

In case the Superintendent of Banks shall have taken possession of the property and business of the bank pursuant to section fifty-seven of this chapter or a permanent receiver of such bank shall have been appointed, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent or the receiver, as the case may be, unless the superintendent or receiver shall refuse to take such action or proceeding upon proper request in writing made by any creditor, or shall have failed or neglected to commence such action or proceeding within sixty days after the receipt of such request, and in that event such action or proceeding may be taken by any creditor of the bank. But no such action shall be brought by a creditor until a judgment shall have been recovered by him against the bank and an execution thereon shall have been returned unsatisfied in whole or in part."

11. On and prior to December 11, 1930, each of the defendants named in Schedule 2 hereto annexed appeared and now appears upon the stock ledger of

The Bank of United States as the owner and holder of the number of shares set opposite their respective names upon Schedule 2, which is annexed hereto and made a part hereof with the same force and effect as though repeated herein at length.

12. Each of the defendants has failed and neglected to pay the amount of the assessment so levied and imposed.

Plaintiff demands judgment against each of the defendants named in Schedule 2 hereto attached for the amount so specified opposite his, her or its respective name upon Schedule 2 with interest thereon from August 8, 1932, and costs of suit to be taxed.

SECOND COUNT.

1. Plaintiff repeats each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the First Count.

2. On and prior to December 11, 1930, each of the defendants referred to in Schedule 3, which is hereto annexed and made a part hereof with the same force and effect as though repeated herein at length, was the equitable owner and holder of the number of shares of stock of The Bank of United States set opposite their respective names in said schedule.

3. The defendant Benjamin Chodosh shown in said schedule on or about September 17, 1930, purchased five shares of said stock from Minnie Chodosh (now Minnie C. Kaplan), but did not have the said shares transferred to his own name on the books of the said Bank.

4. The defendant George Eisenberg purchased forty shares of stock of the said Bank from Benjamin Levy of 95 River Street, Hoboken, N. J., prior to December 11, 1930, but did not have said shares of stock transferred to his own name on the books of the said Bank.

5. The defendant Morris Krumholtz purchased fifteen shares of said stock in said Bank June 6, 1930, and had the same placed of record on the books of the Bank in the name of Irving Weinstein as nominee for the said Morris Krumholtz.

6. The defendant Stern Securities Corporation was in truth and in fact the owner of two hundred and sixty-seven shares of stock of the said Bank, which stood on the books of the Bank in the name of Eric Korman as owner, the said Korman being nominee for the said Stern Securities Corporation.

7. Each of the said defendants has failed and neglected to pay the amount of the assessment so levied and imposed, although duly notified thereof and payment demanded.

Plaintiff demands judgment against each of the said defendants set forth in Schedule 3 for the amounts so specified opposite his, her or its names upon said schedule, with interest thereon from August 8, 1932, and costs of suit to be taxed.

McDermott, Enright & Carpenter,
Attorneys for Plaintiff,
75 Montgomery Street,
Jersey City, N. J.

Schedule 1.

No.

July 6, 1932.

PLEASE TAKE NOTICE:

The last day to present claims having expired, I have determined from my examination of the affairs of The Bank of United States that the reasonable value of its assets is not sufficient to pay its creditors in full.

Pursuant to Section 80 of the Banking Law, I have assessed the sum of 25,250,000.00 Dollars against the stockholders of The Bank of United States, the pro rata share of said assessment against each stockholder on each share of stock being $25.00.

The total assessment against you as holder of .....shares of stock is $.....

I demand that you pay to me, on the 8th day of August, 1932, at 701 Eighth Avenue, Borough of Manhattan, City of New York, the total assessment made against you.

JOSEPH A. BRODERICK,
Superintendent of Banks of the State of New York in charge of The Bank of United States in liquidation.

Schedule 2.

INDIVIDUALS.

Name of Stockholder	*No. of Shares*	*Amount of Assessment*
ANDERSON, Charles P.	180	$4,500.
Applegate, Stephen R.	100	2,500.
Bailey, Hannah C.	2	50.
Benkert, Mrs. Maude A.	75	1,875.
Berger, Samuel	50	1,250.
Bierman, George	67	1,675.
Brick, Arthur R.	10	250.
Cooper, Herbert	60	1,500.
Davis, James Mercer	25	625.
D'Elia, Nicholas W.	95	2,375.
Diggles, Alfred R. M.	3	75.
Drewen, John	18	450.
Ewart, Howard	50	1,250.
Fahrenbruck, Frederick D.	2	50.
Fahrenbruck, Katherine L.	2	50.
Fine, M. James	10	250.
Geismar, Herman	50	1,250.
Goble, Paul S. (M. D.)	5	125.
Goodman, Henry J.	20	500.
Gorlin, Benjamin	20	500.
Gross, Emanuel	60	1,500.
Gruler, William J.	30	750.
Harris, Kate	19	475.
Heilbrun, Benjamin	10	250.
Herman, Morris	20	500.

Schedule 2.

Name of Stockholder	*No. of Shares*	*Amount of Assessment*
Kanter, Charles	10	250.
Kapralik, Mrs. Gertrude	30	Balance 730.
Kohn, Richard E.	75	1,875.
Korman, Eric	267	6,675.
Levy, Benjamin	40	1,000.
Lowy, Mrs. Camilla	5	125.
MacDougall, A. D.	47	1,175.
MacFarland, Clair	20	500.
Neuwirth, J. Paul	20	500.
O'Mealia, Harry E.	50	1,250.
O'Mealia, Harry F.	10	250.
Pedrick, Hamilton G.	60	1,500.
Rosner, Mary	56	1,400.
Schwarz, Andrew	100	2,500.
Staples, Raymond C.	5	125.
Steinberger, Alex	5	125.
Stone, Essie R.	27	675.
Sutton, Frank W., Jr.	100	2,500.
Sylvester, Howard C.	80	2,000.
Van Nostrand, Mrs. Mary A.	30	750.
Waldron, Dr. Ralph	150	3,750.
Warner, Charles N.	100	2,500.
Wells, William J.	12	300.
Woodward, Zulena Cook	18	450.

Schedule 2.

Joint Owners.

Name of Stockholder	*No. of Shares*	*Amount of Assessment*
George W. Bauer & George J. Alles	100	2,500.

Corporations.

Arney-Sutton-Gruler Co.	10	250.
The Bobdan Co.	388	9,700.
The Farg Co., Inc.	100	2,500.
The Mart, Inc.	50	1,250.
Northern N. J. Investment Co.	20	500.
Omaco Securities Co.	20	500.
O'Mealia Outdoor Advertising Co.	10	250.
Sutton Brothers Co.	10	250.
Toms River Amusement Co.	50	1,250.

NOTE:—Schedule 2 annexed to the original complaint includes the names, number of shares and amount of assessment of all the 557 defendants. To reduce the record on appeal only the defendants included in this appeal have been set forth in the foregoing schedule.

Notice of Motion by Defendant, The Bobdon Company, to Strike Out Complaint.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff, vs. BENJAMIN ABRAMS, *et als.*, Defendants.	Action at Law.

TO MCDERMOTT, ENRIGHT & CARPENTER, Esqs., Attorneys for Plaintiff:

PLEASE TAKE NOTICE, that on Saturday, the 9th day of December, 1933, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Essex County Court House in the City of Newark, County of Essex and State of New Jersey, on behalf of the defendant, The Bobdon Company, we shall apply to the Honorable Charles W. Parker, Supreme Court Justice, to strike the plaintiff's complaint herein on the following grounds:

1. That the complaint does not set forth facts sufficient to constitute a cause of action against the said defendant.

2. That the alleged liability of the said defendant set forth in the complaint filed herein is not enforceable in the courts of this State.

Notice of Motion by Defendant, The Bobdon Company, to Strike Out Complaint.

3. That the within action cannot be maintained in this Court, in that it is contrary to and violative of the provisions of Section 94 (b) of the Corporation Act (2 Comp. Stats. p. 1656, Sec. 94 (b), which prohibits the maintenance of an action in a court of law of this State for the enforcement of any statutory personal liability of a stockholder of any foreign corporation.

4. That the complaint does not allege facts sufficient to constitute a cause of action against the defendant under the laws of the State of New York.

HARRISON & ROCHE,
Attorneys of Defendant,
The Bobdon Company.

CHAMBERLIN, KAFER, WILDS & JUBE, Esqs.,
Of Counsel,
2 Rector, Street,
New York, N. Y.

Notice of Motion to Strike Out Complaint.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff, vs. BENJAMIN ABRAMS, *et als.*, Defendants.	Action at Law.

To McDERMOTT, ENRIGHT & CARPENTER, Esqs., Attorneys of Plaintiff:

TAKE NOTICE, that on Saturday, the 9th day of December, 1933, at 9:30 o'clock in the forenoon, at the Essex County Court House, in the City of Newark, in the County of Essex in this state, on behalf of the defendants, Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine and Kate Harris, we shall apply to the Honorable Charles W. Parker, Supreme Court Justice, to strike out the plaintiff's complaint herein on the following grounds:

1. That the complaint does not set forth any cause of action against the said defendants or any of them.

2. That the alleged liability of the said defendants, set forth in the complaint, is not enforceable in the courts of this state.

Notice of Motion to Strike Out Complaint.

3. That the laws of this state prohibit the maintenance of this action in this court.

4. That the alleged causes of action set forth in the complaint, as against each of said defendants is, as to each of said defendants several, separate and distinct, and that each of said defendants is misjoined as a defendant in this action with each and all of the other defendants.

5. That the complaint does not set forth any cause of action against said defendants, or any of them, under the laws of the State of New York.

6. That the complaint does not set forth any cause of action which is cognizable in a court of law.

BILDER, BILDER & KAUFMAN,
Attorneys for above mentioned defendants.

Dated, December 4, 1933.

NOTE:—Notices of similar content were served by attorneys for the remaining appellees.

Opinion.
(Filed Jan. 30, 1934)

NEW JERSEY SUPREME COURT.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York,
Plaintiff,

vs.

BENJAMIN ABRAMS, *et als.*,
Defendants.

On motions by various defendants, to strike out the complaint as to them respectively.

Before Justice Parker, at Chambers.

For the plaintiff, McDermott, Enright & Carpenter.

(Arthur Ofner, of the New York bar, on the brief.)

For the various moving defendants, Walter J. Bilder: Eichmann & Seiden: Howard Ewart: Gross & Gross: Harrison & Roche: Lichtenstein, Schwartz & Friedenberg.

PARKER, J. One of the grounds originally urged was misjoinder of parties, the facts being that several hundred defendants have been joined in what is nominally one action, but several hundred actions combined for convenience, as stockholders of the

defunct Bank of the United States, and are severally charged with individual liability to the extent of the par value of the shares held by them respectively.

I disposed of this objection in another case a few weeks ago. See *Beatty* v. *Lincoln Bus Co.,* memorandum filed December 11, 1933. Up to this writing that opinion does not seem to have been reported.

The other principal ground is that by the statute of 1897, (Section 94 b of the Corporation Act as reprinted in Compiled Statutes,) it is enacted that "no action or proceeding shall be maintained in any court of law of this state against any stockholder, * * * of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, * * * for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, * * * if such statutory personal liability be created by or arose from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in the nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be parties." (C. S. 1656).

The proposition advanced by the defendants is that this statute, which it is admitted was in existence in New Jersey before the organization of the Bank of the United States, bars any such action as the present one, which is by a quasi receiver not

appointed by any court but ex officio pursuant to statute, and for the benefit of all the creditors (and principally the depositors) of the defunct Bank of the United States.

One answer made to this by plaintiff is that the case is not within the language of the statute. Another answer made is that if it is within the language of the statute, there is an impairment of the obligation of a contract. A third answer made seems to be that to deny the right of action in this case would be in defiance of the full faith and credit clause of the United States constitution.

An abstract of the complaint is perhaps necessary. It is in two counts but they are both alike, except that the second count merely charges certain "equitable" owners of shares with the alleged responsibility for one hundred per cent. assessment; whereas the first count relates to the "legal" owners who are in far greater number.

The averments are that plaintiff is and was on December 11, 1930 the Superintendent of Banks of the State of New York; that the Bank of the United States is a corporation organized under the banking law of that State and doing business in the City of New York; that its capital amounted to $25,000,000, and the stock was owned by nearly 21,000 stockholders all over the United States and in foreign countries; that on December 11, 1930, by virtue of the banking law and in view of the financial condition of the bank, the plaintiff as New York Superintendent of Banks took possession of its business and property and is engaged in liquidating the institution pursuant to Section 57 of the New York banking law of 1914. We need not go into details as to the ground assigned for his action as no question is now raised on that score.

Paragraphs 4 and 5 of the complaint go on to say that on May 6, 1931, pursuant to Section 72, plaintiff gave notice to the creditors to present their claims, which notices were mailed and advertised and that the time for presentation expired on June 29th, whereupon the plaintiff determined that the assessments were not sufficient to pay the creditors in full and that there was due by the Bank to Depositors and creditors a sum in excess of $30,000,000 over the reasonable value of assets, which deficiency still exists. That amount is in excess of the par value of all the stock.

Paragraph 6 of the complaint quotes the statute of New York which provides that "the stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind."

Paragraph 7 quotes Section 80 of the same Banking law to the effect that whenever a liability as above exists, and the superintendent has taken possession and has notified creditors to present their claims, and the time to present claims has expired, and he has determined from his examination that the reasonable value of the assets is not sufficient to pay in full, he may enforce the individual liability of such stockholders in whole or in part. Then follow a number of provisions about making demand on the stockholders, and what the demand shall contain, and how it shall be made, and what date shall be fixed, and "in case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either

severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated."

The complaint further states that plaintiff decided that an assessment of $25 a share was required and necessary; and that on or about July 1st, 1932, he made demand on the various stockholders for the payment of $25 for each share of stock appearing upon the ledger to be held by such stockholder. Said demand stated the total amount assessed by plaintiff against all of the stockholders, the equal and pro rata share assessed against each stockholder for each share of stock held by him, and the total amount of the assessment for all shares held by each stockholder.

It then quotes Section 120 of the banking law which, so far as relevant, is to the effect that the individual liability of stockholders is to be governed exclusively by Sections 120 and 80, and that the stockholders shall be individually responsible to the extent of their stock at par in addition to the amount invested by them, and that an action to enforce such liability must be brought within six years after the cause of action has accrued. The section then undertakes to define and describe who the stockholders are (we need not consider that now) and then provides as follows:

"In case the Superintendent of Banks shall have taken possession of the property and business of the bank pursuant to section fifty-seven of this chapter or a permanent receiver of such bank shall have been appointed, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent of the receiver, as the case may be, unless the superintendent or receiver shall refuse to take such action or proceeding upon proper request in writing made by any creditor, or shall have failed or neglected to commence such action or proceeding within sixty days after the receipt of such request, and in that event such action or proceeding may be taken by any creditor of the bank. But no such action shall be brought by a creditor until a judgment shall have been recovered by him against the bank and an execution thereon shall have been returned unsatisfied in whole or in part."

The final averment in the complaint is that each of the defendants named in Schedule 2 annexed to the complaint appearing as stockholders on the books of the bank to the number of shares set opposite his name, has neglected and failed to pay the assessment so imposed.

The briefs submitted in this matter are very voluminous and have come from a number of different counsel, but I think they do not make any substantial points beyond those that have been mentioned above. The case is one of great importance, and I should like to devote much more time to it than is practicable in view of the pressure of other work; but, so far as I can see, the decision of these points seems reasonably plain.

It is to be observed that the present action is not one for the collection of unpaid subscriptions to stock, but for the collection of an assessment up to the original par value of the stock. Consequently it differs from the recent case of *Graham* v. *Fleissner,* 107 N. J. Law, 278 in which Section 94 b was considered and held inapplicable to a case in which the defendant stockholder had secured his stock as an original issue at some fraction of its par value and was held liable for the difference. It was objected in that case that Section 94 b was applicable, but the Court of Errors and Appeals expressly held (p. 280) that the phrase "statutory personal liability" in the statute "means personal liability imposed by statute extra the common law liability to make up a deficit of par value, i.e., the so-called 'trust fund' theory of capital stock," and the Court held that even in the case of "trust fund" liability our courts would not cast up the assets and liabilities of a foreign corporation, but that that must be done at the domicile of said corporation or, as in the particular case, in bankruptcy.

As has been said, the present case is fundamentally different in that the attempt is to enforce by a suit at law against each individual stockholder a statutory personal liability of one hundred per cent. of his claim after an ascertainment of assets, not by any court of law or equity, but by a State official not endowed with any judicial power so far as appears. That official comes over into this State and endeavors by a suit at law (or rather several hundred suits at law) to recover the several amounts that he has himself assessed against the shareholders respectively. This seems to me to fly directly in the face of our statute. As Banking Commissioner who has taken possession and is ad-

ministering the affairs of the defunct corporation as a quasi receiver, the plaintiff is avowedly acting in the interest of the creditors and for no other purpose. He is attempting to recover from the stockholders severally, in several hundred separate suits combined merely for convenience, the amount of their statutory liability up to the statutory limit, for the purpose of paying those creditors. Whether it is one creditor or two or three or a dozen or several thousand appears to me to make no difference in the situation. This suit is not one suit, but a multiple suit, at law, clearly on behalf of creditors of a corporation, and that a foreign one, to enforce in each case a statutory personal liability of a stockholder. This exactly what the statute forbids.

Secondly, that to refuse to entertain this action would be to impair the obligation of a contract.

What I understand to be the contract claimed to exist in this case is the contract between the State of New York and its own corporation and between that corporation and its stockholders which, of course, is dependent upon the New York statute. It seems to be a sufficient answer to say, as has already been said, that our statute was in force long before the Bank of the United States was organized and so far as relates to any rights attempted to be conferred by the New York statute in permitting recovery in other States, this State is in no way bound thereby and perhaps would not be bound even although the incorporation of this bank antedated our statute. However, it is unnecessary to go so far as this. I think the point regarding impairment of contract is without substance.

Finally, that to deny the right of this Commissioner to sue at law in this State, as he is suing, is in definance of the full faith and credit clause of the constitution.

Opinion.

Here again I think the point is without substance. It is true that it has been held in one or more cases in the Supreme Court of the United States, as for example in Converse v. Hamilton, 224 U. S. 243, that where an assessment of this kind has been definitely adjudicated by the courts of the home State and turned in effect into a judgment against the various parties concerned, that adjudication is enforcible in a sister State by virtue of the federal constitution although the laws of the latter state may be to the contrary. But here we have no court adjudication of any kind. The Commissioner, pursuant to a statute, has taken charge and has determined as a Commissioner that the United States Bank is insolvent and that the stockholders ought to be assessed to make up the deficit. That no doubt he can enforce in New York State under the statute of that State. But when he comes over here he is met by the express prohibition of our statute against any suit at law and by the requirement that the suit shall be in the nature of an equitable accounting, to which all stockholders shall be parties. In the proceeding before me the suits are several, and only one defendant is a party in each, in theory of law.

As a matter of comity it is well known that State courts often lend their aid to the enforcement of rights which arise in other States; and in many cases they are bound to do so. But in a matter of this kind it was expressly laid down by the Supreme Court of the United States in Finney v. Guy, 189 U. S. 335, that "whether a state court should permit an action to be maintained therein on the principle of comity between the states is a question exclusively for the courts of that state to decide," to which it may here be added that the

legislature in the present instance undertook to decide that question itself.

My conclusion is that the present complaint cannot be supported and must be struck out as stating causes of action which by statute are not maintainable at law in this State. Whether a judgment for the defendant should be directed thereon is a matter on which counsel are probably entitled to be heard.

As I view the matter now, it would seem that there should be a judgment for the moving defendants subject of course to appeal, and without prejudice to the filing of a bill in equity on the lines laid down in section 94-b of the Corporation Act. The matter might be transferred to the Court of Chancery, but the complaint would have to be reframed. I think in any event.

I will hear counsel on the first convenient motion day as to settlement of these details.

Order.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff, vs. BENJAMIN ABRAMS, *et als.*, Defendants.	Action at Law.

Application having been made by the defendants hereinafter named on due notice to plaintiff for an order striking out plaintiff's complaint herein on the grounds, among others, that the laws of this state prohibit the maintenance of this action in this court and that the complaint does not set forth any cause of action which is cognizable in a court of law of this state, and counsel for the respective parties having presented oral argument and filed briefs, and this court having considered same, and good and sufficient reason appearing herefor, and it appearing that all of the above mentioned attorneys for the above said defendants have consented to the form of this order; it is, on this tenth day of February, A. D. 1934, on motion of Bilder, Bilder & Kaufman, attorneys of defendants Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine, and Kate Harris; and Otto Cooper, attorney of defendant Morris Hermann; and Abe J. David, attorney of defendant Howard C. Sylvester; and

James Mercer Davis, attorney of defendants James Mercer Davis, Hamilton G. Pedrick and Clair MacFarland; and Eichmann & Seiden, attorneys for defendants Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., a corp., Alex Steinberger, A. D. MacDougall and Gertrude Kapralik, and Howard Ewart, attorney of defendants Raymond C. Staples, William J. Gruler, Mrs. Maud A. Benkart, Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Howard Ewart, Mrs. Mary A. Van Nostrand; and Gross & Gross, attorneys for defendant Emanuel Gross; and Norman W. Harker, attorney for defendants Frederick D. Fahrenbruck and Katherine L. Fahrenbruck; and Harrison & Roche, attorneys for defendant The Bobdan Co.; and Sylvan Heilbrun, attorney for defendant Benjamin Heilbrun; and Lichtenstein, Schwartz & Friedenberg, attorneys for defendants The Farg Co. Inc., and Herman Geismar; and Aloysius McMahon, attorney for defendants Harry F. O'Mealia, Harry E. O'Mealia, O'Mealia Outdoor Advertising Co. and Omaco Securities Company; and Perkins, Drewen and Nugent, attorneys for defendants Nicholas W. D'Elia, Eric Korman and John Drewen; and Scammel, Knight & Reese, attorneys for defendant Arthur R. Brick; and Ben S. Shipman, attorney for defendant The Mart Inc.; Aquila N. Venino, attorney for Herbert Cooper, and Whittemore & McLean, attorneys for defendants George J. Alles and George W. Bauer,

Order.

ORDERED, that plaintiff's complaint be and the same hereby is struck out as to the above named defendants, and it appearing that no application is made by plaintiff to amend said complaint, it is further

ORDERED, that judgment final be entered in favor of each of said defendants and against said plaintiff, with costs to be taxed under the direction of this Court.

Let this rule be entered.

CHARLES W. PARKER,
Supreme Court Justice.

Judgment.

NEW JERSEY SUPREME COURT.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff, vs. BENJAMIN ABRAMS, *et als.*, Defendants.	Action at Law.

Judgment Final for Defendants on striking out Complaint.

Bilder, Bilder & Kaufman, attys. for defts. Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine & Kate Harris.

Otto Cooper, Atty. for deft. Morris Hermann.

Abe J. David, Atty. for deft. Howard C. Sylvester.

James Mercer Davis, Atty. for defts. James Mercer Davis, Hamilton G. Pedrick and Clair MacFarland.

Eichmann & Seiden, Attys. for defts. Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., a corp., Alex Steinberger, A. D. MacDougall and Gertrude Kapralik.

Howard Ewart, Atty. of defts. Raymond C. Stables, William J. Gruler, Mrs. Maude A. Benkart (or Benkert), Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Howard Ewart, Mrs. Mary A. Van Nostrand.

Gross & Gross, Attys. for deft. Emanuel Gross.

Norman W. Harker, Atty. for defts. Frederick D. Fahrenbruck & Katherine L. Fahrenbruck.

Harrison & Roche, Attys. for deft. The Bobdan Co.

Sylvan Heilbrun, Atty. for deft. Benjamin Heilbrun.

Lichtenstein, Schwartz & Friedenberg, Attys. for defts. The Farg Co., Inc. & Herman Geismar.

Aloysius McMahon, Atty. for defts. Harry F. O'Mealia, Harry E. O'Mealia, O'Mealia

Outdoor Advertising Co. & Omaco Securities Company.

Perkins, Drewen & Nugent, Attys. for defts. Nicholas W. D'Elia, Eric Korman and John Drewen.

Scammell, Knight & Reese, Attys. for deft. Arthur R. Brick.

Ben S. Shipman, Atty. for deft. The Mart, Inc.

Aquila N. Venino, Atty. for deft. Herbert Cooper.

Whittemore & McLean, Attys. for defts. George J. Alles and George W. Bauer.

Judgment entered this fourteenth day of February, A. D. nineteen hundred and thirty-four against the plaintiff and in favor of defendants Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine, Kate Harris, Morris Hermann, Howard C. Sylvester, James Mercer Davis, Hamilton G. Pedrick, Clair MacFarland, Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., a corp., Alex Steinberger, A. D. MacDougall, Gertrude Kapralik, Raymond C. Staples, William J. Gruler, Mrs. Maude A. Benkart (or Benkert) Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Howard Ewart, Mrs. Mary A. Van Nostrand, Emanuel Gross, Frederick D. Fahrenbruck, Katherine L. Fahrenbruck, The Bobdan Co., Benjamin Heilbrun, The Farg Co., Inc., Herman Geismar, Harry F. O'Mealia, Harry E. O'Mealia, O'Mealia

Outdoor Advertising Co., Omaco Securities Company, Nicholas W. D'Elia, Eric Korman, John Drewen, Arthur R. Bricks, The Mart, Inc., Herbert Cooper, George J. Alles and George W. Bauer for the sum of

costs.

THOMAS J. BROGAN,
Chief Justice.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the Judgment entered in above-stated cause, which said Judgment is recorded in this office in Vol. 49 of Judgments, page 444.

Notice of Appeal and Grounds of Appeal.

(Filed March 31, 1934)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff-Appellant, vs. BENJAMIN ABRAMS, *et als.*, Defendants-Appellees.	Action at Law.

To:

Messrs. Bilder, Bilder & Kaufman, attorneys for defendants Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine, and Kate Harris;

Otto Cooper, Esquire, attorney for defendant Morris Herman;

Abe J. David, Esquire, attorney for defendant Howard C. Sylvester;

James Mercer Davis, Esquire, attorney for defendants James Mercer Davis, Hamilton G. Pedrick, and Clair MacFarland;

Messrs. Eichmann & Seiden; attorneys for defendants Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., Alex Steinberger, A. D. MacDougall, and Gertrude Kapralik;

Notice of Appeal and Grounds of Appeal.

Howard Ewart, Esquire, attorney for defendants Raymond C. Staples, William J. Gruler, Mrs. Maude A. Benkart, Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Howard Ewart, Mrs. Mary A. VanNostrand;

Messrs. Gross & Gross, attorneys for defendant Emanuel Gross;

Norman W. Harker, Esquire, attorney for defendants Frederick D. Fahrenbruck, and Katherine L. Fahrenbruck;

Messrs. Harrison & Roche, attorneys for defendant The Bobdan Co.;

Sylvan Heilbrun, Esquire, attorney for defendant Benjamin Heilbrun;

Messrs. Lichtenstein, Schwartz & Friedenberg, attorneys for defendants The Farg Co., Inc., and Herman Geismar;

Aloysius McMahon, Esquire, attorney for defendants Harry F. O'Mealia, Harry E. O'Mealia, O'Melia Outdoor Advertising Co. and Omaco Securities Company;

Messrs. Perkins, Drewen and Nugent, attorneys for defendants Nicholas W. D'Elia, Eric Korman and John Drewen;

Notice of Appeal and Grounds of Appeal.

Messrs. Scammell, Knight & Reese, attorneys for defendant Arthur R. Brick; Ben S. Shipman, Esquire, attorney for defendant The Mart, Inc.;

Aquila N. Venino, Esquire, attorney for defendant Herbert Cooper;

Messrs. Whittemore & McLean, attorneys for defendants George J. Alles and George W. Bauer.

SIRS:

TAKE NOTICE that the plaintiff hereby appeals to the New Jersey Court of Errors and Appeals from the whole and every part of the order made in the above entitled action dated February 10, 1934, striking out plaintiff's complaint as to the defendants Mary Rosner, Essie R. Stone, Camilla Lowy, Ralph Waldron, J. Paul Neuwirth, Richard E. Kohn, George Bierman, Samuel Berger, William J. Wells, M. James Fine, Kate Harris, Morris Herman, Howard C. Sylvester, James Mercer Davis, Hamilton G. Pedrick, Clair MacFarland, Benjamin Gorlin, Charles Kanter, Henry J. Goodman, Benjamin Levy, Northern New Jersey Investment Co., Alex Steinberger, A. D. MacDougall, Gertrude Kapralik, Raymond C. Staples, William J. Gruler, Mrs. Maude A. Benkart (or Benkert), Zulena Cook Woodward, Hannah C. Bailey, Charles N. Warner, Alfred R. M. Diggles, Charles P. Anderson, Andrew Schwarz, Frank W. Sutton, Jr., Toms River Amusement Co., Arney-Sutton-Gruler Co., Sutton Brothers Co., Stephen R. Applegate, Paul S. Goble, Howard Ewart, Mrs. Mary A. Van Nos-

trand, Emanuel Gross, Frederick D. Fahrenbruck, Katherine L. Fahrenbruck, The Bobdan Co., Benjamin Heilbrun, The Farg Co., Inc., Herman Geismar, Harry F. O'Mealia, Harry E. O'Mealia, O'Mealia Outdoor Advertising Co., Omaco Securities Company, Nicholas W. D'Elia, Eric Korman, John Drewen, Arthur R. Brick, The Mart, Inc., Herbert Cooper, George J. Alles and George W. Bauer, as well as from the whole and every part of the final judgments entered thereon in the above entitled action on the ~~8th day of March, 1934~~, in 18th day of Fe favor of each of the several defendants last aforesaid.

The following are plaintiff's grounds of appeal:

1. Said order and judgments are based upon an erroneous finding by the Court that the laws of this State prohibit the maintenance in this Court of the action set forth in the complaint.

2. Said order and judgments are based upon the erroneous finding that the complaint does not set forth any cause of action which is cognizable in a court of law of this State.

3. Said order and judgments are based upon an erroneous finding by the Court that the action set forth in the complaint is an action brought by or on behalf of a creditor of a foreign corporation against a stockholder thereof, to enforce a statutory personal liability of such stockholder for or upon a debt, default or obligation of such corporation arising from the statutes or laws of another State of the United States, within the intent and meaning of Section 94-B of the Corporation Act of the State of New Jersey.

4. Said order and judgments do not give full faith and credit to the public acts, records and judicial proceedings of the State of New York within the intent and meaning of Article IV, Section 1, of the Constitution of the United States, in that the complaint in above action sets forth as the basis of relief a public act and a judicial proceeding of the State of New York within the intent and meaning of the Constitution of the United States. Said statute of the State of New Jersey, if construed as prohibitive of said action, is void under the Constitution of the United States.

5. Said order and judgments, in effect, deny a remedy in the courts of this State upon a valid contract entered into within the jurisdiction and pursuant to the laws of a sister State, and thereby abridge the privileges and immunities of citizens of the United States and deny to the plaintiff the equal protection of the laws, in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof.

6. Said statute of the State of New Jersey, as construed and applied by said order and judgments, is in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof, and therefore null and void.

7. Said statute, as construed and applied by said order and judgments, in that it closes the courts of this State to plaintiff in enforcement of lawful contract rights except under impossible conditions, deprives plaintiff of its property in said contracts without due process of law, in violation of

the Constitution of the United States and particularly Article V and the Fourteenth Amendment thereof. Said statute is void and said order and judgments based thereon erroneous.

8. The complaint sets forth a cause of action depending upon defendants' contracts as stockholders of The Bank of United States, to pay assessments as and when determined pursuant to the laws of the State of New York, and such contractual obligations are not within the prohibition of said statute of New Jersey relied on by the Court in making said order and judgments.

9. Said order and judgments, in that they deny to the plaintiff a remedy upon lawful causes of action accruing to him under the laws of a sister State, as representative of a corporation of said State, deny to the plaintiff and to said corporation the privileges and immunities of a citizen of the State of New York secured by Article IV, Section 2 of the Constitution of the United States, and said order and judgments are, therefore, erroneous.

10. Said order and judgments, in that they are general judgments against the plaintiff and in favor of the named defendants, and, therefore, a bar to any other action in any other court of this or any other State, are erroneous, since the statute relied upon does not purport to go further than a prohibition against an action at law in the courts of this State, and does not justify a judgment concluding the plaintiff upon the merits of the cause of action.

11. Said order and judgments in favor of the aforesaid defendants and against the plaintiff are

erroneous in that plaintiff's complaint sets forth a valid cause of action upon which plaintiff was entitled to judgment against said defendants or to a trial in support of the allegations thereof.

12. Said order and judgments are in various other respects erroneous, illegal and void.

McDermott, Enright & Carpenter,
Attorneys for Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, Plaintiff-Appellant, *vs.* BENJAMIN ABRAMS, *et als.*, Defendants-Appellees.	Action at Law. On Appeal from Supreme Court.

BRIEF OF McDERMOTT, ENRIGHT & CARPENTER FOR APPELLANT.

This appeal is from a judgment of the Supreme Court entered February 14, 1933, in favor of the defendants-appellees.

Plaintiff brought an action in the Supreme Court against five hundred and fifty-seven defendants resident in this State to recover the double liability assessed against them, under the New York laws, as stockholders of Bank of United States.

The defendants-appellees move to strike out the complaint on various grounds that are specified in the motions. Specimen copies of the notices of motion are printed on pages 19 to 23, inclusive.

Justice Parker held that the laws of this State prohibit the maintenance of the action in the Supreme Court, and that the complaint does not set forth a cause of action cognizable in the Courts of Law of this State; ordered the complaint struck out and that final judgment be entered against the plaintiff (see order, pp. 33 to 35,

inclusive). The judgment appears (pp. 36 to 39, inclusive).

Brief Statement of Facts.

The complaint, which was struck out, alleges that plaintiff was the Superintendent of Banks of the State of New York; that The Bank of United States is a moneyed corporation, organized under the Banking Law of the State of New York, and maintained its office and principal place of business in the Borough of Manhattan.

On December 11, 1930, the capital of The Bank of United States amounted to $25,250,000, represented by 1,010,000 shares of $25.00 per share, all of which was issued and outstanding. The stock was owned by 20,843 stockholders residing in nearly every State of the United States, Cuba, Greece, Switzerland, France, Monaco, Panama, Roumania, Jugo-Slavia and Italy (paragraph 2, p. 5).

On December 11, 1930, The Bank of United States could not with safety and expediency continue its business, and thereupon the plaintiff took possession of its business and property, and has been and is in possession and engaged in the liquidation thereof pursuant to Section 57 of the Banking Law of the State of New York, which is quoted in the complaint (paragraph 3, p. 5).

Prior to May 6, 1931, plaintiff determined to liquidate the affairs of The Bank of United States and notified all creditors in writing, whose names appeared as creditors upon the books of the Bank, to present their claims to him, &c. Notice was inserted and published in thirty-nine newspapers for more than three consecutive weeks, &c. (paragraph 4, p. 6).

Subsequent to June 29, 1931, and prior to July 1, 1932, plaintiff, after an examination of its

affairs, determined and ascertained that the reasonable value of the assets of The Bank of United States was not sufficient to pay its creditors in full, and that there was due and owing by such Bank to its depositors and creditors for moneys received and due and unpaid upon deposit accounts and other moneys owing, for value received, upon its contracts, debts and engagements a sum in excess of $30,000,00, *over and above the reasonable value of such assets.* The creditors of The Bank of United States aggregate over four hundred thousand, and are scattered throughout the United States and foreign countries and beyond the reach of process of the Courts of this State (paragraph 5, p. 7).

Article VIII, Section 7, of the Constitution of the State of New York, provides as follows:

> "The stockholders of every corporation and joint-stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind" (paragraph 6, p. 8).

Section 80 of the Banking Law of the State of New York provides as follows:

> "Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists, and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in part. In case he determines to

enforce such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid, to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address appears in said ledger. Such demand shall state the total amount assessed by the superintendent against the stockholders and the equal and pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholder shall be required to pay such assessment to the superintendent. In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated'' (paragraph 7, pp. 8-9).

Subsequent to such determination and prior to July 1, 1932, plaintiff decided that an assessment of $25.00 against each stockholder for each share of stock held by him was required and necessary

to provide moneys toward the payment and satisfaction of the sums due and owing to the creditors of said Bank. It is further affirmatively alleged that such deficiency then existed and has since continued (paragraph 8, pp. 9-10).

Thereafter, and on or about July 1, 1932, plaintiff made demand in writing upon all the stockholders of The Bank of United States appearing upon its stock ledger for the payment on August 8, 1932, of $25.00 for each share of stock appearing upon such stock ledger to be held by each stockholder. A sample copy of such demand was annexed to the complaint. Such demand stated the total amount assessed by the plaintiff against all of the stockholders, the equal and pro rata share assessed against each stockholder for each share of stock held by him, and the total amount of the assessment for all shares held by each such stockholder. Such demands were duly mailed on July 1, 1932 (paragraph 9, p. 10).

Section 120 of the Banking Law of the State of New York provides as follows:

> "The rights, powers and duties of stockholders of banks shall be as prescribed in the general corporation law and the stock corporation law; but the individual liability of such stockholders for the contracts, debts, and engagements of the bank and the time within which an action may be instituted to enforce such liability shall be governed exclusively by the provisions of this section and section eighty of this chapter.
>
> The stockholders of every bank shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. An action to enforce such liability must be brought within six years after the cause of action has

accrued. The term 'stockholder' as used in this section shall apply to:

1. Such persons as appear by the books of the bank to be stockholders;

2. Every owner of stock, legal or equitable, although the same may be on such books in the name of another person, provided, however, that such term shall not apply to a person holding stock as collateral security for the payment of a debt and not appearing by the books of the bank to be the owner and holder thereof in his own right, or to a person holding stock in a bona fide fiduciary capacity and not appearing by the books of the bank to be the owner and holder thereof in his own right unless such fiduciary shall have invested the funds in his care in violation of law or of the terms under which said funds are held by him, in which case he shall be personally liable as a stockholder.

No person who has in good faith, and without any intent to evade his liability as a stockholder, caused his stock to be transferred on the books of the bank when such bank is solvent to any resident of this State of full age previous to any default in the payment of any debt or liability of the bank, shall be subject to any personal liability for any contracts, debts or engagements of the Bank.

In case the Superintendent of Banks shall have taken possession of the property and business of the bank pursuant to section fifty-seven of this chapter or a permanent receiver of such bank shall have been appointed, all actions or proceedings to enforce the liability of stockholders under this section shall be taken and prosecuted only in the name of the superintendent or the receiver, as the case may be, unless the superintendent or receiver shall refuse to take such action or proceeding upon proper request in writing made by any creditor, or shall have failed or neglected to commence such action or proceeding within sixty days after the receipt of such request, and in that event such action or proceeding

> may be taken by any creditor of the bank. But no such action shall be brought by a creditor until a judgment shall have been recovered by him against the bank and an execution thereon shall have been returned unsatisfied in whole or in part'' (paragraph 10, pp. 10, 11 and 12).

On and prior to December 11, 1930, each of the defendants-appellees named in Schedule 2, annexed to the complaint, appeared and now appears upon the stock ledger of The Bank of United States as the owner and holder of the number of shares set opposite their respective names upon Schedule 2 (paragraph 11, p. 12).

Each of the defendants has failed and neglected to pay the amount of the assessment so levied and imposed. Plaintiff demands judgment, &c. (paragraph 13, p. 13).

For the sake of brevity, we will not repeat the allegations of the Second Count of the complaint, which relate to claims against certain equitable owners, for the reason that the issues can be determined under the facts as hereinabove stated.

Grounds of Appeal.

Appellant alleges the following grounds of appeal:

1. The order and judgments are based upon an erroneous finding by the Court that the laws of this State prohibit the maintenance in the Supreme Court of the action set forth in the complaint.

2. Said order and judgments are based upon the erroneous finding that the complaint does not set forth any cause of action which is cognizable in a court of law of this State.

3. Said order and judgments are based upon an erroneous finding by the Court that the action

set forth in the complaint is an action brought by or on behalf of a creditor of a foreign corporation against a stockholder thereof, to enforce a statutory personal liability of such stockholder for or upon a debt, default or obligation of such corporation arising from the statutes or laws of another State of the United States, within the intent and meaning of Section 94-B of the Corporation Act of the State of New Jersey.

4. Said order and judgments do not give full faith and credit to the public acts, records and judicial proceedings of the State of New York within the intent and meaning of Article IV, Section 1, of the Constitution of the United States, in that the complaint in above action sets forth as the basis of relief a public act and a judicial proceeding of the State of New York within the intent and meaning of the Constitution of the United States. Said statute of the State of New Jersey, if construed as prohibitive of said action, is void under the Constitution of the United States.

5. Said order and judgments, in effect, deny a remedy in the courts of this State upon a valid contract entered into within the jurisdiction and pursuant to the laws of a sister State, and thereby abridge the privileges and immunities of citizens of the United States and deny to the plaintiff the equal protection of the laws, in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof.

6. Said statute of the State of New Jersey, as construed and applied by said order and judgments, is in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof, and therefore null and void.

7. Said statute, as construed and applied by said order and judgments, in that it closes the

courts of this State to plaintiff in enforcement of lawful contract rights except under impossible conditions, deprives plaintiff of its property in said contracts without due process of law, in violation of the Constitution of the United States and particularly Article V and the Fourteenth Amendment thereof. Said statute is void and said order and judgments based thereon erroneous.

8. The complaint sets forth a cause of action depending upon defendants' contracts as stockholders of The Bank of United States, to pay assessments as and when determined pursuant to the laws of the State of New York, and such contractual obligations are not within the prohibition of said statute of New Jersey relied on by the Court in making said order and judgments.

9. Said order and judgments, in that they deny to the plaintiff a remedy upon lawful causes of action accruing to him under the laws of a sister State, as representative of a corporation of said State, deny to the plaintiff and to said corporation the privileges and immunities of a citizen of the State of New York secured by Article IV, Section 2, of the Constitution of the United States, and said order and judgments are, therefore, erroneous.

10. Said order and judgments, in that they are general judgments against the plaintiff and in favor of the named defendants, and, therefore, a bar to any other action in any other court of this or any other State, are erroneous, since the statute relied upon does not purport to go further than a prohibition against an action at law in the courts of this State, and does not justify a judgment concluding the plaintiff upon the merits of the cause of action.

11. Said order and judgments in favor of the aforesaid defendants and against the plaintiff are

erroneous in that plaintiff's complaint sets forth a valid cause of action upon which plaintiff was entitled to judgment against said defendants or to a trial in support of the allegations thereof.

12. Said order and judgments are in various other respects erroneous, illegal and void (pp. 43, 44, 45 and 46).

POINT I.

Section 94b of the Corporation Act does not prevent this action being brought at law to recover the full amount of the assessment levied by the Superintendent of Banks in New York under the New York Law.

The statute relied upon by the defendants and applied as a bar to this action in the opinion of Justice Parker reads as follows:

> "94b. Liabilities arising under laws of other states or countries; actions to enforce.—Sec. 2. No action or proceeding shall be maintained *in any court of law of this state against* any stockholder, officer or director of any domestic or foreign corporation *by or on behalf of any creditor* of such corporation to enforce any statutory personal liability of such stockholder, officer or director *for or upon any debt, default or obligation of such corporation,* whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if

> any, and all of its creditors and all of its stockholders shall be necessary parties. (P. L. 1897, p. 125.)''

The above statute does not in any way apply to the case at bar for the following reasons:

(1) This action is not brought ''by any creditor'' of The Bank of United States. It is brought by Joseph A. Broderick as Superintendent of Banks of the State of New York for the benefit of all creditors of the Bank.

(2) This action is not brought against a stockholder ''for or upon any *debt, default or obligation of such corporation*''—The Bank of United States. This action is brought upon the personal obligation of the *stockholder,* which is:

> ''The stockholders of every bank shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. An action to enforce such liability must be brought within six years after the cause of action has accrued.'' (Section 120 of the Banking Law of the State of New York.)

Section 94b of the New Jersey statute was undoubtedly passed to prevent a single creditor of a domestic or foreign corporation commencing individual suits against any stockholder, officer or director of a domestic or foreign corporation, as formerly permitted by the laws of some of the States.

Splendid illustrations of the type of foreign statute and actions against which this statute is directed are given in the decisions in *Western National Bank* vs. *Reckless,* 96 Fed. Rep. 70, and *Marshall* vs. *Sherman,* 42 N. E. 419.

Section 32 of Kansas Gen. St. 1868, page 198, provided:

> "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except on order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

(See *Western National Bank* v. *Reckless,* 96 Fed. Rep., at p. 72.)

This Act was amended by Chapter 10 of the Laws of Kansas of 1898, which took effect January 11, 1899, and which substituted for individual actions against stockholders of a corporation upon their stockholder's liability, a suit in equity by a receiver to be appointed after a judgment against the corporation.

See decision of Justice Harlan in *Henley* v. *Meyers,* 215 U. S. 373; 54 L. Ed. 240.

It will thus be seen that Kansas changed the statute at which Section 94b of our Corporation Act was aimed, in order to provide at the domicile an action in the nature of an equitable accounting, in which the assets and liabilities could be casted up and the pro rata liability of stockholders determined.

We have no hesitation in asserting that Section 94b of the Corporation Act was not directed at a suit brought by the foreign representative of all creditors and all stockholders, to recover assessments validly levied at the domicile of a foreign corporation either by a receiver, superintendent of banks, or other statutory delegate, but was aimed by its very terms at the action permitted by the Kansas Law of 1868, which permitted any creditor of a corporation to sue any stockholder of that corporation wherever he could find him to recover a debt owing *by the corporation to the creditor.* The stockholder under the Kansas statute had to pay the debt or debts of the corporation up to an amount equal to the par value of his stock.

For the reasons just given the case of *Cochrane* v. *Morris,* 10 N. J. Misc. Rep. 82, is not sound and should not be followed.

In that case Judge Oliphant struck out ~~an answer filed to a~~ a complaint based upon a cause of action similar to the one at bar. The Court relied upon *Western National Bank* v. *Reckless,* 96 Fed. Rep. 82, and *Marshall* v. *Sherman,* 148 N. Y. 9. These were both actions brought by a single creditor of a Kansas bank against a single stockholder residing in this State.

The underlying situation and conditions that largely influenced the Court in *Marshall* v. *Sherman* (1895), 148 N. Y. 9, are stated at pages 26-28 as follows:

> "* * * The stockholders of this Kansas bank are not equitably liable for any greater sum than may be necessary to discharge the debts after the corporate property has been applied. * * * It is quite evident, therefore, that the equitable proportion of the corporate debts which this defendant should pay cannot be ascertained or determined in this action. * * * If this action can be maintained

it is quite apparent that one creditor may collect his debt in full and another creditor may not be paid anything, except what he is able to collect from the corporation. The statutes upon which this action is based provide, among other things, that when judgment is obtained against a stockholder and it is satisfied by collection or payment he may, in turn, maintain an action against all the other stockholders, who are such at the time of dissolution, for the recovery of the portion of the debt for which they were liable, and if any stockholder thus sued shall not have property enough to satisfy his portion of the claim the deficiency shall be divided equally among the remaining stockholders and collected accordingly. It is quite apparent that the purpose of the law cannot be carried out, except by a proceeding in equity for an accounting, to which all the stockholders are made parties. If the plaintiff can maintain this action and collect his debt from the defendant, how can the defendant proceed against his fellow-stockholders to reimburse himself for that part of the debt which they should have paid? It would be manifestly unjust and unfair to compel him to pay this claim and turn him over to another action, perhaps in another state, or in many states, in order to obtain the contribution which the law evidently contemplates."

"* * * Within recent years numerous business enterprises have been promoted in some of the western states, the money for the prosecution of which has been to a large extent borrowed here, either in the form of direct loans upon some kind of security, or by inducing many of our citizens to purchase stock in corporations organized for the purpose under local laws. Much of these investments, amounting to a vast sum in the aggregate, has been lost. This result is in some degree to be attributed to financial depression and the consequent derangement of business, but in a much greater degree to the gross mismanagement and dishonesty of the managers and pro-

moters. The funds thus procured have been used largely in furtherance of local and private interests, and in disregard of every prudent safeguard for the protection of the investors, and sometimes in defiance of every principle of common honesty. In some cases, when the managers well knew they were hopelessly involved, they continued to transact business, borrowing recklessly and pledging the assets in their possession or under their control. When the crash came these assets were sold by the pledgees, and, of course, sacrificed in many cases, leaving large deficiencies, which honest and prudent management could have converted into a surplus. A careful investigation of some of the disastrous failures of loan, investment, trust, land and mortgage companies, as well as banks and other corporations, will reveal this condition of things. It will not be difficult for speculators to purchase large claims against these defunct corporations at a very low price if they can be readily enforced here against stockholders who have made and lost investments in the stock."

"* * * The courts of Massachusetts have uniformly refused to entertain actions of this character, upon the ground either that to enforce the foreign law would be injurious to its own citizens, or that complete justice could not be administered in its courts under its special and peculiar provisions. (*Erickson* v. *Nesmith, supra; New Haven Horse Nail Co.* v. *Linden Spring Co.,* 142 Mass. 349; *Post* v. *T., C. & S. L. R. R. Co.,* 144 Mass. 341; *Bank of North America* v. *Rindge,* 154 Mass. 203.) The arguments of the court in these cases upon which the conclusion was based deserve the highest respect, and it is worthy of notice that in the case last cited the statute sought to be enforced was the identical one now under consideration in the case at bar.

"The highest court of Illinois has also refused to enforce this same statute and provision of the Kansas Constitution on the ground that the remedy was special and must

be pursued in the state where the corporation exists. (*Fowler* v. *Lamson,* 146 Ill. 472.) In another case (*Young* v. *Farwell,* 138 Ill. 326) it held that it could not enforce by action at law a statute of Oregon for the collection of unpaid subscriptions, for the reason that a complete settlement of the controversy required a bill in equity where all the parties interested were before the court, so that complete justice could be meted out to all, and all conflicting rights and equities finally adjusted. (*Patterson* v. *Lynde,* 112 Ill. 196; 106 U. S. 519.) By the Constitution and laws of Michigan stockholders of corporations of that state are individually liable for certain debts to be enforced by action of assumpsit, and the highest court of Wisconsin has held that the remedy was exclusive; that the corporation itself was a necessary party and that the liability could be enforced only in the courts of Michigan. (*May* v. *Black,* 77 Wis. 101.) It has been also held, after exhaustive consideration, that a creditor of an Ohio corporation could not enforce the statutory liability of a stockholder in the courts of West Virginia. (*Nimick* v. *Mingo Iron Works Co.,* 25 West Va. 184.) There are numerous other decisions in the state and Federal courts that hold in effect either that such a liability cannot be enforced at all beyond the local jurisdiction, or that such an action must be in equity after all remedies against the corporation have been exhausted, and that too in the state where the stockholder is sought to be charged, or at least the bill must show upon its face by proper allegations that such a proceeding was impossible, and that all the corporate assets have been applied to the payment of the claims of creditors. (*Terry* v. *Little,* 101 U. S. 216; *National Tube Works Co.* v. *Ballou,* 146 U. S. 517; *Pollard* v. *Bailey,* 20 Wall. 520; *Fourth Nat. Bank* v. *Francklyn,* 120 U. S. 747; *Peck* v. *Miller,* 39 Mich. 594; *Barrick* v. *Gifford,* 47 Ohio St. 181; *Allen* v. *Walsh,* 25 Minn. 543; *Smith* v. *Huckabee,* 53 Ala. 191.)"

A striking difference in the attitude of the New York Courts where there is centralized enforcement of the assessment pursuant to a statutory plan providing for prior ascertainment of the deficiency and equitable and ratable enforcement and distribution to creditors is shown by the decisions of the Courts of that State in *Howarth* v. *Angle,* 162 N. Y. 179; *Shipman* v. *Treadwell,* 200 N. Y. 472 and *Royal Trust Company* v. *Harding,* 155 App. Div. 104. In *Howarth* v. *Angle,* in sustaining the right of a Receiver of a foreign corporation to sue in such a situation, the Court said "It would be a provincial and narrow view for our courts to refuse to extend the usual State commodity."

The New Jersey statute, Section 94b, was designed to afford New Jersey stockholders of foreign corporations protection similar to that established in *Marshall* v. *Sherman, supra,* by judicial decree. That such was the policy and purpose of Section 94b is established by the case of *Cochrane* v. *Morris,* 157 Atl. 652 (N. J. 1931), where the dismissal of the action was based exclusively upon the reasoning of the Court in *Marshall* v. *Sherman, supra.*

It is not without significance that Section 94b is specifically directed to assessment enforcement "by or on behalf of *any creditor.*" The statute was obviously aimed at preventing the old evil and injustice of individual creditor enforcement of the assessment for the individual and personal benefit of a single creditor and was not aimed at general enforcement on behalf of the entire body of creditors. In this action, of course, the Superintendent represents the bank and the entire body of depositors and stockholders of the Bank and not any individual or group of creditors.

The New York Banking Law meets all of the criticisms and objections to individual creditor

assessment enforcement. A responsible public official of that State is directed by law, first to examine the liabilities and ascertain the reasonable value of the assets of the bank and upon the basis of such an examination to determine the necessity of the assessment (*Banking Law,* Section 80). It specifically requires that the assessment be levied against the stockholders equally and ratably and not one for the other (*New York Banking Law,* Section 120). Through this centralized enforcing agency all moneys collected are to be distributed apportionately and equitably among the creditors of the bank, many of whom are undoubtedly residents of New Jersey (*Banking Law,* Section 79) and it imposes upon this same official the duty to return to all stockholders of the bank any surplus remaining after creditors have been paid in full and after stockholders have been reimbursed for any assessment that may have been so paid by them (*Banking Law,* Section 79). Under this plan all stockholders are treated on a basis of equality and may not be compelled to pay more than their equal and ratable portion of the liabilities of the Bank. These safeguards were enacted for the protection of the stockholders and eliminate all of the defects inherent in the Kansas and similar statutes. There is no public policy of New Jersey adverse to enforcing assessments against New Jersey resident stockholders of foreign corporations or banks (*Western Bank* v. *Reckless,* 96 Fed. 70).

It is respectfully submitted that Justice Parker's construction of this statute is erroneous. Section 94b must be strictly construed, being in derogation of the common law. It is submitted that the statute in no way applies to situations and cases like the present, but was directed at certain statutes enacted a generation ago in a few western states, which permitted creditors of insolvent

corporations to sue the stockholders directly, and one after the other, wherever found, until the creditor was paid in full.

POINT II.

Plaintiff's remedy is in the Courts of Law, and the Court of Chancery of New Jersey does not have jurisdiction.

A.

The Action Is at Law.

It is quite apparent that under the provisions of Sections 80 and 120 of the New York Banking Law the plaintiff as Superintendent of Banks was charged with the duty of making an official determination whether there was a stockholder's liability in addition to the par value of his shares, and the amount thereof payable by the several stockholders, for the purpose of making up, so far as possible, any deficiency between assets and liabilities of the Bank.

In *Converse* vs. *Ayer* (Supreme Judicial Court of Massachusetts, 1908), 84 N. E. 98, Judge Braley held that an action to recover the amount of an assessment levied upon a stockholder resident in Massachusetts, in a foreign jurisdiction, is an action at law, and that the liability must be determined by the laws of the domicile of the corporation.

In *Bernheimer* vs. *Converse,* 206 U. S. 516, an action was brought by the receiver of a corporation of Minnesota to enforce the stockholder's liability under the laws of that State. Mr. Justice Day (p. 529) said:

> "It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional pro-

> vision, contractual in its nature and, as such, capable of being enforced in the courts not only of that State, but of another State and of the United States, Whitman &c. *vs.* Bank, 176 U. S. 559, although the obligation is not entirely contractual and springs primarily from the law creating the obligation. Christopher *v.* Norvell, 201 U. S. 216."

The provisions of the New York Act are similar to the provisions of the National Banking Act making the stockholders, upon the insolvency of a bank, liable for an amount up to but not exceeding the full par value of the shares held, to make up the difference between assets and liabilities.

Therefore, the decisions in the Federal Courts construing the provisions of the National Banking Act are of prime authority on the questions involved here.

In *Washington National Bank of Tacoma* vs. *Eckels, Comptroller,* 57 Fed. Rep. 870, Judge Hanford said (p. 872):

> "In 1876 congress passed a law which, in terms, gives the comptroller of the currency the right to appoint a receiver whenever he becomes satisfied, after an examination, that a national bank is insolvent. The power thus vested in the comptroller of the currency is discretionary, and I think the rule holders good in this case, as in others, that where the head of a bureau in one of the departments of the government is clothed with discretionary powers, and authority to investigate facts and act upon his conclusions, his conclusions as to the facts are final, and not reviewable by the courts; so that the decision of the comptroller of the currency in this case, that the bank is insolvent, is to be taken as a finality. It is equivalent to the fact, whether the bank is really insolvent or not, so far as to authorize the exercise of the comptroller's power to put the bank in the hands of a receiver."

In *Dewees* vs. *Smith* (C. C. A., Eighth Circuit), 106 Fed. Rep. 438, affirmed sub-title *Smith* vs. *Brown, Receiver,* 187 U. S. 637, 47 L. Ed. 344, Judge Sanborn said:

> "The acts of congress confer the power and impose the duty upon the comptroller to determine within the statutory limit the amounts that shall be paid by each stockholder upon his individual liability, and the times when he shall pay these amounts. The liability of the shareholder does not mature —does not become due—until the comptroller adjudges it to be payable and demands it, and it falls due in such amounts and at such times as he decrees. Kennedy *vs.* Gibson, 8 Wall. 498, 505, 10 L. Ed. 476; U. S. *vs.* Knox, 102 U. S. 422, 425, 26 L. Ed. 216; Bank *vs.* Case, 99 U. S. 628, 634, 25 L. Ed. 448; Casey *vs.* Galli, 94 U. S. 673, 681, 24 L. Ed. 168; Bushnell *vs.* Leland, 164 U. S. 684, 685, 17 Sup. Ct. 209, 41 L. Ed. 598. . . .
>
> "The liability of a shareholder of a national bank is contractual. It rests on his subscription for or his receipt and acceptance of his stock. By that act he agrees to be a shareholder of the bank, and to assume and discharge all the legal obligations and duties of such a shareholder. Bank *vs.* Hawkins, 174 U. S. 365, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007. Upon familiar principles the acts of congress and the settled rules of law to which reference has been made are necessarily read into and become a part of every stockholder's contract. The agreement of the shareholder with the bank and its creditors thus becomes a contract that, to an amount not exceeding the par value of his shares of stock, and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligation of his bank, Rev. St., Sections 5151, 5234; Kennedy *vs.* Gibson, 8 Wall. 498, 19 L. Ed. 476."

Judge Sanborn also said at page 445:

> "Under the acts of congress and the decisions of the courts to which reference has been made the comptroller of the currency constitutes a quasi judicial tribunal, to whose exclusive determination congress has intrusted the decision in the first instance of the questions, what proportion of the full liability of the stockholder of an insolvent bank it is necessary to collect to pay its debts, and when this amount shall be paid. His decisions of questions within his jurisdiction are, like the decisions of the land department and of the other quasi judicial tribunals, impervious to collateral attack, and open to avoidance by the Court only in a direct attack upon them on the grounds of clear error of law, fraud, or mistake. U. S. *vs.* Knox, 102 U. S. 422, 425; 26 L. Ed. 216; U. S. *vs.* Northern Pac. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; Bogen *vs.* Mortgage Co., 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S. App. 346, 350; U. S. *vs.* Winona & St. P. R. Co., 67 Fed. 948, 959, 15 C. C. A. 96, 107, 32 U S. App. 272, 289."

In that case the question involved was whether the comptroller of the currency could lawfully make and collect by actions at law in the name of the receiver more than one requisition or assessment upon a stockholder of an insolvent national bank in order to pay its debts. There was a judgment below in favor of the defendant. The Circuit Court of Appeals ordered this judgment reversed, with directions to the District Court to enter judgment for the receiver of the amount claimed.

The Supreme Court affirmed this judgment under authority of *Studebaker* vs. *Perry,* 184 U. S. 258, 46 L. Ed. 528; *McDonald* vs. *Thompson,* 184 U. S. 71, 46 L. Ed. 437; and *U. S.* vs. *Knox,* 102 U. S. 422, 26 L. Ed. 216.

In *Kennedy* vs. *Gibson,* 8 Wall. 498, 19 L. Ed. 476, the Supreme Court held:

> "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.
>
> The liability of the stockholders is several, and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution and the case may stand over for the further action of the Court, —if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the result in many cases cannot be foreseen. The same remarks

> apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered."

In *Studebaker* vs. *Perry,* 184 U. S. 258, 46 L. Ed. 528, the Supreme Court said:

> "When the full amount is assessed there can be but one suit against each stockholder. He is suable for his full liability at once, and there is no reason for equitable jurisdiction. If a partial assessment is made, there may be other assessments, when the receiver has liberty to sue at law for even a partial assessment, although equity has concurrent jurisdiction to prevent a multiplicity of suits.
>
> "In general the liability of stockholders to assessment under local statutes is deemed transitory in nature, enforceable by common law remedies in states other than that of the corporation, although special statutory forms of remedy given by the local statute could not be resorted to elsewhere" (citing cases).
>
> Shriver *vs.* Woodbine Savings Bank, 285 U. S. 467; 76 L. Ed. 884.

Under the Federal rule pertaining to assessment enforcement by the Comptroller of Currency it has been repeatedly held that an action to enforce the full par value assessment must be brought at law, and that no grounds for jurisdiction in equity exist. (*Kennedy* v. *Gibson, supra; Hale* v. *Allison,* 188 U. S. 56.) This rule is based upon the conclusiveness of the determination by the Comptroller of Currency which ex-

cludes an action based upon an accounting and deprives equity of jurisdiction. A similar rule applies to enforcement of the assessment by the Superintendent of Banks and requires that action by him also be maintained at law in the absence of peculiar and special conditions.

Kennedy vs. *Gibson, supra,* and the cases following it, are based upon the very general and familiar rule that any discretionary determination by an official is binding and conclusive in the absence of bad faith or arbitrary misconduct.

> *Matter of Lungheno,* 176 App. Div. 285;
> *Marbury* vs. *Madison,* 1 Cranch 157;
> *Isaacs* vs. *Marcus,* 258 N. Y. 257;
> *People ex rel. Broderick* vs. *Morton,* 156 N. Y. 136;
> *Dillon* vs. *Butler, Inc.,* 174 N. Y. Supp. 178.

The New York State Banking Act of 1909, as revised by the Laws of 1914, was enacted to conform the New York system of banking regulation, liquidation and assessment to the National Banking Act.

> *Matter of Union Bank,* 204 N. Y. 313;
> *Van Tuyl* vs. *Scharmann,* 208 N. Y. 53;
> Report to Governor of the Commissioner on Banks, December 1907;
> Report of Superintendent of Banks, N. Y., Senate Document No. 6, 131st Session, p. XXIX.

It follows that the rule of the Federal Courts applicable to assessments levied by the Comptroller of Currency applies and controls assessment enforcement through the office of the Superintendent of Banks of the State of New York.

In making the certificate of the the superintendent presumptive evidence the New York

Legislature was not abandoning the aforesaid general doctrine, but merely reiterating it. "Presumptive evidence" is used in Section 80 as presumptive in the sense that all official determinations are presumptively valid.

Broderick vs. *Adamson,* 148 Misc. 353; 265 N. Y. S. 804;
Broderick vs. *Aaron,* 147 Misc. 854, 264 N. Y. S. 15.

A very brief history of the New York law seems advisable.

Under the New York Laws of 1849, Chapter 226, the determination of the necessity for an assessment against stockholders was vested in the New York Supreme Court. The receiver after paying a first dividend petitioned the Court, upon notice to the bank, and a published notice to stockholders, to determine the necessity of the assessment. The Court appointed a referee, who examined the assets and liabilities and reported back to the Court his findings, upon the basis of which the Court adjudicated the necessity of the assessment.

Empire Bank, 18 N. Y. 199;
Matter of Reciprocity Bank, 22 N. Y. 9;
Matter of Hollister Bank, 27 N. Y. 393;
Matter of Oliver and Lee's Bank, 21 N. Y. 9.

The history and development of assessment enforcement from its early foundation resting upon an order or decree of the Court entered in the insolvency proceeding, (cases cited, *supra*) to the more modern procedure of delegating this power by statute to administrative officers as an auxiliary step in the liquidation of insolvent corporations, clearly indicate an intention to invest the administrative determination with the same conclusive

effect as the prior judicial determination. (Compare: *Converse* v. *Hamilton,* 224 U. S. 343; *Matter of Reciprocity Bank,* 22 N. Y. 9 and *Graham* v. *Fleissner,* 107 N. J. Law 278, involving the conclusive effect of an adjudication of the necessity of the assessment in the jurisdiction of domicile of the corporation, with *Washington National Bank of Tacoma* v. *Eckele,* 57 Fed. 870; *Kennedy* v. *Gibson,* 8 Wall. 498; *Gile* v. *Duke,* 5 Fed. (2nd), 952 C. C. A. 9th, and *Broderick* v. *Adamson,* 148 Misc. 353, 265 N. Y. Supp. 804, where a similar determination by the Comptroller of Currency or Superintendent of Banks was given like conclusive force and effect). This accords with the development of administrative control in recent years and the vesting of quasi-judicial functions in administrative officers and the clothing of their determination with the same binding effect as decrees of Court (*Isaac* v. *Marcus,* 258 N. Y. 257; *Dweese* v. *Smith* (C. C. A., 8th), 106 Fed. 438, affirmed as *Smith* v. *Brown,* 187 U. S. 367).

Under Section 19 of the Laws of 1909, the predecessor statute of the present Section 80 of the New York Banking Law, the Superintendent was merely authorized to enforce the assessment "if necessary to pay the debts of such corporation." Under this statute it was held that the Superintendent's mere unsupported statement that he thought the assessment necessary was insufficient (*Cheney* v. *Scharmann,* 145 App. Div. 456). Undoubtedly as a consequence of that decision and to bring the New York law into conformity with the Federal rule applicable to assessments levied by the Comptroller of Currency, the New York Legislature enacted the present Section 80 of the New York Banking Law, specifically requiring an official determination by the Superintendent of the necessity of the assessment and vesting in him the right to enforce the statutory

liability upon the basis of the determination so made. This section further provided that after default in payment after demand the Superintendent shall have "a cause of action" in his own name against the stockholders. Thus, under this section, upon the determination by the Superintendent and default in payment the right to enforce and the cause of action itself is complete.

The execution of the certificate referred to in Section 80 of the Banking Law is purely optional and its use a mere privilege which the Superintendent may avail himself of or not. It is merely an additional method to which he may resort in the event that he does not care to invoke or rely upon the legal principle, which excludes attack upon his determination in the absence of clear error of law, fraud or mistake. Obviously by permitting the Superintendent to employ this method of proof, the Legislature did not intend to deprive the acts of the Superintendent of the protection of the general legal principle already referred to and which has been applied by the courts of New York to the acts of public officers by an unbroken line of decisions from the earliest times (*Matter of Lungheno,* 176 App. Div. 285; *Isaacs* v. *Marcus,* 258 N. Y. 257; *People ex rel. Broderick* v. *Morton,* 156 N. Y. 136).

The New York Banking Laws were subsequently amended in 1909 so as to provide that "the Superintendent may, if necessary, enforce" the assessment.

In *Cheney* vs. *Scharmann,* 145 App. Div. 456, decided under the 1909 Law, the superintendent merely testified that he decided to enforce the assessment. The Court held this was insufficient.

The New York State Banking Act was revised in 1914 and under this revision the Superintendent was given authority to make an official determination that a deficiency existed and that an assessment was necessary.

Cheney vs. *Scharmann, supra,* is therefore not applicable, as it was decided under the 1909 Law which merely gave the Superintendent a right to sue where he could prove by lawful evidence that an assessment was necessary.

The right of the plaintiff to sue stockholders for the assessment levied by the plaintiff herein in liquidation of The Bank of United States, the necessity for the assessment and the amount thereof, and other matters relating to the validity of the assessment have been decided by the Supreme Court of the State of New York in *Broderick* v. *Adamson,* 148 N. Y. Misc. 353, 265 N. Y. S. 804, in which the assessment as levied was upheld. In deciding that case the Court discussed fully the effect to be given the assessment and the certificate, and concluded that the Superintendent's determination, as evidenced by the certificate, was binding on the stockholders to the same extent as the determination by the Comptroller to assess stockholders of National banks. Justice Lydon's full statement on this question is as follows:

> "Plaintiff offered in evidence a certificate of the amount of the deficit executed by the superintendent of banks pursuant to Section 80 of the Banking Law. This certificate recited the determination of the superintendent to levy the assessment and included a statement of the value of the assets and the amount of the liability of the bank and the then existing deficiency. The defendants objected to the admission in evidence of the certificate on the ground that the provisions of Section 80, under which the facts stated in the certificate are made presumptive evidence, is unconstitutional. But it has always been within the legislative province to create rules of evidence and methods of proof applicable to the trial of judicial controversies, and moreover it is a familiar principle of common law that official statements made in the discharge of his duty by a public official are presumptive evi-

dence of the facts therein contained (Richards *v.* Rovin, 178 App. Div. 535). Section 80 of the Banking Law may be considered either as an exercise of this general power or merely as a statutory expression of this common law rule. Upon the introduction in evidence of the certificate of the superintendent the defendants asserted the right to call the superintendent of banks for cross-examination, contending that the effect of the introduction of the certificate in evidence was precisely the same as if the superintendent had been called in person as a witness and testified to the facts stated in the certificate. Under the statute, plaintiff is entitled to rest upon the certificate alone, and should not be required as part of his case to justify the facts therein stated (Marine Trust Co. *v.* Nuway Devices, Inc., 204 App. Div. 752, 198 N. Y. Supp. 715). To hold the contrary would clearly impair or destroy the presumption and circumvent the plain purposes of the statute * * *.

"While the question was not presented upon the trial, it would seem appropriate in view of the large body of litigation pending and prospective involving the enforcement of assessments against bank stockholders, to state my views with respect to the effect and weight to be given to the certificate provided for under Section 80 of the Banking Law. It is my opinion that this certificate, in the absence of a showing of fraud, illegality, bad faith or obvious errors, constitutes conclusive evidence of the facts therein stated. This is the rule of the Federal Courts in actions to enforce the statutory liability of stockholders of national banks (Kennedy *v.* Gibson, 8 Wall. 498; Studebaker *v.* Perry, 184 U. S. 258). The National Banking Act contains no provision similar to that of Section 80 and the rule applied in the Federal jurisdictions rests upon no positive statute, but merely upon the presumption of good faith and regularity attending the performance of official acts (Isaac *v.* Marcus, 258 N. Y. 257; Matter of

Bank of Canastota, 235 App. Div. 281; Matter of Lunghino, 176 App. Div. 285). There is neither logic nor reason in the principle that the certificate of the superintendent may be overthrown upon the basis of mere differences of opinion between the superintendent and the experts and witnesses of the defendants in relation to reasonable values. The determination of the superintendent is essentially and peculiarly an administrative act resting upon the exercise of sound business judgment and discretion (Banking Law, Sec. 80; Matter of Union Bank, 176 App. Div. 477). If not infected with bad faith or obvious error, or violative of any fixed legal principle, it should not be subject to attack upon the theory that the preponderance of evidence, in the opinion of the trier of the facts indicates that the values as fixed by the superintendent are merely erroneous. Liquidation presupposes the prompt and speedy conversion of assets to cash in the interests of creditors, and the right to enforce and collect the assessment should not be subject to defeat by the mere balancing of the opposing opinions and views of expert witnesses upon the questions of reasonable values. If it should ultimately appear that the assessment was unnecessary in whole or in part, the stockholders are entitled to share in any remaining surplus (Banking Law, Sec. 79). As between the stockholder and the creditor, it is the convenience of the latter that is preferred by the courts. * * *"

The assessment was upheld in a second suit instituted in the Supreme Court in the State of New York in *Broderick* v. *Aaron,* 147 N. Y. Misc. 854. (Motion to dismiss complaint denied.) This case was finally decided in favor of the plaintiff on April 11, 1934, and judgment entered after trial against upwards of ten thousand New York stockholders. The opinion has not yet been reported. The Bank of United States was made a party defendant in this action. In the decision

filed, Justice Lydon held, "The defendant, The Bank of United States, was a proper party defendant to this action and entitled to appear and defend such action for the benefit and protection of its stockholders." It has been repeatedly held that the corporation represents its stockholders for the purpose of defending the assessment, and that a judicial decree entered upon such a litigation is binding upon all stockholders. (*Converse* v. *Ayer,* 197 Mass. 443; *Goss* v. *Carter,* 156 Fed. 746.)

The plaintiff brought an action at law to recover on this same cause of action from non-resident stockholders in Pennsylvania. The right was upheld in *Broderick, Superintendent of Banks* v. *Stephano,* 171 Atl. Rep. 582. In that case the Supreme Court of Pennsylvania held that the assessment has become conclusive on non-residents of New York by reason of the decision of the New York Court in *Broderick* v. *Adamson.* The Court held in part as follows:

> "Actions to enforce liability of stockholders of foreign corporations have frequently been sustained in Pennsylvania and other jurisdictions (citing cases). The test in determining whether the action will lie in this state is to ascertain if the law of the incorporating state allows recovery against stockholders resident there, and when this question has become judicially settled, together with other relevant facts such as the amount of the assessment and the authority of the receiver or other officer to sue, the full faith and credit clause of the federal constitution requires us to allow the action here. Converse *v.* Hamilton, 224 U. S. 243. 'The existence and extent of the liability of a shareholder for assessments or to contribute to the corporation for the payment of debts of the corporation, is determined by the law of the state of incorporation.' Sec. 203 Restatement of the Law Conflict of Laws.

"All questions of plaintiff's right to maintain this suit, the amount of assessment, and other matters relating to the validity of the action taken against the stockholders of the bank in question have been determined by the courts of New York in Broderick *v.* Adamson, 148 N. Y. Misc. 353, in which the assessment as levied was upheld. This effectually disposes of appellant's contention that the statement of claim does not aver sufficient facts on which to base the action * * *.

"The principle of law applicable to this case and determinative of the main issue here involved is that 'where a proceeding in insolvency has taken place in the state which is the domicile of the corporation, in which proceeding the amount which ought to be paid by each stockholder, under the governing statute, to liquidate the debts of the corporation, has been ascertained, the receiver or other liquidating officer, duly appointed in the foreign jurisdiction and by statute or decree made a quasi trustee or assignee invested with all the rights possessed by the creditors, may maintain an action against a domestic stockholder in such foreign corporation to recover his share of the amount necessary to a liquidation so ascertained.' 14 C. L. 998."

In the State of Connecticut this plaintiff instituted separate actions at law in the various counties where defendants resided. In *Broderick* vs. *Steinberg,* the Common Pleas Court, Fairfield County, decided December 4, 1933, in favor of the plaintiff. The Court of Common Pleas for New Haven County denied the right to the plaintiff to sue at law in *Broderick* v. *Alderman,* decided February 9, 1934. These cases are both on appeal to the Court of Last Resort of Connecticut.

B.

The Court of Chancery does not have jurisdiction.

Section 94b, after stating that no action shall be maintained in any court of law of this State, concludes with the words:

> "and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this State other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties."

The above section is a supplement to the Corporation Act (P. L. 1897, Chap. 50, p. 124). The object of this Act is not expressed in its title and therefore it is repugnant to Article IV, Section VII, par. 4, of the State Constitution, as to that part which would deny the plaintiff a right of action in the courts of law; or, if it should be held to put sole jurisdiction in the Court of Chancery.

It is well settled in this State that this action cannot be brought in the Court of Chancery.

In *McDermott, Receiver* vs. *Woodhouse,* 87 N. J. Eq. 615, this Court held that the amount of a stockholder's liability on unpaid stock must be ascertained in the forum of the corporation's domicile, in a proceeding to which the corporation itself is an indispensable party; that the propriety and amount of an assessment upon stockholders to pay creditors are internal affairs of the corporation with which the courts of another jurisdiction will not intermeddle; that a stockholder is not bound to pay an assessment on his stock until the assessment is made and he can know how much he has to pay, and that when his liability has been ascertained it must be en-

forced in a court of law, unless some element of equity jurisdiction appears. The Court said:

> "Following that ruling" (Scoville *vs.* Thayer, 105 U. S. 143), "the logic and justice of which we do not question, no suit can be maintained against the demurring defendant until the amount of his liability has been ascertained by proceedings in New York. When that liability has been ascertained, it must be enforced in a court of law (Barkalow *vs.* Totten, 53 N. J. Eq. 573; Hood *vs.* McNaughton, 54 N. J. Law 425), unless some element of equity jurisdiction appears, not present in this case as far as the bill shows."

In *Chicago Title & Trust Co.* vs. *Young,* 90 N. J. Eq. 27, Vice Chancellor Stevenson held that an action to levy an assessment on behalf of creditors upon the holders of stock of an Illinois corporation must be brought in Illinois, and that this Court has no jurisdiction where the corporation has no assets, no agent and no creditors; that after a suit for an accounting of the assets and liabilities of an Illinois corporation has been conducted to a finish in the State of Illinois, and an assessment of stockholders ordered, to which proceeding all stockholders wherever resident are privies, and by which they are bound, then an action can be maintained in a court of law in New Jersey against the executors of a former stockholder to enforce such assessment.

In *Graham* vs. *Fleissner,* 107 N. J. L. 278, this Court held that an assessment against stockholders, levied in a bankruptcy proceeding in New York, was properly brought in this State in an action at law. The Court reaffirmed the doctrine of *McDermott* vs. *Woodhouse,* that our courts would not cast up the assets and liabilities of a foreign corporation for the purpose of enforcing the "trust fund" liability as against individual

shareholders. This must be done at the domicile of the corporation.

Furthermore, under the New York statute the duty of casting up the assets and liabilities of a New York bank is reposed exclusively in the Superintendent of Banks, and his determination is conclusive upon all parties.

Under the decision in *Bernheimer* vs. *Converse*, 206 U. S. 516, the stockholder upon acquiring his stock incurred an obligation created under the New York laws, contractual in its nature, to pay any assessment that might be levied by the Superintendent of Banks.

Our Court of Chancery does not have jurisdiction again to cast up the assets and liabilities, for it might conceivably create a different obligation than that created by the New York Superintendent of Banks. If this is not so, and if our Court of Chancery has jurisdiction again to cast up the assets, it must necessarily follow in a case like the present where there are stockholders in nearly every State of the United States, the plaintiff might be forced by such statutes as this to go through such an equitable accounting in each of the forty-eight States in which stockholders of the Bank reside. All of the books of the corporation and all of the assets should be under the control of the domiciliary administrator or Court if it is to properly conduct an equitable accounting action, such as is referred to in the statute. Such control in the domicile cannot be maintained if each State where suits must be brought can also have control of both books and assets.

Since it is well established by the cases above mentioned that the Court of Chancery of New Jersey does not have jurisdiction in such a case, this statute must fail because it denies every other form of action, but the one which this Court has said may not be brought in the Court of Chancery.

POINT III.

If an equitable accounting must be brought, as provided by the Statute, it is so unreasonable and arbitrary in this case as to violate the due process clause of the Fourteenth Amendment.

There is no public policy in New Jersey against compelling New Jersey stockholders of foreign corporations to pay assessments levied against them under the laws of foreign States. (*Western Bank* v. *Reckless,* 96 Fed. 70.)

This is apparent from Section 94b. This section does not deny the right to recover such assessments, but it is argued that it imposes the obligation to commence an action for an equitable accounting "for the proportionate benefit of all parties interested, *to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.*"

It appears from paragraph 5 of the complaint (admitted by the motion to strike) that "the creditors of The Bank of United States aggregate over four hundred thousand and are scattered throughout the United States and foreign countries and beyond the reach of process of the courts of this State." It also appears that the 1,010,000 shares of The Bank of United States was owned by "20,843 stockholders residing in nearly every State of the United States, and also residing in Cuba, Greece, Switzerland, France, Monaco, Panama, Roumania, Jugo-Slavia and Italy" (paragraph 2 of the Complaint, p. 5).

The plaintiff as Superintendent of Banks of the State of New York is the legal representative of the corporation. (*Matter of Weinfeld,* 237 App. Div. 850.)

Rolfe vs. *Rundle,* 103 U. S. 322, is authority for the proposition that the plaintiff is the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust.

See also *Clark* vs. *Willard,* decided by the Supreme Court of the United States, opinion by Justice Cardozo April 2, 1934, 78 L. Ed., Pamphlet No. 11, page 743.

He therefore falls within the designation in the statute of "legal representative" of the corporation. If the statute is to be complied with, not only must the plaintiff as legal representative of the corporation be a party to such an action, but also "all of its creditors," over four hundred thousand, residing throughout the United States and foreign countries, ~~but~~ and also "~~also~~ all of its stockholders," aggregating 20,843, residing in nearly every State of the United States and in nine foreign countries.

If it be held that this statute requires such equitable accounting to be brought in order that plaintiff may recover, to which there shall be as parties over four hundred and twenty thousand, eight hundred and forty-three stockholders and creditors, then, we have no doubt, that the statute is so unreasonable and arbitrary as to be violative of the due process clause of the Fourteenth Amendment.

Furthermore, if such an action must be brought in equity, the Superintendent of Banks would be required to bring into this jurisdiction all the books, records and papers of the corporation, and all of its assets, so that the assets and liabilities might properly be cast up here. There could be no proper casting up without they were within the control of the Court which casts them. If New Jersey can enforce such a proceeding as a

sine qua non to enforce the statutory liability against New Jersey stockholders, then every State in which stockholders reside could enforce the same sort of action. This merely emphasizes the unreasonableness of the statute, and indicates that such a statute in any State is sufficient to deny to the plaintiff as Superintendent of Banks his property rights in the assessments owing by non-resident stockholders.

Mr. Justice Roberts in one of the latest decisions of the Supreme Court of the United States on this subject says:

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."
>
> *Nebbia* vs. *New York* (decided March 5, 1934), 78 L. Ed., Advance Opinions, Pamphlet No. 9, page 563, at page 570.

In the very recent case of *Snyder* vs. *Commonwealth of Massachusetts,* opinion by Mr. Justice Cardozo, filed January 8, 1934, 78 L. Ed., Advance Opinions, No. 5, page 319, the Supreme Court of the United States held that a state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of justice ranked as fundamental. That was an appeal in a criminal case where the jury in a murder case was permitted to view the scene, not in the presence of a defendant, and it was held that the

Fourteenth Amendment does not assure to a defendant the privilege to be present at a bare inspection by a jury at which nothing is said to direct attention.

If, however, this plaintiff is required to bring an action in equity in the nature of an equitable accounting, and join as necessary parties all of the creditors and all of the stockholders, which would be wholly unnecessary but for the provisions of the statute, it would seem that there can be no question but what the statute must be held to be violative of the principle laid down by the Supreme Court.

During the period of time when the complaint against four hundred and twenty thousand persons was being prepared, some inevitably would die, making amendment after amendment necessary to the bill of complaint. After the bill has been filed the cost of bringing the defendants into Court would be enormous. The publication of notice to approximately four hundred and twenty thousand absent defendants would be very costly. There are about twelve hundred words in each newspaper column. There would be at least eight hundred and forty thousand proper and surnames of the four hundred and twenty thousand defendants. At the lowest estimate, there would be about eighty newspaper pages in the notice to absent defendants, which must be published once a week for four weeks successively. It is entirely likely that the bare cost of carrying such a litigation through to final decree would aggregate more than the amount recoverable in this case.

Justice Parker refers in his opinion to the fact that as a matter of comity the State courts often lend their aid to the enforcement of rights which arise in other States; and in many cases they are bound to do so.

One of the most familiar instances of contracts valid in foreign States being enforced in New Jersey, where they would be void if made in this State, is given in *Thompson* vs. *Taylor,* 66 N. J. L. 253. This Court held that a contract of suretyship of a married woman, domiciled in New Jersey, if made in New York, may be enforced against the married woman in this State, although such contract if made here would be void. Justice Garrison in his opinion said:

> "Whatever may be our opinion of the policy of legislation beyond our state, we are bound by the principles of comity to recognize its validity, unless it clearly contravenes the principles of public morality, or attacks the interests of the body of the citizens of our state."

Justice Parker in his opinion below refers to the decision of the Supreme Court of the United States in *Finney* vs. *Guy,* 189 U. S. 335, as authority for the proposition that "whether a state court should permit an action to be maintained therein on the principle of comity between the states is a question exclusively for the courts of that state to decide."

While that, as a general proposition, is true, yet, there is no public policy in New Jersey opposed to enforcing the obligation of stockholders, such as here attempted to be enforced, and, to the contrary, the denial of the right now asserted flies in the face of the decision of the Supreme Court of the United States, filed April 9, 1934, in *Hartford Accident & Indemnity Company* vs. *Delta & Pine Land Company,* a true copy of which is annexed to this brief. The gist of the decision is as follows:

> "Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the per-

> formance would violate its laws, it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. . . . A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment."

In *Shriver* vs. *Woodbine Bank,* 285 U. S. 467, the Superintendent of Banks of Iowa brought suit to enforce an assessment and in discussing the enforceability of such liability in other States the unanimous court speaking through Mr. Justice Stone says on page 479:

> "And in general the liability of stockholders to assessment under local statutes is decreed transitory in nature, *enforcible by common law remedies in states other than that of the corporation,* although special statutory forms of remedy given by the local statute could not be resorted to elsewhere. See Whitman *v.* Oxford National Bank, 176 U. S. 559; Hancock National Bank *v.* Farnum, 176 U. S. 640; Hale *v.* Hardon, 95 Fed. 747; Rhodes *v.* United States National Bank, 66 Fed. 512; Dexter *v.* Edmands, 89 Fed. 467."

POINT IV.

If Section 94b of the Corporation Act denies plaintiff his right to sue at law to recover the amount of the assessment levied by him in New York, it violates Article IV, Section 1 of the Constitution of the United States, and is null and void.

"Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such acts, Records and Proceedings shall be proved, and the Effect thereof."

Converse v. *Hamilton,* 224 U. S. 243, is very similar to and involves the same principle raised in the one at bar and holds that the refusal of the Wisconsin Courts to permit an action to enforce the double liability of the stockholders of an insolvent Minnesota Corporation in the State of Wisconsin denies the constitutional right of full faith and credit to the laws of Minnesota.

In that case the Constitution and laws of Minnesota provided that each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him. *Minnesota Thresher Mfg. Company* did not come under the exception and its stockholders were subject to the double liability. A sequestration proceeding was instituted in the Courts of Minnesota against the company and a Receiver was appointed. Further proceedings resulted in an ascertainment of the complete insolvency of the company and of the necessity of resorting to the double liability of its stockholders. Assessments were made of thirty-six and sixty-four per cent, respectively.

The defendants in the suit were stockholders in the Company and failed and refused to pay either assessment. They were not made parties to the sequestration suit. Demurrers to complaints were sustained upon the ground that to permit the actions to be maintained in the Wisconsin Courts would be contrary to the settled policy of that State in respect to enforcement of the liability of stockholders in its own corporations, and judgments of dismissal were entered accordingly. The judgments were affirmed by the Supreme Court and Writs of Errors were sued out of the United States Supreme Court.

Justice Van Devanter in delivering the opinion of the Court said:

> "This liability is not to the corporation, but to the creditors collectively; is not penal, but contractual; is not joint, but several; and the mode and means of its enforcement are subject to legislative regulation."

Chapter 272 of the Laws of Minnesota, 1899, is discussed at length in the opinion. It describes the mode of making the assessment and of its enforcement, and the court held that there was ample authority in the Statutes to permit the Receiver to institute the suit in question against stockholders in the State of Wisconsin. The Supreme Court conceded that it was necessary for them to look to the Minnesota Constitution, Statutes and decisions to determine the nature and extent of the liability in question and determined that the law enforcing the double liability had been sustained in the Courts of that State, and then held:

> "This statement of the nature of the liability in question, of the laws of Minnesota bearing upon its enforcement, and of the effect which judicial proceedings under those laws have in that State, discloses, as we think,

that in the case now before us the Supreme Court of Wisconsin failed to give full faith and credit to those laws and to the proceedings thereunder, upon which the receiver's right to sue was grounded."

Referring to the character of the Receiver the Court held:

"By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere. So, when he invoked the aid of the Wisconsin Court, the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce, for the benefit of his *cestuis que trustent,* a right of action, transitory in character, against one who was liable contractually and severally, if at all."

The Court concludes:

"True, the full faith and credit clause of the Constitution is not without well-recognized exceptions—but the laws and proceedings relied upon here come within the general rule which that clause establishes, and not within any exception. Thus, the liability to which they relate is contractual, not penal. The proceedings were had with adequate jurisdiction to make them binding upon the stockholders in the particulars before named. The subject to which Chapter 272 is addressed is peculiarily within the regulatory power of the State of Minnesota; so much so that no other state properly can be said to have any public policy thereon. And what the law of Wisconsin may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration."

There is no material distinction between *Converse* vs. *Hamilton* and the case at bar. The fact that the assessment in the *Converse* case was made by a Court and the assessment in the *Broderick* case was made by the Superintendent of Banks of the State of New York does not render the latter assessment less effective. The assessment made by the plaintiff in this case was made under the Banking Law of the State of New York and Article IV, Section I, of the United States Constitution requires every State of the Union to accord the laws of New York as well as the decisions of the Courts of that State full faith and credit.

The laws of the State of New York, as more specifically set forth in the complaint, not only give the Superintendent of Banks power and authority to make the assessment, but they also vest him with power and authority to enforce the assessment. We quote from Section 80 of the Banking Law of the State of New York as follows:

> "In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable."

For other cases arising under the Minnesota Statute see *Selig* vs. *Hamilton,* 234 U. S. 652, 58 L. Ed. 1518; *Bernheimer* vs. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, and *Converse* vs. *Aetna National Bank,* 212 U. S. 567, 53 L. Ed. 654.

In all of these cases the double liability under the Minnesota statute was held to be enforceable in other States.

In *Marin* vs. *Augdeahl,* 247 U. S. 142, 62 L. Ed. 1038, the Court held:

> "Under these circumstances, the Order is entitled, under the Constitution and Laws of the United States, to the same faith and credit in the Courts of North Dakota as by law or usage are given to such an Order of the Courts of Minnesota."

In *Rolfe* v. *Rundle,* U. S. Supreme Court, 1880, 103 U. S. 322, under a statute in Missouri, similar in type to the one under consideration, Chief Justice Waite defines the capacity in character of the commissioners, wherein he states, on page 225:

> "Rolfe is not an officer of the Missouri State Court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the corporation itself for all the purposes of winding up its affairs."

In *Gile* v. *Duke,* Circuit Court of Appeals, 9th Circuit, 1925, 5 Fed. 2d 952, the action was brought by the Supervisor of Banking of the State of Washington, Circuit Judge Ruckin states on page 953:

> "The principal contentions of the plaintiffs in error are: First, that the banking officer of the state is like a mere chancery receiver, and cannot maintain an action in a foreign jurisdiction; and, second, that there was no competent proof of the bank's insolvency. These two questions have been determined adversely to the plaintiffs in error by repeated decisions of the Supreme Court of the State and the Supreme Court of the United States. Hanson v. Soderberg, 105 Wash. 255, 177 P. 827; Aetna Casualty & Surety Co. *v.* Moore, 107 Wash. 99, 181 P. 40; German-American Mer. Bank *v.* Foster, 116 Wash. 313, 199 P. 314; German-American Mer. Bank *v.* Ripley, 124 Wash. 322, 214 P. 160; Rolof *v.* Rundle, 103 U. S. 222, 26 L. Ed. 337; Bernheimer *v.* Converse, 206 U. S. 516, 27 S. Ct. 755, 51 L. Ed. 1163; Converse *v.* Hamilton, 224 U. S. 243, 32 S. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913 D, 1292. Under these authorities the banking officer of the state is the statutory successor of the bank for the purpose of winding up its affairs, and may sue in any jurisdiction, and the determination of the banking officer that an assessment is necessary is conclusive upon the courts and cannot be controverted by stockholders."

It is not necessary to be entitled to full faith and credit that the determination of the stockholder's liability should be made by a court of record, and that all persons to be charged should be made parties to the suit. The New York statute makes the Superintendent of Banks in his official capacity the official legislative delegate for the purpose. He is clothed with all the jurisdiction

that a court of equity would have to cast up the assets, as well as the liabilities, and make all determinations necessary to enforce the liability, just as the Comptroller of the Currency does with relation to national banks. His is the statutory and duly authorized demand for payment which is necessary to bring the full faith and credit clause into operation.

Scoville vs. *Thayer,* 105 U. S. 159, 26 L. Ed., at p. 974.

POINT V.

The cause of action to recover upon the assessment is transitory and may be enforced in New Jersey.

It is a well settled and universally recognized principle that for the purpose of extraterritorial enforcement the assessment liability is contractual as distinguished from penal in nature and the cause of action for its enforcement is transitory and may be asserted in jurisdictions other than the state of incorporation (*Converse* v. *Hamilton* (1912), 224 U. S. 243, where an action by a Receiver of a Minnesota corporation to enforce the assessment against Wisconsin stockholders was sustained; *Gile* v. *Duke* (1925), 5 Fed. (2) 952, C. C. A. 9th, where the Court sustained an action by the Supervisor of Banking of the State of Washington against a stockholder of an insolvent Washington bank instituted in the State of Oregon; *Bernheimer* v. *Converse* (1907), 206 U. S. 516, permitting a Receiver of a Minnesota corporation to enforce an assessment against a New York stockholder in the Courts of that State; *Hirning* v. *Hamlin* (1925), 200 Iowa 1322, permitting the Superintendent of Banks of the State

of South Dakota to recover in Iowa an assessment levied against an Iowa stockholder of an insolvent South Dakota bank; *Baird* v. *Cole* (1929), 207 Iowa 664, permitting statutory receiver of North Dakota to recover stock assessment; *Bullock* v. *Oliver* (1923), 155 Georgia 151, permitting the Receiver of a Florida bank, who under the Florida statute was authorized to "sue for and enforce the individual liability of the stockholders" to maintain an action in Georgia to recover a stock assessment; *Baird* v. *Mall* (1930), 57 S. D. 309, similar facts; *Harris* v. *Briggs* (1920), 264 F. 726, C. C. A. 8, permitting the Commissioner of Insurance and Banking of Texas to recover in Missouri a 100% assessment against a Missouri stockholder of a Texas bank; *Mobley* v. *Smith* (1931), 138 So. 551, cert. den. 224 Ala. 45, 138 So. 550, permitting the Superintendent of Banks of the State of Georgia to maintain in Alabama a suit to enforce a 100% stock assessment against an Alabama stockholder of an insolvent Georgia bank; *Good* v. *Derr* (1931), 46 F. (2d) 411, C. C. A. 7, permitting a statutory receiver of a South Dakota investment corporation to recover in Wisconsin a 100% assessment against a Wisconsin stockholder; *Howarth* v. *Angle* (1900), 162 N. Y. 179, sustained an action by a Receiver of a Washington bank against a New York stockholder; *Shipman* v. *Treadwell* (1911), 200 N. Y. 472, sustaining a suit by a Receiver of an Ohio corporation to enforce the assessment against New York stockholders thereof; *Royal Trust Company* v. *Harding* (1913), 155 App. Div. 104, permitting a Canadian liquidator of an insolvent bank in Canada to collect the assessment from New York stockholders thereof, and to like effect see *Restatement of the Law of Conflict of Laws,* §§203, 204).

It is to be specially noted that although the courts of New York denied the right of a single

creditor to sue an individual stockholder (*Marshall* v. *Sherman, supra*), it allowed recovery when the statutory liability was sought to be enforced at the instance of receivers.

Howarth v. *Angle* (*supra*);
Shipman v. *Treadwell* (*supra*).

Conclusion.

Section 94b of the Corporation Act was not intended to operate on a plaintiff occupying the position of Superintendent of Banks of a foreign State, who, under the laws of his State, had all the rights, powers and duties of a court of equity in making an official casting up of assets and liabilities, and determining whether there should be an assessment against stockholders, the amount thereof, and when payable.

It is submitted that plaintiff's remedy is in the courts of law. This State prides itself on keeping actions strictly legal in the courts of law and matters of equitable jurisdiction in the Court of Chancery. There is nothing of an equitable nature in plaintiff's cause of action.

The Court below did not transfer the cause to the Court of Chancery. It dismissed the complaint and entered judgment against the plaintiff. This judgment in effect determines the assessment is unenforceable in New Jersey. Clearly, in any event, this judgment must be reversed.

It is respectfully submitted that this action was erroneous. If plaintiff must file a bill in the Court of Chancery in the nature of an equitable accounting, and make all the creditors and all of the stockholders parties, the statute then will be so arbitrary and unreasonable in this instance as to amount to a denial of due process, unless, of course, the Court should hold that plaintiff in his

official position represents all creditors and all stockholders except those resident in New Jersey against whom an enforcing decree is prayed and that none not resident in New Jersey need be named as actual parties.

It is therefore respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

McDermott, Enright & Carpenter,
Attorneys for Plaintiff-Appellant.

James D. Carpenter, Jr.,

Carl J. Austrian,
Arthur Ofner,
Harold N. Cohen,
Of the New York Bar,
Of Counsel.

Exhibit A.

SUPREME COURT OF THE UNITED STATES.

No. 650—October Term, 1933.

Hartford Accident & Indemnity Company, *et al.*, Appellants, *vs.* Delta & Pine Land Company.	Appeal from the Supreme Court of the State of Mississippi.

(April 9, 1934.)

Mr. Justice Roberts delivered the opinion of the Court.

This was an action instituted in a circuit court of Mississippi by Delta & Pine Land Company, a corporation of that state, with its principal place of business therein, against Hartford Accident & Indemnity Company, a corporation of Connecticut, having its principal place of business in Hartford in that state. The declaration alleges that on or about January 1, 1928, the plaintiff applied to the defendant for a fidelity bond and paid the agreed premiums therefor, and the defendant executed and delivered to the plaintiff such a bond, whereby it bound itself to pay the plaintiff, within sixty days after satisfactory proof, pecuniary loss sustained by the plaintiff through fraud or dishonesty or wilful misapplication by any employee "in any position, anywhere," from the time that the name of such employee should be placed upon a schedule attached to the bond to

and including the termination of the suretyship for such employee by his dismissal, retirement from service, discovery of loss, or cancellation of the bond by the parties. It is alleged that the name of H. H. Harris, as treasurer of the plaintiff, appears upon the schedule, and that the amount of coverage for him is $25,000. Sundry defalcations by Harris between May 9, 1929, and December 20, 1929, totaling $2,703.79, are set forth, all of which and the resulting loss occurred in the first judicial district of Bolivar County, Mississippi. The further material matters charged are that the defendant throughout all the times mentioned in the declaration, and ever since, was and now is duly qualified and licensed to do business in Mississippi; that the dishonest acts of Harris were discovered on or about May 20, 1931, immediate notice given to the defendant at its home office, and affirmative proof of loss under oath, with full particulars, filed with the defendant at its home office within three months after the discovery. The declaration in conclusion asserts compliance by plaintiff with all the terms of the bond, and refusal of the defendant, though requested, to make payment of the sum demanded. Annexed to the declaration are copies of the bond and the supplementary schedules forming part of it.

The defendant's plea was, in substance: the plaintiff, before and at the date of the contract of suretyship, was doing business in Tennessee, with its principal office at Memphis in that state, and defendant also was then and is now doing business in Tennessee, having an agency at Memphis; plaintiff, through its office at Memphis, applied to defendant through its agency there for the bond, rider and schedules containing the name of the defaulting employee, Harris, constituting the contract of suretyship; defendant through its agency

at Memphis executed and delivered the bond and schedules to plaintiff at its office in that city; the contract is a Tennessee contract and governed by the laws of Tennessee, and full faith and credit must be given to it in the courts of Mississippi in accordance with the requirements of Article IV, Section 1, Article I, Section 10, and Section 1 of the 14th Amendment of the Constitution of the United States; there was not at the time of delivery of the contract, and is not now, any statute in Tennessee prohibiting or invalidating the condition or limitation in the contract to the effect that any claim thereunder must be duly made upon the defendant as surety within fifteen months after the termination of the suretyship for the defaulting employee, and the plaintiff did not make claim upon the defendant for the loss within fifteen months after the termination of the suretyship for Harris, as the contract was cancelled and terminated December 31, 1929, and the plaintiff made no claim until June 22, 1931.

To this plea the plaintiff demurred, assigning these causes of demurrer: (1) the construction and validity of the provision of the contract relied upon in the plea is to be determined by the laws of Mississippi, and not by the laws of Tennessee; (2) the statute of limitations of the state where suit is brought is the statute which governs the time for bringing this action, and the provision in the contract requiring that any claim thereunder must be made upon the defendant within fifteen months after the termination of the suretyship of the defaulting employee is in violation of Section 2294 of the Mississippi Code of 1930, and in violation of the public policy of Mississippi, and its courts are not required to give full faith and credit to this provision of the contract by Article IV, Section 1, Article I, Section 10, or Section 1 of the 14th Amendment of the Constitution.

The cause came on for hearing upon the pleadings, and the court sustained the demurrer. The defendant declined to plead further; whereupon judgment was entered by default in favor of the plaintiff, a jury was impaneled and assessed damages at the amount claimed, and final judgment was accordingly entered.

Upon appeal by the defendant the Supreme Court of Mississippi affirmed the judgment. Conceding that under the decisions of the Supreme Court of Tennessee the provision for notice within fifteen months of the termination of the suretyship is a valid limitation of liability and not a limitation of action, the court said the converse is true in Mississippi. Although the bond was executed and delivered and the agreement consummated in Tennessee, where the plaintiff and the defendant's agent had their respective offices, and where, in the absence of proof of a contrary intent, the contract was to be performed, the court concluded that the statutes of Mississippi made the instrument a Mississippi contract, and annulled the contractual limitation of the time for giving of notice of claim.

The Mississippi statutes relied upon were the following:

> "A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss or injury of something in which the assured or other party has an interest, as an indemnity therefor; and it shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest or lives in this state, or with any resident thereof; or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of

this chapter. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein." (Section 5131 of the Mississippi Code of 1930.)

"The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants." (Section 2294 of the Mississippi Code of 1930.)

The state Supreme Court said:

"But clearly under section 5131, Code 1930, defining insurance, this indemnity bond is a contract of insurance within the purview of that statute; and, further, it being expressly provided therein that all contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein, in our judgment, makes the contract herein under review a Mississippi contract and solvable under the laws of this state. The contract here provided or stipulated that the appellee should be indemnified from loss by the defalcation of H. H. Harris in any position anywhere, and when he, the employee and the insured herein, removed to Mississippi and there defaulted, so far as the appellee is concerned its interest was insured or indemnified by the appellant in Mississippi, and, under the provision quoted from the above statute, became operative, and this state is obligated to enforce it, as a Mississippi contract, although it contained all the elements necessary to make it a Tennessee contract, but for the statute."

* * * * * *

"When the statute declares that such a contract shall be deemed to be made in this state, it means that the conflict of law be-

> tween the two states is eliminated and thereby, . . . a contract for fifteen months' notice was a limitation of the action unenforceable as such in this state."

The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (Hooper *v.* California, 155 U. S. 648; Orient Insurance Company *v.* Daggs, 172 U. S. 557, 565-7; New York Life Insurance Company *v.* Cravens, 178 U. S. 389, 398-9); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. New York Life Insurance Company *v.* Head, 234 U. S. 149; Aetna Life Insurance Company *v.* Dunken, 266 U. S. 389, 399. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Insurance Company *v.* Dick, 281 U. S. 397, 407-8.

It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to

the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligation by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Insurance Company *v.* Dick, *supra,* p. 408), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. Aetna Life Insurance Company *v.* Dunken, *supra;* Home Insurance Company *v.* Dick, *supra.* Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare Bond *v.* Hume, 243 U. S. 15, 22. But clearly this is not such a case.

Our conclusion renders unnecessary a consideration of the claims made under the full faith and credit and contract clauses of the federal constitution.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

So ordered.

(8316) Pandick Press, Inc., 22 Thames St., New York, U. S. A.

New Jersey Court of Errors and Appeals

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff-Appellant, *v.* BENJAMIN ABRAMS, *et als.*, Defendants-Appellees.	Action at Law. Appeal from Supreme Court.

BRIEF OF HERMAN GEISMAR AND THE FARG CO., INC., DEFENDANTS-APPELLEES.

Statement of Facts.

The facts as stated in appellant's brief are substantially correct.

The grounds of the motions to strike the complaint, made by defendants Herman Geismar and The Farg Co., Inc., a corporation, upon which judgment was entered in the Supreme Court, were as follows:

(1) That said complaint fails to state facts sufficient to constitute a cause of action.

(2) That said complaint fails to allege or disclose a cause of action in that it is contrary to the provisions of P. L. 1897, page 125, Section 2 (2 C. S. 1910, p. 1656, paragraph 94b).

POINT I.

In view of Section 94b of the New Jersey Corporation Act (2 C. S. p. 1656), the plaintiff's action is not maintainable in the New Jersey Supreme Court.

The section of the Act in question reads as follows:

> "No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties (P. L. 1897, p. 125)."

This statute declares the public policy of this state. There is no similar provision for double liability of stockholders in banking corporations organized under the laws of this state and, apparently realizing the harshness of the statutory

remedy in other states, our legislature has declared, in passing the above statute, that the only remedy afforded to enforce such statutory liability by the courts of New Jersey shall be an equitable accounting action, in which the necessary parties shall be as enumerated therein.

The recent case of *Cochrane* v. *Morris,* 10 N. J. Misc. 82, 157 At. Rep. 652, is on all fours with the present. Judge OLIPHANT, sitting as Supreme Court Commissioner, dismissed the complaint in a suit brought by the liquidator of a Florida bank against a stockholder, to enforce a one hundred per cent. assessment on his stock under the Florida Banking Act, which read as follows:

> "Stockholders of every banking company shall be individually responsible equally and rateably and not for one another for all contracts, debts and engagements of such company to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares."

The Court held:

> "The statute invoked as a defense by the defendant was passed to protect the citizens of New Jersey in just such a situation as is here presented * * *"

and in striking the complaint, adjudicated

> "* * * that the plaintiff does not allege or disclose any cause of action against the defendant, in that it is contrary to the provisions of Paragraph 94b of the Corporation Act, * * *."

The appellant has argued that the statute was intended to apply only to suits brought by a

single creditor of a foreign corporation against a single stockholder thereof, and distinguishes the present case from that of *Western National Bank* v. *Reckless,* 96 Fed. 70, thus attacking the propriety of the decision in *Cochrane* v. *Morris, supra.*

It is respectfully submitted that the appellant's attempted construction is forced and unsound, for the allegations of the complaint indicate, and the plaintiff contends, that the action in this case is being brought by the Superintendent of Banks of the State of New York in behalf of the creditors of the Bank of the United States against the stockholders of said Bank. We submit that the statute was intended to apply to a case where an action is brought on behalf of all creditors, as well as where it is brought in behalf of a single creditor, and it is intended to apply where the action is brought against many stockholders, as well as against a single stockholder. In support of this contention, we refer the Court to Section 9 of "An Act Concerning Statutes," *4 Comp. Stat. 4972, Section 9,* which reads:

> "That whenever, in describing or referring to any person, party, matter or thing, any word importing the singular number, or masculine gender is used in any statute, the same shall be understood to include, and shall apply to several persons and parties, as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it be otherwise provided, or there be something in the subject or context repugnant to such construction (Rev. 1877, p. 1121)."

Furthermore, as remarked by the court below, appellant did not bring one joint action against the numerous stockholders, but merely for the purpose of convenience joined numerous actions against individual stockholders in one complaint.

The appellant also argues that the statute applies only to an action *by,* as distinguished from one *on behalf of,* a creditor. The very language of the statute, however, refutes this argument. *Graham* v. *Fleissner,* 107 N. J. L. 278, and *McDermott* v. *Woodhouse,* 87 N. J. Eq. 615, indicate that the statute is applicable to the instant case.

Appellant argues for a strict construction of Section 94b as being in derogation of the common law. We respectfully submit that the liability which is sought to be enforced in the present case is foreign to the common law and is dependent entirely upon the constitution and statutes of the State of New York. It is further submitted that rather than a forced and narrow construction of the statute, the court should apply such construction as will effectuate the clear purpose of the legislature as expressed in the statute. No recourse need be had to the laws of Kansas, or of other states, to ascertain the purpose of our legislature in passing the statute involved.

POINT II.

Section 94b of the New Jersey Corporation Act does not violate the full faith and credit clause of the United States Constitution (Article IV, Section 1).

The said clause reads as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and

judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The appellant's point is, that the State of New Jersey, in refusing to permit an action in the nature of the present one and requiring the enforcement of liability in the equity court, as specified in the section, denies to the constitution and banking laws of the State of New York the full faith and credit to which they are entitled under the Federal Constitution. At various places in the appellant's brief appears the assertion that the determination of the Superintendent of Banks of New York as to the necessity for, and the amount of, his assessment against the stockholders is conclusive and binding upon the stockholders in the absence of proof of fraud, illegality, bad faith or obvious error. Concededly this is so *in New York*. *Broderick* v. *Adamson,* 148 N. Y. Misc. 353, 265 N. Y. Supp. 804. But it does not follow that such determination, which is administrative, *ex parte,* and not judicial, has the same effect in other states. No extended argument is needed to point out that the superintendent's acts are not judicial proceedings, although by the law of New York (Banking Law, Section 80) he is empowered to assess stockholders, which could formerly be done in that state only by the Supreme Court in a judicial proceeding. *Cheney* v. *Scharmann,* 145 App. Div. 456.

The array of Federal cases set out in appellant's brief, such as, *Kennedy* v. *Gibson,* 8 Wall, 498, 19 L. Ed. 476; *Studebaker* v. *Perry,* 184 U. S. 258, 46 L. Ed. 528; *Deweese* v. *Smith,* 106 Fed.

438 (affd. 187 U. S. 637), 47 L. Ed. 344, holding that the determinations of the Comptroller of Currency in assessing stockholders under the National Banking Act are conclusive and not subject to collateral attack, is also irrelevant. This is so, since the assessments under the National Banking Act were not considered under the full faith and credit clause. The federal statutes and the acts done thereunder by federal officers by virtue of the supremacy clause of the constitution (Article VI, Section 2) became part of the municipal law of every state in the Union. Hence, the statement of the effect of the assessments by the Comptroller of Currency throughout the United States is no more cogent an argument that the assessment herein is a judicial proceeding entitled to full faith and credit in the State of New Jersey, than the declaration in *Broderick* v. *Adamson, supra,* of the effect of the Banking Superintendent's decisions in New York.

The full faith and credit clause is not self-executing. *McElmoyle* v. *Cohen,* 13 Peters, 312, 10 L. Ed. 177. It required Congress to legislate as to the manner of proof and effect of the acts, records and proceedings which are entitled to full faith and credit thereunder. Accordingly, on May 26, 1790, Congress passed the following law:

> "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by

> the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken (R. S. Section 905)."

Under the constitutional provision as carried into effect by the statute of 1790, the Supreme Court has on numerous occasions held that when a judgment of one state is sued upon in another state, it shall have the same effect in the latter state as it had in the state in which it was obtained, and that the purpose of bringing a new suit in the second state is simply so that process may be issued to execute the judgment. *Bennett* v. *Bennett,* 63 N. J. Eq. 306 (Errors and Appeals, 1901). However, even as to the enforcement of judgments, there are definite limitations, and in these cases the sister state is not required by the constitutional provision and the statute to enforce the judgment of another state. The most usual of these cases are (1) Where the judgment is on a penalty. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 32 L. Ed. 239; (2) Where the judgment has attempted to declare rights in real estate within the boundaries of the state which is asked to enforce it. *Bullock* v. *Bullock,* 52 N. J. Eq. 561, affirming 51 N. J. Eq. 444; (3) Where a decree of divorce has been rendered, purporting to dissolve a marriage, the parties to which were domiciled in one state, for a cause arising in the

state of the marital domicile, but not a cause for divorce in that state. *Andrews* v. *Andrews,* 188 U. S. 14, 47 L. Ed. 366; (4) Where the judgment was rendered by a court not having jurisdiction of the cause of action or of the parties. *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565, and see also: *N. J. Evidence Act,* P. L. 1900, page 366. So, an action on a judgment of one state may be barred by the expiration of the statute of limitations of the state within which the judgment is sued upon. *Bank* v. *Dalton,* 9 How. 522, 13 L. Ed. 242.

It has generally been stated by the courts that the full faith and credit clause is not jurisdictional, but merely provides a rule of evidence. *Anglo-American Provision Co.* v. *Davis Provision Co.,* 191 U. S. 373, 48 L. Ed. 225, and cases cited therein. *Clifford* v. *Williams,* 131 Fed. 100; *Israel* v. *Israel,* 130 Fed. 237. And one very important and logical result of this statement is that a state need not provide a court within which and a procedure by which the judgment of a sister state may be sued upon.

In *Anglo-American Provision Co.* v. *Davis Provision Co., supra,* the court, per HOLMES, J., said:

> "* * * The parties are both Illinois corporations, and the plaintiff in error brought suit in the New York Supreme Court upon an Illinois judgment. By the New York Code of Civil Procedure, section 1780, it is provided that 'an action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: * * * 3. Where the cause of action arose within the state, etc.' * * *.
>
> "The state court decides that the cause of action did not arise within the state in the

sense of the words of the Code, and, of course, we follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States * * *.

"We are of opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the constitution establishes a rule of evidence rather than of jurisdiction. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 291, 32 L. Ed. 239, 243, 8 Sup. Ct. Rep. 1370; Andrews v. Andrews, 188 U. S. 14, 36, 47 L. Ed. 366, 371, 23 Sup. Ct. Rep. 237. The Constitution does not require the State of New York to give jurisdiction to the supreme court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the act in pursuance of it which Congress has passed. Rev. Stat. section 905 (U. S. Comp. Stat. 1901, p. 677). But the Constitution does not require the state to provide such a court * * *."

See also

Weidman v. *Weidman,* 174 N. E. 206 (Mass. 1931), especially at page 208.

The appellant relies upon the case of *Converse* v. *Hamilton,* 224 U. S. 243; 56 L. Ed. 749, which was a suit brought by the receiver of a Minnesota corporation, who by the proceedings in a sequestration suit brought conformably to the laws of

Minnesota, became a quasi assignee and representative of the creditors, and charged with the enforcement of the liability of the stockholders (under a double liability provision of the Minnesota law) in the Minnesota courts and elsewhere. It was held in that case by the United States Supreme Court that the refusal of Wisconsin courts to permit the action to be brought denies the constitutional full faith and credit to the judicial proceedings in that State upon which the receiver's title, authority and right to relief were grounded. There are several other cases in the United States Supreme Court similar in principle to the Converse case, and the appellant, in his brief, has cited several of them, to wit: *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163; *Converse* v. *Aetna,* 212 U. S. 567, 53 L. Ed. 654; *Selig* v. *Hamilton,* 234 U. S. 652, 58 L. Ed. 1518. In none of these cases was there involved a statute passed by the Legislature of the forum in which the plaintiff chose to bring his suit to enforce the stockholders' double liability which deprived the courts of the state from entertaining such suits. The only point made was that a court of one state, having general jurisdiction, could not, on grounds of policy or in its discretion, refuse to enforce the judgment or judicial proceedings of a sister state.

It is respectfully submitted that, under the authority of the case of *Anglo-American Provision Co.* v. *Davis Provision Co., supra,* a state could constitutionally pass an act the effect of which would be that the state did not provide any means of enforcing a judgment of a sister state; and if it provided a certain remedy for enforcing such judgment, whether the same be a reasonable remedy or otherwise, it could not be compelled to afford a different procedure. So, conceding,

for argumentative purposes only, the Superintendent's assessment to be a "judicial proceeding" within the meaning of the full faith and credit clause, still New Jersey might prohibit its enforcement by statute, and Section 94b, providing a certain form of remedy instead of prohibiting any remedy, is constitutional.

The appellees do not rely, however, on this point alone to uphold under the full faith and credit clause the statute which is now being attacked.

The plaintiff herein seized upon a general similarity between the natures of the present action and the action in *Converse* v. *Hamilton, supra,* and that line of cases. There is one very important point of difference which has been overlooked by the appellant, and this difference is sufficient to show the inapplicability of the doctrine of *Converse* v. *Hamilton, supra.* In cases like *Converse* v. *Hamilton, supra,* the plaintiff, in every instance, had sued upon a judicial decree or as a result of judicial proceeding in a foreign state. In the instant case, the plaintiff is suing upon a cause of action given to him by the statute of the State of New York. On page 46 of his brief appellant seeks to treat this difference as immaterial; but we submit the distinction is of vital importance and materiality for the reason that statutes and judicial records and proceedings of courts are afforded different treatment under the full faith and credit clause. The statute of 1790, *supra,* clearly shows this distinction for the reason that said statute, with respect to statutes, merely provides a method of authentication thereof, whereas, with respect to judicial records and proceedings, it prescribes, in addition to a method of authentication, that said proceedings shall

have the same effect in states where they are proved in evidence as they had in the state whose judicial proceedings and records they are.

In Justice STONE'S dissent to *Yarborough* v. *Yarborough,* 78 L. Ed. 172, at page 180, there is a note, which reads as follows:

> "The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone. It was remarked on the floor of the Constitutional Convention that without the extension of power in the legislature, the provision 'would amount to nothing more than what now takes place among all Independent Nations.' Hunt and Scott, Madison's Reports of the Debates in the Federal Convention of 1787, page 503. The play which has been afforded for the recognition of local public policy in cases where there is called in question only a statute of another state, as to the effect of which Congress has not legislated, compared with the more restricted scope for local policy where there is a judicial proceeding, as to which Congress has legislated, suggests the Congressional power."

The learned Justice appears to make the very point now contended for by the appellees. Therefore, whatever may be the compulsion upon the states to enforce the judgments of sister states, there is no such compulsion to enforce a cause of action arising under the laws or even by virtue

of the laws of a sister state. *Flagg* v. *Baldwin,* 38 N. J. Eq. 219, decided in 1894, by our Court of Errors and Appeals, is the leading case in this state on the point that where the enforcement of a contract made in a sister state would violate the plain public policy of this state, such contract is excepted from the rule of comity which requires the enforcement by the courts of one state of contracts made in another even though valid by the *lex loci contractus.* The last cited case declares the general rule which obtains among the states when enforcement is sought in one of a right arising in another. The same rule obtains where the cause of action is based directly upon a statute of a sister state. It may be remarked that the appellant's cause of action in the instant case rests upon a statutory basis of a contractual nature.

Statutes have no operation or effect *per se,* except within the territorial limits of the state. *Pennoyer* v. *Neff, supra; Dexter* v. *Edmands,* 89 Fed. 467; *Tennessee Coal Iron & R. R. Co.* v. *George,* 233 U. S. 354, 58 L. Ed. 997; *Hancock National Bank* v. *Ellis,* 172 Mass. 39, 51 N. E. 207.

The statutes of one state may be enforced, however, in another state if they create transitory causes of action. *Tennessee Coal Iron & R. R. Co.* v. *George, supra; Dennick* v. *Central R. R. of New Jersey,* 26 L. Ed. 439; *Loucks* v. *Standard Oil Company of New York,* 224 N. Y. 99, 120 N. E. 198; *Howarth* v. *Angle,* 162 N. Y. 179, 56 N. E. 489. Such enforcement, however, is by the comity of the sister state and not by virtue of the full faith and credit clause of the United States Constitution. See *Loucks* v. *Standard Oil Company of New York, supra,* wherein CARDOZO, C. J.,

wrote an instructive opinion on this point. Also *Baltimore & Ohio R. R. Co.* v. *Stewart,* 168 U. S. 445, 42 L. Ed. 537; *Brown* v. *Perry* (Vt. 1931), 156 Atl. 911; *Texas R. R. Co.* v. *Cox,* 145 U. S. 593, 36 L. Ed. 829; *Dexter* v. *Edmands, supra; Hancock National Bank* v. *Ellis, supra; State ex rel. Bossung* v. *District Court* (Minn.), 168 N. W. 589, 1 A. L. R. 145.

Under the rule of comity, a state may and frequently does enforce actions arising out of the statutes of a sister state when their enforcement is not inconsistent with its public policy. This is the entire force and extent of the decisions in the various cases cited under Point V of appellant's brief, and the other cases cited in said brief wherein the courts *permitted* the enforcement of an assessment against a stockholder of a state banking corporation which was not founded upon an actual judicial proceeding. In the Pennsylvania case of *Broderick* v. *Stephano,* 171 Atl. Rep. 582, it is true that the court mentioned the full faith and credit clause, but this, it is submitted, was unnecessary to the decision, since there was neither a public policy nor a statute of Pennsylvania which would prevent such recovery at law, and the Pennsylvania banking act contains provisions similar to those in the New York Act (171 Atl. Rep., p. 583). The Connecticut *nisi prius* decisions cited on page 33 of appellant's brief, being in conflict, should be accorded no weight.

That it does offend the public policy of the State of New Jersey (as evidenced by its refusal to create a similar liability on stockholders in domestic moneyed corporations and by the enactment of the statute involved herein), to enforce liabilities such as the court is now asked to en-

force except by the equitable suit provided for in the statute, requires no argument. The United States Supreme Court said, in *Bond* v. *Hume,* 243 U. S. 15, at page 22, 61 L. Ed. 565, at page 568:

> "And finally, it is certain that, as it is *peculiarly within the province of the law-making power to define the public policy of the state,* where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted." (Italics ours.)

Had the policy of this state been to prohibit enforcement of such liability in any court and had eliminated from Section 94b that portion permitting an equity action, the statute would still be constitutional, for, according to the highest authority in this nation, *a state may constitutionally prohibit any suit in its courts to enforce the cause of action arising under the statutes of a sister state,* provided it does not thereby discriminate against citizens of other states. *Chambers* v. *Baltimore & Ohio R. R. Co.,* 207 U. S. 142, 52 L. Ed. 143, is the leading case. Suit was brought in Ohio on a death action arising under a Pennsylvania statute, the deceased having been a citizen of Pennsylvania. Judgment for the plaintiff in the trial court was reversed by the Ohio Supreme Court because an Ohio statute provided that recovery could be had under the statute creating a cause of action for a wrongful death in foreign states only when the deceased was a citizen of

Ohio. The Supreme Court of the United States affirmed the action of the Ohio Supreme Court. After stating the rule of the privileges and immunities clause, the Court said on page 146 of L. Ed.:

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. * * * But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states."

It was held that the Ohio statute was constitutional, for it did not discriminate between plaintiffs or beneficiaries, but as to the *subject matter of the suit.* The Court said that the plaintiff has "been denied access to the Ohio courts * * * because the cause of action which she presents is not cognizable in those courts."

(The intimation in the appellant's grounds of appeal [No. 5, State of Case, p. 44] that Section 94b violates the privileges and immunities clause, and deprives plaintiff of the clear protection of the laws, which is not argued in appellant's brief, is rebutted by this last cited case.)

See, also, *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 74 L. ed. 926; *Bradford Elec. Light Co.* v. *Clapper,* 286 U. S. 145, 76 L. ed. 1026, especially at page 160, L. ed. page 1035; *Dougherty* v. *McKenna Process Co.* (*Ill.*), 99 N. E. 619, and the note in *74 A. L. R.,* 710, *et seq.*

Hence, it is submitted that the court below was entirely correct in deciding that such causes of action as the appellant presented are enforceable in sister states only through comity (*Finney* v. *Guy,* 189 U. S. 335, 47 L. ed. 839; *Bond* v. *Hume,* 243 U. S. 15, 61 L. ed. 565) and that there is no constitutional inhibition upon this state which would invalidate Section 94b of the Corporation Act.

POINT III.

Section 94B of the New Jersey Corporation Act does not violate the due process clause of Fourteenth Amendment.

Appellant argues that the remedy outlined in Section 94b is so cumbersome and unreasonable as to deprive appellant of "his property rights" in the assessment alleged to be owing by stockholders not resident in New York, without due process of law. This does not follow. As demonstrated by Point II, *supra,* the appellant and creditors represented by him never had a property right in the cause of action alleged in the complaint herein. The obligation to pay for the debts of the bank up to the par value of the shares owned may have been a property right of the creditors, but other states need not have provided a court in which, or a procedure by which, such right could be enforced. *Anglo-American Provision Co.* v. *Davis Provision Co.,* 191 U. S. 373, 48 L. ed. 225; *Chambers* v. *Baltimore & Ohio R. R. Co.,* 207 U. S. 142, 52 L. ed. 143. Certainly, there was no vested right in the special remedial procedure outlined in Section 80 of the New York banking law. *Schriver* v. *Woodbine Savings Bank,* 285 U. S. 467, 479, 76 L. ed.

884, 892; *Howarth* v. *Angle,* 162 N. Y. 179, 188. These cases recognize that where a statute creates a liability of stockholders to assessment, although the liability is transitory, the special statutory forms of remedy provided by such statute may not be resorted to elsewhere. Section 80 of the banking law of New York is such a special form of remedy upon the obligation created by Section 120 of that Act and by the New York Constitution. The principle declared in the cases last cited is persuasive of appellees' contention that in seeking to enforce this liability outside of New York, appellant must *accept* whatever remedies are provided by the forum, whether reasonable or otherwise.

As was held in *Louisville & Nashville R. R. Co.* v. *Schmidt,* 177 U. S. 230, 44 L. ed. 747:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein."

This same principle has been enunciated in numerous other Supreme Court cases.

If New Jersey has seen fit to provide a remedy for enforcing the statutory liability, which it need not have done, appellant cannot complain of any alleged unreasonableness of that remedy provided. The procedure required by Section 94b is no different, however, from that required in New York prior to the enactment of the present Section 80 of the New York banking law. See *Marshall* v. *Sherman,* 148 N. Y. 9, 42 N. E. 419, and *Cheney* v. *Scharmann,* 145 App. Div. 456, 129 N. Y. Sup. 993.

Appellant cites three recent decisions of the United States Supreme Court, viz.: *Nebbia* v. *New York,* 78 L. Ed. 563; *Snyder* v. *Commonwealth of Massachusetts,* 78 L. Ed. 319, and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Company,* 78 L. Ed. 767, in support of his argument under this point. It is submitted that said cases are entirely irrelevant. Section 94b is not an attempt unreasonably to limit the freedom of contract, as was alleged in *Nebbia* v. *New York, supra,* nor a deprivation of life or liberty by unreasonable court procedure, as alleged in *Snyder* v. *Commonwealth of Massachusetts, supra,* nor an attempt by one state to declare illegal a contract which was valid and legal in a sister state where the contract was made, as alleged in *Hartford, &c., Co.* v. *Delta, &c., Co., supra.*

It is charged by appellant that the statute "flies in the face of" the last-named decision; but said decision merely held that a contract is to be construed according to the law of the place of contract, and not by the *lex fori,* a familiar principle of conflicts of law; it further held that a statute which contravenes this principle so as to limit the obligation of the contract violates the due process clause. Concededly, if the obligation of the appellees herein was under a contract made in the State of New York, rather than under a New York statute and having a contractual nature, and the New Jersey statute provided that in suits brought to enforce the liability in this state, the stockholders would have to pay no more than one-half of the par value of their shares, such statute would be unconstitutional and the *Hartford, &c., Co.* v. *Delta, &c., Co.,* case, *supra,* would be in point. But the obligation herein is not based upon contract, but upon the Constitu-

tion and laws of New York State (State of Case, pp. 8, 10, ff.). The courts, although frequently referring to the "contractual nature" of such obligation, are careful to avoid such confusion of thought. See *Bernheimer* v. *Converse,* 206 U. S. 516, 529, 51 L. Ed. 1163, 1174, and especially the language of Mr. Justice HOLMES, found at the end of the reported opinion at page 535, L. Ed. page 1176. And assuming that in purchasing stock in the Bank of the United States, appellees thereby actually contracted for double liability, still, a contract is to be construed according to the laws of the State wherein acceptance takes place. Presumably, these purchases by New Jersey residents took place in New Jersey—the complaint does not allege that the "contract" was entered into in the State of New York. Then, for this additional reason, the *Hartford, &c.* v. *Delta, &c.,* case, *supra,* fails to be applicable. In that case, the Mississippi statute would not be unconstitutional as applied to contracts entered into in Mississippi, although it was held to be unconstitutional as applied to a Tennessee contract.

Nor does the section of the Corporation Act concern itself with the nature or extent of the stockholders' liability under the New York law. It simply specifies the sole remedy for the enforcement of such liability that this state will permit. *Hartford, &c., Co.* v. *Delta, &c., Co., supra,* is further distinguishable, in that the Mississippi statute which was declared unconstitutional was passed in 1930, subsequent to the expiration of the period of limitation contained in the contract of the parties in that case; whereas Section 94b was enacted in 1897, long before the present banking law of New York, and certainly long before the Bank of the United States was

incorporated and the appellees purchased stock therein.

Rolfe v. *Rundle,* 103 U. S. 222, and *Clark* v. *Willard,* 78 L. Ed. 743, hold no more than that a Superintendent of Banks, unlike an ordinary Chancery receiver, has a status which is to be recognized in foreign states. This may be conceded, but the decisions do not hold that therefore all causes of action given to the Superintendent by the laws of his state are required to be enforced in the courts of other states.

In short, there is nothing in the Fourteenth Amendment which controverts the well-established rule referred to in Point II, *supra,* that, except for the requirement of the full faith and credit clause and the Federal statute of 1790, that judicial proceedings of one state are to be enforced in sister states, rights acquired under the laws of one state are enforceable in other states only through comity. This being so, the reasonableness of the remedy which the statute (Section 94b) provides cannot be brought into question in this court.

POINT IV.

The appellees' liability is enforceable in this state only by an equitable accounting action conformable to Section 94B of the New Jersey Corporation Act.

Appellant devotes much space to his argument that an action at law is the proper method of enforcing the appellees' obligation. He cites the New Jersey decisions of *McDermott, Receiver,* v. *Woodhouse,* 87 N. J. Eq. 615; *Chicago Title & Trust Co.* v. *Young,* 90 N. J. Eq. 27, and *Graham* v. *Fleissner,* 107 N. J. Law, page 278, as authori-

ties. These cases were dealing, however, not with the statutory liability of stockholders to assessment to pay corporate debts; but with the liability of subscribers for corporate stock to pay the amount of their subscription—the so-called "trust fund liability." They held that the courts of the domicile of the corporation should determine the amount and necessity for assessment, and that then an action at law would lie in this state to recover the assessment. Of course, Section 94b was not applicable to that type of suit (*Graham* v. *Fleissner, supra*), as it is to this action. And the legislature has plenary power to provide in what courts, and through what procedure, a right of action may be enforced in this state. The right to legislate upon the courts within its borders, and the remedies afforded therein, inheres in the State of New Jersey as a sovereign, and there is nothing in the United States Constitution which interferes with this complete control. *McElmoyle* v. *Cohen,* 13 Peters 312, 10 L. Ed. 177; *Bacon* v. *Howard,* 61 U. S. 22, 15 L. Ed. 811; *Chambers* v. *B. & O. R. R. Co.,* 207 U. S. 142, 52 L. Ed. 143; *Bank* v. *Dalton,* 9 How. 522, 13 L. Ed. 242.

Under this unquestionable power, the legislature provided, in Section 94b, for the equity proceeding, and the statute is conclusive upon this court, regardless of the opinion expressed in the cases dealing with the trust fund liability (*ubi supra*). *Bond* v. *Hume,* 243 U. S. 15, 61 L. Ed. 565.

As shown under Point II, *supra,* New Jersey may entirely refuse to enforce, in its courts, the stockholders' liability. Instead of closing our courts completely to suits to enforce the stockholders' liability, this state has seen fit to give a remedy of a certain kind. Appellant must be

content therewith. The State of New York, by virtue of the provisions contained in its statutes, cannot interfere with New Jersey's control over its courts. *Tennessee Coal & Lee Co.* v. *George,* 233 U. S. 354, 58 L. Ed. 997; *Hancock National Bank* v. *Ellis,* 172 Mass. 39, 51 N. E. 207; *Spokane I. E. R. Co.* v. *Whitley,* 237 U. S. 487, at pages 494, 495, 59 L. Ed. 1060, at page 1067. If the appellant bases his supposed right to sue at law in New Jersey upon the New York banking law, Section 80, he is met by this rule.

Appellant intimates that the operation of Section 94b, providing for suits in the Court of Chancery rather than in the courts of law, is repugnant to Article IV, Section VII, paragraph 4, of the State Constitution, in that its object is not expressed in its title. Since this argument was not advanced to the court below, it should be unavailable to the appellant here. *Park Ridge* v. *Reynolds,* 74 N. J. Law 449. It is submitted, however, that the broad title of the Act, which was supplemented by Section 94b, *i. e.,* "An Act Concerning Corporations," fairly encompasses the object of this section. The Corporation Act embodies a complete system of law governing corporations. Section 94 is germane to the immediately preceding portions of the original act, which also provide for the court in which suits to enforce the personal liability of officers, directors and stockholders of a corporation shall be brought. *2 C. S.,* 1910, page 1655, Section 92, *et seq.*

Therefore, the statute successfully meets the test expressed in *Hulme* v. *Board of Commissioners of Trenton,* 95 N. J. Law 30, 111 Atl. Rep. 541:

> "* * * The constitutional provision was meant to prevent the concealment of the real object of the act and what is commonly called

> logrolling. The incongruity of the object of a statute in its application to the facts must depend on the existing state of the law, just as the Court of Errors and Appeals has held that the object expressed in the title must give notice of the effect of the legislation to one conversant with the existing state of the law (Sawter v. Shoenthal, 83 N. J. Law, 499, 501, 502, 83 Atl. 1004) * * *."

Aside from the above statute, it is submitted that an equitable accounting action is the proper procedure, for as was said in *Cochrane* v. *Morris,* 10 N. J. Misc. 82, 157 Atl. Rep. 652:

> "Justice requires that a stockholder at best pay only his proportionate share of the liabilities and that can only be determined in a proper proceeding in a court of equity, which the statute contemplates."

See, also, *Marshall* v. *Sherman,* 148 N. Y. 9, at page 22.

Conclusion.

These appellees submit that the judgment below should be affirmed, for that:

1. The present action is barred by Section 94b of the New Jersey Corporation Act;

2. Said statute does not violate the full faith and credit clause of the Federal Constitution, since the assessment by the Superintendent of Banks is not a judgment or judicial proceeding in itself; since the statutory cause of action alleged in the complaint is contrary to the statute and public policy of this state, and since the full

faith and credit clause does not compel any state to afford any remedy for a transitory cause of action arising under the laws of another state;

3. Said statute does not violate the due process clause of the Fourteenth Amendment, since said clause does not deprive a state of its right to legislate concerning its courts and the remedies to be afforded therein;

4. The action was not properly brought in the courts of law.

The appellant cannot be heard to complain that final judgment was entered in the court below, instead of there being a transfer to the Court of Chancery, since his counsel agreed to the form of judgment in open court.

It is submitted, however, that the entry of judgment final does not have the effect of barring a proper proceeding conformably to Section 94b of the Corporation Act.

Wherefore, it is respectfully submitted that the judgment of the Supreme Court should be affirmed.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys for Herman Geismar and
The Farg Co., Inc., a corporation,
Defendants-Appellees.

DAVID FRIEDENBERG,
of Counsel.

PRESS OF FREMONT PAYNE, INC.

[11791]

New Jersey Court of Errors and Appeals

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, Plaintiff-Appellant, vs. BENJAMIN ABRAMS, *et als.*, Defendants-Appellees.	Action at Law. On Appeal from Supreme Court.

BRIEF OF EICHMANN & SEIDEN FOR VARIOUS APPELLEES.

This is an appeal from a judgment entered in the Supreme Court in favor of various defendants.

The plaintiff instituted his action in the Supreme Court, as Superintendent of Banks of the State of New York, to recover from the defendants a double liability imposed upon them under the laws of the State of New York as stockholders of the Bank of United States, an insolvent bank of the State of New York.

Various defendants moved to strike out the plaintiff's complaint for various reasons, the chief reasons being (1) that this action was not maintainable in the New Jersey Supreme Court because of the prohibition contained in Section 94B of the New Jersey Corporation Act, and (2) that the complaint did not set forth a cause of action.

As all of the facts in this case are fully set out in the appellant's brief, they need not be repeated here. Undoubtedly various other appellees will file briefs in this cause, and therefore in order to avoid

unnecessary repetition as far as possible, this argument will be as concise and brief as possible, and will be confined solely to a reply to the points raised in appellant's brief.

POINT I.

Section 94B of the New Jersey Corporation Act is a bar to the plaintiff's action in the New Jersey Supreme Court.

The first point raised by the appellant as a reason for the reversal of the judgment entered in this cause is that Section 94B of the Corporation Act is not applicable to this case, because this action is not brought by a creditor for a debt of the corporation.

Section 94B of the Corporation Act prohibits an action at law "by or on behalf of any creditor". It is undisputed that the plaintiff is the representative of all of the creditors and depositors of the Bank of United States. The appellant in this respect contends that the Statute is aimed solely at actions brought by single creditors and not at an action brought by a representative of all of the creditors. This contention is apparently based upon the fact that the word "creditor" in the Statute is used in the singular number.

Under Section 9 of "An Act relative to Statutes" (C. S., p. 4972), it is provided "that whenever in describing or referring to a person * * * importing the singular number * * * is used in any statute, the same shall be understood to include and shall apply to several persons * * * unless it be otherwise provided, or there be something in the statute or context repugnant to such construction."

It is clearly apparent from reading the entire section of the Corporation Act, that the Legislature intended that any action by a creditor, or on behalf of any or all creditors, be barred in a court of law. If the Statute is to be construed as being aimed at only actions by single creditors, the words "or on behalf of" would thus be rendered meaningless, and it is a cardinal rule of construction of statutes that every word contained therein should be given its ordinary meaning.

The appellant also contends that this action is not brought "for or upon any debt, default or obligation of such corporation." Section 120 of the Banking Laws of the State of New York, upon which the appellant's right of action is based, provides that "the stockholders of every bank shall be individually responsible * * * for all contracts, debts or engagements of the bank * * *." Surely there is no real distinction between "debt, default and obligation" and "contracts, debts and engagements."

The case at bar is exactly similar to the case of *Cochrane* vs. *Morris,* 10 N. J. Misc. Rep. 82, decided by Judge Oliphant, in which case it was held that a complaint setting forth substantially the same matters as is set forth in plaintiff's complaint in the case at bar, did not set forth a cause of action because of the prohibition of Section 94B of the Corporation Act.

The appellant contends that Judge Oliphant's decision is not sound and should not be followed because, as the appellant contends, the decision in that case is based upon the decisions in *Western National Bank* vs. *Reckless,* 96 Fed. Rep. 70, and *Marshall* vs. *Sherman,* 148 N. Y. 9 (See Aplt.'s Br., p. 13). A reading of Judge Oliphant's opinion in *Cochrane* vs. *Morris,* discloses that he based his conclusions upon the provisions of Section 94B of

the Corporation Act, and in that opinion Judge Oliphant expressly stated that the case of *Western National Bank* vs. *Reckless,* was not applicable. As to Judge Oliphant's reference to *Marshall* vs. *Sherman,* it is true that that case was referred to as a wonderful exposition of the theory and principle of the law, but was in no sense the sole basis for his determination.

We must therefore conclude that the cause of action alleged in plaintiff's complaint comes directly within the provisions and meaning of Section 94B of the Corporation Act, and must therefore be controlled by that Statute.

POINT II.

Plaintiff has no remedy in the Courts of Law of this State.

As his second point for reversal, the appellant contends that his remedy is in the Courts of Law, and that the Court of Chancery of New Jersey does not have jurisdiction over the subject matter of this suit.

In support of this contention numerous cases from various jurisdictions are cited to the effect that actions to enforce the statutory liability of stockholders may be brought in Courts of law. This proposition as a general rule is not disputed. There is no question but that an action at law such as the present action could be maintained in this State, were it not for the express prohibition of Section 94B of our Corporation Act. In all of the cases cited by the appellant in support of this contention, there was no question of the existence of a procedural statute such as Section 94B, which expressly provides for the form of remedy to be pursued in cases such as the present one.

As will be shown later, the Legislature of this State has an absolute right to enact a procedural statute regulating the form in which actions such as the present one can be maintained.

The appellant also contends that the Court of Chancery does not have jurisdiction over this cause of action, and in support of this contention cites the following New Jersey cases: *McDermott* vs. *Woodhouse,* 87 N. J. Eq. 615; *Chicago Title & Trust Company* vs. *Young,* 90 N. J. Eq. 27; and *Graham* vs. *Fleissner,* 107 N. J. L. 278. None of these cases are applicable to the case at bar, nor do they support the appellant's contention in the respect in which they are cited. All of these cases deal with actions to recover unpaid subscriptions to stock and cases in which the stockholders secured stock at only a part of its par value, that is the "trust fund" theory of stockholders liability. In these cases it is held that the New Jersey Court would not cast up the assets and liabilities of a foreign corporation to determine the amount of the stockholders liability on the "trust fund" theory. In the case of *Graham* vs. *Fleissner,* 107 N. J. L. 278, this Court expressly held that Section 94B of the Corporation Act does not apply to actions to enforce the "trust fund" liability of a stockholder, and in none of the cases cited did the Court decide that the Court of Chancery had no jurisdiction over actions to enforce a stockholder's statutory personal liability.

Section 94B of the Corporation Act expressly confers upon the Court of Chancery the jurisdiction over the present case, and even if such jurisdiction were not so expressly conferred, that Court could assume jurisdiction under the general equity doctrine that the Court of Chancery would grant relief to a suitor when no adequate remedy at law is available or provided for.

POINT III.

Section 94B does not violate the Fourteenth Amendment to the United States Constitution.

The next contention of the appellant is that the equitable action provided for in Section 94B is so unreasonable and arbitrary as to violate the due process clause of the Fourteenth Amendment to the United States Constitution. The only reason advanced in support of this contention is that it would be very expensive for the appellant to institute an action in the Court of Chancery in which action over four hundred thousand parties would be joined, and in which action it would be necessary for the plaintiff to bring into this jurisdiction all of the records of the Bank.

It cannot be said that if the terms of the Statute are unreasonable or arbitrary because it would work a hardship upon the appellant that this Statute is void. Such an adjudication would in effect deny to a representative of some other insolvent foreign corporation the right to enforce a statutory liability of stockholders even if the litigation would not be as expensive and involve as many parties as in the present case.

The State of New Jersey has the sovereign right to prescribe the form of remedy to be pursued in its courts to enforce liabilities or obligations imposed by the laws of foreign states, and the power of the State cannot be affected or in any way impaired because in one isolated instance the party seeking to enforce such liability may incur some hardship and be put to expense in doing so.

POINT IV.

Section 94B of the Corporation Act does not violate Article IV, Section 1 of the United States Constitution.

The appellant contends that Section 94B is void because it violates the full faith and credit clause of the United States Constitution.

The main reliance for this contention by the appellant is the case of *Converse* vs. *Hamilton,* 224 U. S. 243, decided by the United States Supreme Court. In that case the courts of Wisconsin refused to enforce a statutory personal liability imposed upon a stockholder under the laws of Minnesota, where the assessment of the liability had been imposed under an order of the Minnesota courts. There is a broad distinction between the case of *Converse* vs. *Hamilton* and the case at bar. In the cited case the assessment of the stockholders' liability was definitely adjudicated in a judicial proceeding in the home state of the corporation, whereas in the present case the assessment of the defendants' liability was not made by any court or by any judicial action.

The full faith and credit clause of the United States Constitution requires full faith and credit to be given to public laws, records and judicial proceedings of sister states. The proceedings in the case at bar under which the stockholders' liability was assessed, was not a judicial proceeding and is therefore not of such nature as to require the Courts of this State to enforce such liability in spite of the declared public policy of this State. The statutory officer making the assessment in the present case is both the moving party and the judge and jury of the facts necessary for a determination of the assessment, from whose determination no appeal or

right of recourse to any Court is given to the stockholders.

For the reasons stated, the case at bar is not one in which the full faith and credit clause requires enforcement of the stockholders' liability in this State, and therefore the determination on this point must rest upon the general doctrine of comity between states.

Section 94B of the Corporation Act may be construed as a declaration of the public policy of this State to refuse to enforce the statutory personal liability of a stockholder, except when the action to enforce such liability is one in the nature of an equitable accounting.

The provisions of the full faith and credit clause are not as all inclusive as may be thought at first reading; as Judge Van Devanter said in *Converse* vs. *Hamilton,* 224 U. S. 243:

> "The full faith and credit clause of the Constitution is not without well-recognized exceptions."

And in the case of *Bradford Electric Light Company* vs. *Clapper,* 286 U. S. 145, at page 160, Judge Brandies said:

> "It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another state. There is room for some play of conflicting policies. Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because * * * the enforcement of the right conferred would be obnoxious to the public policy of the forum.
>
> A state may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere."

And as Justice Stone said, in the same case, at page 163, in a concurring opinion:

> "I should hesitate to say that the Constitution projects the authority of the Vermont statute across state lines into New Hampshire, so that the New Hampshire courts, in fixing the liability for a tortious act committed within the state, are compelled to apply Vermont law instead of their own. The full faith and credit clause has not hitherto been thought to do more than compel recognition outside the state, of the operation and effect of its laws upon persons and events within it."

In the case of *Masci* vs. *Young,* 109 Law, 453, affirmed by the U. S. Supreme Court, 289 U. S. 253, the New Jersey Court of Errors and Appeals, states the general rule regarding enforcement of foreign laws. Justice Donges said at page 454:

> "It seems to be the settled law that certain classes of foreign created actions will not be enforced, namely, those which are penal, those which are contrary to the policy of the law of the state, in which the suit is brought, and those for whose enforcement the local judicial procedure is inadequate."

In addition to the foregoing, there is another reason for upholding the validity of Section 94B of the Corporation Act, and that is, that this section is a procedural statute and does not in any manner affect a substantive right.

It is a fundamental rule that a State may pass laws concerning the proper procedure to be followed and the particular court in which certain actions may be brought and maintained.

Innumerable cases may be cited in support of this proposition, but as the rule is fundamental, for the sake of brevity, we merely refer to the following quotations from Corpus Juris:

In 12 C. J. p. 826, Section 298, it is stated as follows:

> "The legislature has power to regulate and control the forms of procedure for the administration of justice in the Court."

And in 1 C. J., Section 92, p. 984, "Actions", it is stated:

> "It is well settled that the lex fori, or the law of the forum, governs as to the form of remedy and all matters of procedure relating thereto. Willard vs. Wood, 164 U. S. 502; Bacon vs. Howard, 20 How. 22; Robinson vs. Campbell, 3 Wheat. 212; James Dickinson vs. Harry, 273 U. S. 119.
>
> It is elementary that the lex fori governs in all matters relating to the remedy and course of procedure. It controls the form of the action * * * the parties to the suit * * * and the sufficiency of the pleadings and the competency of the evidence. Fryklund vs. Great Northern Railroad Co., 101 Minn. 37, 111 NW 727."

The New Jersey Court of Chancery has recognized the fact that Section 94B is a procedural or remedial statute not affecting any substantive rights. In the case of *Johnson* vs. *Tennessee Oil Co.,* 74 N. J. Eq. 32, Vice-Chancellor Emery said at page 35:

> "The liability of the defendants as stockholders, to creditors of the company upon their stock, depends on the laws of Arizona, subject as to parties and procedure to our own act of 1897 (Sec. 94 B. of the Corporation Act), requiring in such cases the suit for enforcing a statutory personal liability to be not an action at law, but a suit in equity for an accounting to which the corporation and all of the stockholders are parties."

For the reasons set forth it is apparent that Section 94B of the Corporation Act does not in any

respect violate the full faith and credit clause of the United States Constitution for the reasons (1) that the assessment upon which the present action is based is not a judicial proceeding within the meaning of the full faith and credit clause, and (2) that Section 94B is a procedural statute and does not affect the appellant's substantive rights.

POINT V.

The fifth point made by the appellant in his brief is that the present action is transitory in its nature and may be enforced in New Jersey.

It is conceded that the cause of action of the appellant is transitory and is capable of enforcement in this State. However, the appellant in order to enforce his right of action must pursue the form of remedy prescribed by the laws of the forum in which enforcement is sought. In New Jersey under Section 94B of the Corporation Act, the cause of action may not be enforced in a court of law, but the appellant has his remedy by the institution of an action in the nature of an equitable accounting.

For the reasons above set forth, it is respectfully submitted that the action of the Supreme Court in the case at bar was not in any respect erroneous, and that the judgment of the Supreme Court should be affirmed.

EICHMANN & SEIDEN,
Attorneys for Defendants-Appellees,
Benjamin Gorlin, Charles Kanter,
Henry J. Goodman, Benjamin Levy,
Northern New Jersey Investment
Co., a corporation, Alex Steinberger, A. D. MacDougall and Gertrude Kapralik.

NEW JERSEY COURT OF ERRORS AND APPEALS

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York,
Plaintiff-Appellant,

v.

BENJAMIN ABRAMS, *et als.*,
Defendants-Appellees.

ACTION AT LAW.

ON APPEAL FROM SUPREME COURT.

BRIEF FOR DEFENDANTS NAMED BELOW.

PREFATORY STATEMENT.

This brief is filed on behalf of:

Raymond C. Staples
William J. Gruler
Mrs. Maude A. Benkart
Zulena Cook Woodward
Hannah C. Bailey
Charles N. Warner
Alfred R. M. Diggles
Charles P. Anderson
Andrew Schwarz
Frank W. Sutton, Jr.

Toms River Amusement Co.
Arney-Sutton-Gruler Co.
Sutton Brothers Co.
Stephen R. Applegate
Paul S. Goble
Mrs. Mary A. Van Nostrand
Howard Ewart
Hamilton G. Pedrick
Clair MacFarland
James Mercer Davis.

The bank of the United States (a New York corporation) failed December 11, 1930, and was taken over on that date by the Superintendent of Banks of the State of New York (Case, 5). The bank had a capital of $25,250,000, represented by 1,010,000 shares of the par value of $25 per share, and the stock was distributed among 20,843 stockholders residing in various sections of the country (Case, 5).

On July 6, 1932, by notice in writing, the Superintendent of Banks of the State of New York notified the stockholders that he had levied an assessment against each of them in the sum of $25 per share, payable August 8, 1932, pursuant to the provisions of Section 80 of the Banking Law of the State of New York (Case, 15).

On November 13, 1933, this suit at law against several hundred of the New Jersey stockholders was instituted in the Supreme Court of this State (Case, 2).

Notices of motions to strike the complaint were served upon plaintiff's counsel; the matter came on for argument before Mr. Justice Parker in the

Essex Circuit; briefs were submitted by both sides; Justice Parker filed an opinion on January 30, 1934 (Case, 23) wherein he determined to strike the complaint for the reasons in the opinion set forth; and, under date of February 10, 1934, an order was made formally striking the complaint (Case, 33). From this order, plaintiff has appealed to this Court.

POINT I.

SECTION 94b OF THE NEW JERSEY CORPORATION ACT CONSTITUTES A BAR TO THE PROSECUTION OF THE PRESENT SUIT AT LAW.

This New Jersey statute, enacted in 1897, is set forth at length on pages 10 and 11 of appellant's brief and will not be here repeated.

In support of this point, we, of course, place reliance principally upon the opinion rendered by Mr. Justice Parker in the Supreme Court and the reasons therein given and the cases therein cited, which opinion will be found in the State of the Case, page 23.

Notwithstanding the argument attempted under Point I of appellant's brief, a reading of plaintiff's complaint, particularly paragraphs 5, 6, 7 and 8, thereof (Case, pp. 7-10); of the notice of assessment sent to the stockholders (Case, 15); and of Section 94b of the Corporation Act, a copy of which is set forth in appellant's brief on page 10, must inevitably

lead to the conclusion that this action in the New Jersey Supreme Court was instituted in a court of law against stockholders of a foreign corporation on behalf of the creditors of such corporation, to enforce a statutory personal liability of the stockholders, in plain defiance of the provisions of the New Jersey statute. Mr. Justice Parker in his opinion upholding the validity of the New Jersey statute, cites, *inter alia, Finney v. Guy,* 189 U. S. 335, paragraph 3 of the Syllabus of that case reading as follows:

> "Whether a State Court should permit an action to be maintained therein on the principle of comity between the States is a question exclusively for the Courts of that State to decide."

As additional authorities for the same proposition, we cite the following cases:

Dougherty v. American McKenna Process Co., 255 Ill. 369, 99 N. E. 619, decided by the Supreme Court of Illinois in 1912. That was a suit in the courts of Illinois for death by wrongful act occurring in New Jersey. The Illinois statute prohibited suit for death occurring outside of Illinois, but counsel contended the action was based upon the New Jersey statute and that a denial of the right to sue in Illinois would contravene the provisions of Sec. 1, Art. 4 of the Federal Constitution. In refusing to entertain jurisdiction of the suit in the State of Illinois, the Court held:

> "Whatever force and obligation the laws of one country have in another depend solely on the laws and municipal regulations of the latter.

Story on Conflict of Laws (8th Ed.) Sec. 23. * * * Except, however, 'as restrained and limited by that instrument (Constitution), they, (the States) possess and exercise the authority of independent states.' Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. It was not intended by the provisions of the federal constitution relied on by counsel to give to the laws of one State any operation in other States except by a permission, express or implied, by those States. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357. Laws are without force beyond the jurisdiction of the State which enacts them, and can have no extra territorial effect except by a comity of other States. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. * * * If the policy of the forum has been expressed positively in a statute, that policy must prevail. When the legislature speaks upon a subject upon which it has constitutional power to legislate, public policy is what the statute indicates. * * * Each State, subject to restrictions of the Federal Constitution, determines the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has arisen outside of the State. St. Louis, Iron Mountain & S. Railroad Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. Different States may have different policies, and the same State may have different policies at different

> times, provided that any policy the State may choose to adopt must operate the same way on its own citizens and those of other States. Chambers v. Baltimore & Ohio Railroad Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143."

In *Carey v. Schmeltz,* 221 Mo. 13 2, 119 S. W. 946, the Digest Report of this case reads as follows:

> "It has never been held under this full faith and credit clause of the U. S. Constitution that a State is compelled to enforce in its courts the statute of another when such statute is penal in its character or contrary to the policy of the State. Considering the large number of States of this Union and their separate and distinct governmental policies, great confusion would result if a right of action created by the peculiar policy of one State under its peculiar statute could be carried into another State and the State to which it is carried be compelled to enforce it through its own courts although contrary to the policy of its own laws."

In *Chambers v. Baltimore & O. R. Co.,* 207 U. S. 142, decided by the United States Supreme Court in 1907, action was brought under the Death Act in the State of Ohio under a Pennsylvania statute for the alleged wrongful death of Chambers while engaged in work as an engineer for the defendant railroad. Both Chambers and wife resided in the State of Pennsylvania at the time of his death and the accident occurred in that State. Under the Ohio statute, a right of action in the Ohio courts where

death occurred outside of the State of Ohio was only given to citizens of Ohio. After judgment for the defendant in Ohio, the matter went to the United States Supreme Court on writ of error and the latter Court, in dismissing the writ and upholding the Ohio statute, said:

> "But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The State policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies, and the same State may have different policies at different times. But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other." (pp. 148-149.)

In *St. Louis, Iron Mountain & Southern R. R. Co. v. Taylor,* 210 U. S. 281, Mr. Justice Moody, in delivering the opinion of the United States Supreme Court, said at page 285:

> "Each State may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts

transitory actions, where the cause of action has arisen outside its borders."

Van Tuyl v. Carpenter, 135 Tenn. 629 (188 S. W. 234), was a suit instituted by the then Superintendent of Banks of the State of New York in the courts of Tennessee against certain residents of Tennessee who were stockholders of the Carnegie Trust Company, a New York banking corporation, to recover on a stock assessment made by Van Tuyl as Superintendent of Banks of the State of New York. The case is an exact parallel to the one *sub judice.* The Supreme Court of Tennessee in a lengthy, well-reasoned and outstanding opinion, denied the right of the Superintendent of Banks of the State of New York to bring suit in Tennessee and held, at page 236, 188 S. W. Rep.:

"So, the statutory rule quoted could be applied here only through comity. * * * So the question recurs: Shall we enforce a liability based solely on the arbitrary action of the Superintendent of Banks of the State of New York? We decline so to do. That action is arbitrary because it is based solely on the will of a single person directed by no fixed principle declared in any form by the social organization."

In *Cochrane, Liquidator, &c. v. Morris,* 10 N. J. Misc. 82, Judge Oliphant, sitting in the Mercer Circuit, struck out the complaint in an action at law instituted by the Liquidator of the First Bank of

Lake Worth, Florida, for a stock assessment against a resident of New Jersey under a Florida statute, basing his action upon Section 94-b of the New Jersey Corporation Act.

Under Point I of his brief, appellant cites *Western National Bank v. Wreckless,* 96 Fed. 70, as illustrating the enforcement of liability created by a statute of the State of Kansas against a New Jersey resident holding stock in a Kansas Trust Company which failed. The case was decided by the U. S. Circuit Court for the New Jersey District in 1899. A careful reading of that case, however, will show that the Court found that the cause of action arose in 1892, whereas Section 94-b of the New Jersey Corporation Act did not become effective until March 30, 1897, so that the statute had no controlling force on a cause of action that had arisen some five years before the statute was enacted. Judge Oliphant makes note of that fact in his opinion in re: *Cochrane v. Morris, supra.*

In *Flagg v. Baldwin,* 38 N. J. Eq. 219, this Court said:

> "The enforcement of a foreign law and contracts dependent thereon for validity within another jurisdiction and by the courts of another nation, is not to be demanded as a matter of strict right. It is permitted, if at all, only from the comity which exists between states and nations. Every individual community must judge for itself how far its comity ought to extend."
>
> (pp. 223 and 224.)

> "A contract valid where made will not be enforced by the courts of another country, if, in so doing, they must violate the plain public policy of the country whose jurisdiction is invoked to enforce it, or if its enforcement would be injurious to the interest or conflict with the operation of the public laws of that country." (p. 224.)

The same proposition is stated in *Wharton on the Conflict of Laws* (3d Ed.), Vol. 2, p. 940, wherein it is stated:

> "A contract valid by law of the State in which it is made * * * is valid and enforceable everywhere, unless it is * * * repugnant to the policy * * * of the jurisdiction in which it is sought to be enforced."

The Legislature of this State has the right to determine our public policy and a reference to the Legislation in New Jersey on this subject is the best evidence of what our public policy in this respect has been and is.

> *American Radiator Co. v. Rogge,* 86 N. J. L. 436, at 441.

Section 94-b of the New Jersey Corporation Act expresses the Legislative policy of this State with respect to the manner in which a stock assessment liability may be enforced. It merely regulates the remedy and does not deny the right.

POINT II.

THE ASSESSMENT AGAINST NEW JERSEY STOCKHOLDERS SOUGHT TO BE ENFORCED IN THIS SUIT IS INVALID BECAUSE MADE AND LEVIED BY THE SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK WITHOUT NOTICE TO STOCKHOLDERS IN NEW JERSEY.

A reading of the complaint in this suit will reveal no allegation that any notice of any kind was ever given to these defendants of the proceedings by which the assets and liabilities of the Bank of the United States were determined and the amount of the assessment against stockholders was arrived at. In fact, the first notice given to these defendants of the proceedings in New York was notice of the assessment already made against them and a demand for its payment (Case, 15). In other words, the liability for the assessment was already fixed and the amount thereof determined before the defendants were ever notified of the proceedings. If such proceedings are valid, then the defendants have been judged and condemned without hearing and without an opportunity for hearing. Can such a proceeding be upheld? We contend it cannot for these reasons:

Section 1 of Article 4 of the United States Constitution requires that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the

plaintiff in this suit relies upon that constitutional provision in attempting to enforce the assessment made by the Superintendent of Banks of the State of New York. That section of the Constitution, however, does not require the acts of a sister State to be enforced when such acts or proceedings are had without jurisdiction or are otherwise wanting in due process of law.

Wetmore v. Karrick, 205 U. S. 141 (148-149).

In *Old Wayne Life Assn. v. McDonough,* 204 U. S. 8, Mr. Justice Harlan, in speaking for the Supreme Court of the United States, said at page 15:

> "The constitutional requirement that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law. 'No judgment of a Court is due process of law, if rendered without jurisdiction in the Court, or without notice to the party.' Scott v. McNeal, 154 U. S. 34, 46. No State can, by any tribunal or representative, render nugatory a provision of the Supreme Law. And if the conclusiveness of a judgment or decree in a court of one State is questioned in a court of another government, Federal or State, it is open, under

proper averments, to inquire whether the Court rendering the decree or judgment had jurisdiction to render it.

Such is the settled doctrine of this Court."

In *Scott v. McNeal,* 154 U. S. 34, Mr. Justice Gray, speaking for the U. S. Supreme Court, said, at page 46:

"No judgment of a Court is due process of law, if rendered without jurisdiction in the court or without notice to the party. * * * Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the Court. And such a judgment is wholly void, if a fact essential to the jurisdiction of the Court did not exist."

In *McDermott v. Woodhouse,* 87 N. J. Eq. 615, this Court held:

"In order to fix a stockholder's liability, he must be bound by the proceedings to determine the amount thereof. He cannot be bound without some sort of notice."

(p. 618.)

In the same case, the Court held that the utmost extent of the liability of stockholders is to pay the amount required to satisfy claims of the corporate creditors, and that:

"Since this is the limit of the stockholders'

> obligation, it follows that the amount must be ascertained by a tribunal which has the power to ascertain the total amount of the debts and the total amount of the assets of the corporation."

In *Graham v. Fleissner's Executors,* 107 N. J. L. 278, 153 A. 526, this Court, speaking through Mr. Justice Parker, held with respect to a bankruptcy proceeding in New York State wherein was determined the deficiency necessary to make up an amount to pay corporate creditors and wherein was ascertained and apportioned among existing or former stockholders the liability to assessment (under the trust fund theory) that some notice of such proceedings, of the hearing, and, finally, of the amount due by the stockholders was necessary, and that notice sent by mail to the former stockholder, particularly if actually received by him, as it appears to have been in that case, was sufficient to bind him (p. 283).

We recognize the apparently well-established legal principle that:

> A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member; that a decree or judgment determining insolvency and assessing stockholders is final and conclusive between the parties and their privies without personal notice of hearing; and that, in the absence of fraud, the judgment must be held to be final and conclusive against the stockholders if the Court

rendering it had jurisdiction; saving, however, to the stockholder in a suit upon the assessment, defenses of payment, release, etc.

The foregoing principle of law is upheld in the following cases:

Great Western Telegraph Co. v. Purdy, 162 U. S. 329;
Hawkens v. Glenn, 131 U. S. 319;
Glenn v. Liggett, 135 U. S. 533;
Glenn v. Marbury, 145 U. S. 499;
Hancock National Bank v. Farnum, 176 U. S. 639;
Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co., 57 N. J. Eq. 627;
McDermott v. Woodhouse, 87 N. J. Eq. 615, at 618;
Coe v. Armour Fertilizer Works, 237 U. S. 413, at 423.

And see also cases cited in *Van Tuyl, et al. v. Carpenter,* 135 Tenn. 629, 188 S. W. 234, at pp. 235, 236, of the S. W. Reporter.

However, as stated by the Supreme Court of Tennessee in *Van Tuyl v. Carpenter,* 188 S. W. 234, at 235-236:

> "No such representation is supported by the authorities where the call is made by a mere non-judicial officer belonging to the executive department of a State government. Nor do we think that such decision can be properly made since the power exercised is purely arbitrary."

The representation referred to by the Tennessee Court is, of course, the representation of the individual stockholders by the corporation in insolvency proceedings, and the reference to "a mere non-judicial officer" refers to the Superintendent of Banks of the State of New York. Indeed, in *Matter of Union Bank,* 204 N. Y. 313, 97 N. E. 737, the Superintendent of Banks of the State of New York is classed as a mere receiver and it is denied that he has any judicial powers whatever.

Van Tuyl v. Carpenter, supra, decided by the Supreme Court of the State of Tennessee in 1916, is an exact parallel to the case now at bar. It was a suit by the Superintendent of Banks of the State of New York against residents of the State of Tennessee, instituted in the Tennessee courts, to enforce against stockholders resident in Tennessee double liability under the statutes of the State of New York by reason of the failure of Carnegie Trust Company, a New York Banking corporation. The reported case is rich in citation of authorities, both Federal and State; is apparently well reasoned; and is worthy of the careful consideration of this Court.

In passing upon the provisions of the New York statute and the 1914 amendment thereto, the Tennessee Court held:

> "Furthermore, we do not think that the arbitrary character of the proceeding is countervailed by the leave which the statute gives to the corporation to go into court within ten days after its seizure by the superintendent, and apply for an injunction. No such privilege is ac-

corded to the stockholders as such, or to any stockholder, so that it results, if the Board of Directors does not choose to apply to the Court, or in default thereof the majority of the stockholders, through or pursuant to a stockholders' meeting, within the ten days referred to, there is no possibility of relief for any stockholder against arbitrary action on the part of the superintendent of banks."

(pp. 235-236 of the S. W. Rep.)

The Court further held that if it were conceded that the corporation had intervened by its stockholders or directors and applied for an injunction and that each of the stockholders would be represented in court by the corporation, that still the fact remains that no such action was in fact taken in this case and hence there was and could be no representation of stockholders in court by the corporation, so that, to sustain the power exercised by the Superintendent of Banks of New York:

" * * * we must be willing to adjudge, either that the power to represent is tantamount to actual representation, or that the possession of such power and the failure to exercise it would be binding by way of estoppel on the stockholders. The first supposition is, of course, absurd. The second is also unsound because it is based on the presumption of an active duty resting on the corporation to apply for an injunction in every such case, or to consider the question and decide whether such application

should be made. It is clear that the statute imposes no such active duty, but at most gives the corporation the privilege of making the application. In deciding whether it will avail itself of the privilege, the corporation does not represent the individual stockholders as to the reserved liability due creditors from them under the statute. The statute does not in terms give it such power, and we cannot, by construction, hold that it was conferred. Beyond doubt, a power of representation so far-reaching ought to be conferred in unmistakable terms in the statute itself, so that subscribers to stock would know, when entering into the contract, the terms to which they were consenting."

(p. 236, S. W. Reporter.)

Referring to the 1914 amendment to the New York statute, which provides that in any action based upon the statute, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, and setting forth the value of assets and amount of liabilities as determined by him shall be presumptive evidence of the facts therein stated, the Tennessee Court held that amendment could not avail the superintendent in a suit in another jurisdiction because:

"No State can impose upon any other State a rule of evidence for use in the courts of the latter."

(p. 236, S. W. Rep.)

The Court further held that it would not enforce an assessment fixed by the Superintendent of Banks of the State of New York, for the reason that:

> "That action is arbitrary because it is based solely on the will of a single person, directed by no fixed principle declared in any form by the social organization."
>
> (p. 236, S. W. Rep.)

And further:

> " * * * The question is not whether the New York Act is valid. That is an inquiry for the New York courts, under the Constitution of that State, and we do not express an opinion on it. We do say, however, that it is against the policy of this State to vest such powers in a mere ministerial officer, powers which we regard as of a high judicial nature, to be exercised only by Courts after due notice and the appearance of parties in person or by representation. Indeed, the principle as we state it seems to be recognized by the Supreme Court of the United States, in those cases which we have cited, holding assessments made in foreign courts valid, on the ground that, the corporation being sued and present, the stockholders were present by its virtual representation. Coe v. Armour Fertilizer Works, *supra,* and cases which we have cited with it."

To summarize our position under this point, we say that the assessment made by the Superintendent of Banks of the State of New York sought to be en-

forced against New Jersey stockholders in this suit is not the judgment or decree of any Court entitled to recognition in other States; that it is the arbitrary action of an administrative or executive officer of the State of New York had without notice of any kind to these defendants; that if the assessment by the superintendent were held by the Courts of this State to be binding, such holding would be violative of the due process of law clause of the Federal Constitution, and that there is nothing in the full faith and credit clause of the Constitution which requires this or any other Court to place the stamp of its approval and to hold conclusive upon these defendants the act of a single administrative or executive officer of another State had and taken without notice to those sought to be bound thereby. To hold otherwise would, we contend, deprive these defendants of the fundamental right of being heard before being condemned.

The defect argued under this point, being apparent on the face of the complaint, is sufficient cause for striking the complaint.

POINT III.

THE SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK IS WITHOUT RIGHT OR AUTHORITY TO MAINTAIN AN ACTION IN THE STATE OF NEW JERSEY.

The Superintendent of Banks of the State of New York has no judicial powers, but is classed by the

courts of the State of New York as a mere statutory receiver.

Matter of Union Bank, 204 N. Y. 313, 97 N. E. 737.

In support of this point, we beg leave to adopt the opinion of the Supreme Court of Tennessee in *Van Tuyl, et al., v. Carpenter, et al.,* 135 Tenn. 629, 188 S. W. 234, as follows:

> "The right of action, if any, is not in the bank but in the Superintendent of Banks. His right is rooted in the statute, but that statute gives him no right to sue in a foreign State. Such vestiture has been held, by the highest authority, an essential perequisite. Hale v. Allinson, 188 U. S. 65, 23 Sup. Co. 244, 47 L. Ed. 388; Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163; Bernheimer v. Converse, 206 U. S. 534, 27 Sup. Ct. 755, 51 L. Ed. 1176; Converse v. Minn. Thresher Mfg. Co., 212 U. S. 567, 29 Sup. Ct. 691, 53 L. Ed. 654; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913 D, 1292; Selig v. Hamilton, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518. And see Irvine v. Elliott (D. C.), 203 Fed. 82. * * * ."
>
> (p. 237, S. W. Rep.)

> "The rule is general that a mere Chancery Receiver has no right to sue in a foreign State and can assert such claims as he has only through the exercise of comity on the part of the State in which he seeks to exercise his func-

tions. Hardee v. Wilson, 129 Tenn. 511, 167 S. W. 475, Ann. Cas. 1916 A, 94; Booth v. Clark, 17 How. 322, 15 L. Ed. 164; Great Western M. & M. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, and the same rule would necessarily attribute the duties of a receiver to an officer of a foreign State claiming authority under a legislative Act of such foreign State, since foreign laws can have no extra territorial efficacy, save in those instances which are governed by the 'full faith and credit' clause of our Federal Constitution, and the case supposed is not one of them."

(p. 237, S. W. Rep.)

"However, if the Receiver has the legal title to the claim sued on, he has generally a right to sue in the foreign State (Hardee v. Wilson, *supra*), but the New York cases hold that the Superintendent of Banks does not possess the legal title to such assets as are here sued on, but only the right to sue and collect. La Fayette Trust Co. v. Higginbotham, 136 App. Div. 747, 121 N. Y. Supp. 490; Matter of Union Bank of Brooklyn, 204 N. Y. 313, 97 N. E. 737."

(p. 237, S. W. Rep.)

"We may add that even if it appeared that the foreign Superintendent of Banks, or statutory receiver, had either the title to the assets, or power given him by the statute of his State, to sue in a foreign jurisdiction, or both, we do

not see how he could, in a foreign jurisdiction, sue stockholders on their double liability, without a previous judicial ascertainment, in his own State, in a suit brought against the corporation, showing debts and assets and the necessity of a call on stockholders. The possession of title would be of no importance unless the amount due could be ascertained. Likewise, the right to sue in a foreign State could have no extra-territorial effect, save as an incident to a judicial proceeding in the receiver's own State, purporting to confer that right under statutory authority; it would then be operative, if at all, under the full faith and credit clause of the Federal Constitution."

(p. 238, S. W. Rep.)

"In writing this opinion we have assumed, as the clear weight of authority indicates, that stockholders who subscribe for stock in a corporation, in a State which at the time has a statute providing for the double liability referred to, become contractually bound to meet and carry the liability imposed by the statute; that the duty imposed is governed by the law of contract, and the payment required cannot be treated as a penalty. * * * Whitman v. Oxford Natl. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587; Ferguson v. Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Flash v. Conn., 16 Fla. 428, 26 Am. Rep. 721; Bell v. Farwell, 176 Ill. 589, 52 N. E. 346, 42 L. R. A. 808, 68 Am. St. Rep. 194; Stecker v. Davidson,

74 Kan. 214, 86 Pac. 136, 118 Am. St. Rep. 315; Pfaff v. Gruen, 92 Mo. App. 560, 69 S. W. 405, Hancock Natl. Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232. Perhaps a better statement of the principle would be that the liability arises out of the statute which imposes it, but the statute becomes binding on the stockholder through his subscription, whereby he places himself in such relation to it, as that he is bound by its terms, and so may be said to agree by implication that he will pay when the conditions of his liability for a specified amount are lawfully made to appear. Christopher v. Norvell, 201 U. S. 216, 224, *et seq.*; 26 Sup. Ct. 502, 50 L. Ed. 732; 5 Am. Cas. 740; Kulp v. Fleming, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611. But if the method of ascertaining such liability is such as cannot be recognized in a foreign State because against its public policy, then such liability cannot be consistently recognized in that State. Therefore, on the grounds we have stated, such liability cannot be enforced here merely on an assessment made by the Superintendent of Banks of the State of New York; and the judgment dismissing the bill must be affirmed."

(p. 238, S. W. Rep.)

Inasmuch as it affirmatively appears by the allegations of the complaint, particularly by paragraphs 6, 7 and 10 thereof (Case, pp. 8-12), that the Superintendent of Banks of the State of New York, the

plaintiff in this suit, is a mere statutory receiver and that his attempt to collect assessments in this State is founded only upon the statutes of the State of New York combined with the arbitrary act of an executive officer of the State of New York in making the assessment, and is not founded upon any judicial proceeding in the State of New York, that, we say, furnishes an additional reason under the authorities above cited for striking the complaint in this suit.

ANSWER TO SOME OF APPELLANT'S CONTENTIONS.

I.

Appellant argues in his brief that because the provisions of the New York statutes are similar to the provisions of the National Banking Act, by virtue of which the Comptroller of the Currency is authorized to make and levy assessments against stockholders in insolvent national banks, the decisions of the Federal Courts construing the provisions of the National Banking Act are of prime authority on the questions in the suit at bar (Appellant's Brief, pp. 14-25). But that, we say, is a *non sequitur*. The National Banking Act is nation-wide in its scope and application, whereas the New York statutes are without force beyond the boundaries of that State. Decisions of the Federal Courts construing the provisions of the National Banking Act are not concerned with the full faith and credit clause of the

Federal Constitution, nor with enforcement of assessments in a foreign jurisdiction, nor with the principles of comity between States and nations.

As said by the Supreme Court of Tennessee in *Van Tuyl v. Carpenter, supra*:

> "The question is not whether the New York Act is valid. That is an inquiry for the New York courts, under the constitution of that State, and we do not express an opinion on it."

But when the Superintendent of Banks of the State of New York comes into the courts of New Jersey to enforce an assessment made by him in New York, under a New York statute, against citizens of New Jersey, in a proceeding of which the New Jersey stockholders had no notice, then the question properly and immediately arises as to whether or not, by virtue of any constitutional provision or principle of comity between States, the courts of New Jersey are obliged to regard such assessment, made in a foreign jurisdiction, by a single executive officer of such foreign jurisdiction, without notice to the New Jersey stockholders, as being conclusive and binding against the citizens in this State.

No such questions are involved in a construction by the Federal courts of the provisions of the National Banking Act. Neither would there be involved any questions of conflicting State policies (as illustrated by the provisions of the New York statutes in contrast with the provisions of Section 94-b of the New Jersey Corporation Act), because there is only one National Banking Act and only one juris-

diction in which it operates; viz: the United States of America.

For these reasons, we say that the decisions of the Federal courts construing the provisions of the National Banking Act have no force or application to the controversy now before this Court.

II.

On pages 25-28 of his brief, appellant argues that the Court of Chancery of the State of New Jersey does not have jurisdiction to entertain the present suit and cites in support thereof the following New Jersey cases:

McDermott v. Woodhouse, 87 N. J. Eq. 615;

Chicago Title & Trust Co. v. Young, 90 N. J. Eq. 27;

Graham v. Fleissner, 107 N. J. L. 278.

In each of those cases our courts do hold that the assets and liabilities of the foreign corporation should be cast up and the assessment necessary against the stockholders determined in the courts of the domicile of the corporation and that, after such determination, a suit at law would lie against New Jersey stockholders. Each of those cases, however, is to be distinguished from the case at bar in that the case at bar is brought to recover a personal liability imposed by a statute, whereas in the cases cited by appellant, as above, each of the suits was upon the trust fund theory of liability at common

law and the assessment against the stockholders was based upon the fact that they had acquired their stock for less than par value.

In *Graham v. Fleissner's Executors,* 107 N. J. L. 278, this Court expressly held that Section 94-b of the New Jersey Corporation Act had no application to a suit brought upon the trust fund theory of liability but applied only to a personal liability imposed by a statute extra the common law liability.

Under this section of his brief, appellant also cites *Bernheimer v. Converse,* 206 U. S. 516. That was a suit brought by the receiver of a Minnesota corporation against a citizen of the State of New York to enforce against the latter an assessment founded upon a Minnesota statute making stockholders liable for double the par value of their stock held in a Minnesota corporation. That case does not hold, as stated in appellant's brief, that the stockholder, upon acquiring his stock, incurred an obligation to pay any assessment that might be levied by the Superintendent of Banks. On the contrary, the insolvency of the Minnesota corporation and the assessment against stockholders under the statute of that State were both had and determined by a decree or judgment of the Minnesota courts—a judicial proceeding, and not by virtue of the arbitrary act of an executive officer such as we have in the case at bar.

III.

Under Point 4 of his brief (pp. 34-40), appellant cites several cases arising under a statute of the

State of Minnesota, and one or two other States, similar in some respects to the New York statute, under which it was held that a receiver appointed under the State statute might go into other jurisdictions to bring suits against stockholders and that the assessments made at the domicile of the corporation were conclusive and binding upon the stockholders in a suit by the receiver in another jurisdiction. An examination of those cases, however, will reveal that in each of the cases the fact of insolvency, as well as the appointment and authority of the receiver, were founded upon a decree or adjudication of the courts at the domicile of the corporation—and not merely upon an arbitrary act of a single executive officer, as has been done under the New York statute in the present suit.

Wherefore, we say that while the judicial decrees of a foreign State determining corporate insolvency; making an assessment against stockholders; and appointing a receiver, are no doubt entitled to full faith and credit in other States under the provisions of the Federal Constitution, that constitutes no authority for demanding full faith and credit in New Jersey for an assessment levied by the Superintendent of Banks of the State of New York, whose act is in no sense of the word a judgment or decree of any court.

Other points argued in appellant's brief have been either covered in the affirmative parts of this brief or are not deemed worthy of further argument.

In conclusion, we respectfully say that the judgment of the Supreme Court in striking the complaint

should be sustained, not only for the reasons given in the opinion by Mr. Justice Parker, but also for the additional reasons set out under Points II and III of this brief.

Respectfully submitted,

HOWARD EWART,
Attorney for Defendants Above-Named.
JAMES MERCER DAVIS,
Of Counsel.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, *Plaintiff-Appellant,* *vs.* BENJAMIN ABRAMS, *et als.*, *Defendants-Appellees.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES, The Bobdon Company and Herbert Cooper.

Judgment was entered in the New Jersey Supreme Court on February 14, 1934, in favor of the defendants-appellees, The Bobdon Company, (spelled Bobdan in the summons, complaint and schedules, and throughout the proceedings in this Court), and Herbert Cooper, for costs, which, under Justice Parker's order of February 10, 1934, are to be taxed under the direction of the Supreme Court. The defendants-appellees were sued by Joseph A. Broderick, Superintendent of Banks of the State of New York, upon the double liability assessed under New York laws against them as holders of stock of the Bank of the United States. The Bobdon Company is alleged to be the owner of 388 shares of the capital stock of said bank and was assessed $9,700.00, the par value of the stock. Herbert Cooper is alleged to be the owner of 60 shares, and was assessed $1,500.00, the par value of the stock. The appellant has listed twelve grounds of appeal from the judgment of the Supreme Court. Grounds numbers 5, 9 and 10, are not argued in the appellant's brief and are therefore deemed to be

abandoned, and ground number 12, an omnibus ground of appeal, will also be deemed to be abandoned, and will not be considered by the appellees in this answering brief.

I.

The Superintendent of Banks of the State of New York, having taken possession of the "business and property" of the Bank of the United States pursuant to Chapter Two of the Consolidated Laws (Laws of 1914, Chap. 369) of the State of New York, cannot as a matter of right maintain this action in a court of the State of New Jersey.

(A) The Superintendent of Banks of the State of New York, under the statute in that State, has the status of a mere Chancery Receiver, and is not vested with title to the assets of a failed bank which he is liquidating.

The cases of *Relf* v. *Rundle,* 103 U. S. page 322, and *Gile* v. *Duke,* 5 Fed. 2nd, 952, quoted and cited by appellant (pages 38, 47, 48, of appellant's brief) can be distinguished upon the ground that in those cases the receivers were given different powers by the statutes appointing them than the Superintendent of Banks was given by the New York statute. It appears in *Relf* v. *Rundle,* which considered a Missouri statute, that Relf was the statutory successor to a dissolved life insurance corporation of that State, and that he was designated by law to *take the property* of such corporation and *hold and dispose* of it in trust for the use and benefit of creditors. In *Gile* v. *Duke,* the situation is different from the case at bar because the banking officer of the State had been held in numerous cases to have the title under the statute of the

State of Washington, to the cause of action which he was asserting.

Luikheart v. *Spurck,* 1 Fed. Sup. 52, a case involving an assessment for a double liability against a stockholder under a Nebraska statute, which affirms the power of the receiver to enforce this double liability in an action outside the State of his appointment, is an interesting illustration of the power which may be given to a receiver. This case, urged by the appellant in his brief in the lower court, has been abandoned on this appeal. The case was decided in the District Court for the Southern District, Illinois, in 1932. The Court held that the Nebraska statute and decisions made the receiver for the purpose of enforcing the double liability of a stockholder in a foreign jurisdiction "a trustee, and ***holder of the nominal legal title to the fund*** derived from the double liability and *to the cause of action for its enforcement* for the benefit of all the creditors" (1 Fed. Sup. at page 59), and goes on to conclude that the receiver "*having title,* may sue as of right in a foreign jurdisdiction." It is in these respects that the New York statute and the New York decisions fail to give the Superintendent of Banks the same standing in a court outside of New York State in an action for the enforcement of this stock assessment liability.

The situation in the three cases above noted should be contrasted with that which arose in Tennessee when the New York Superintendent of Banks, suing under the Statute here involved, sought to recover an assessment from a stockholder residing in Tennessee to pay the debts of the bank. The Tennessee Court held that the New York Superintendent of Banks did not possess the legal title to the claim sued on, but only the right to sue and collect, and hence that he

could assert such claim only through the exercise of comity. *Van Tuyl* v. *Carpenter,* (1915) 135 Tenn. 629, 188 S. W. 234. While it may be competent for the State of New York to empower its Superintendent of Banks to sue delinquent resident stockholders in its own courts, it is difficult to see how that State could empower its Superintendent to recover assets located in a sister state of independent sovereignty, unless the State of New York vests in its Superintendent title to property wherever located.

The New York statutes as construed by its own courts do not vest title in the Superintendent, either as to assets located in that State or elsewhere. *Yokohoma Specie Bank, Ltd.* v. *Chinese Merchants Bank,* 219 App. Div. 256 (1927). This case involved a submission of a controversy upon an agreed statement of facts. The plaintiff banking corporation was licensed to do business in New York; the Chinese Merchants Bank was likewise licensed to do business there. On June 13, 1924, the Superintendent of Banks of New York took possession of the Chinese Bank's assets. Three days later the Yokohama Bank sued the Chinese Bank in Illinois and levied upon certain assets located there belonging to the Chinese Bank. The Illinois proceedings were discontinued by agreement and the Illinois property brought to New York for determination of the respective rights thereto. The controversy was dismissed for the reason that it turned upon the attitude of the Illinois courts, which was a question of fact impossible to determine in the New York proceeding. In referring to the necessity of a determination in Illinois, the Court said, at page 258:

> "The Superintendent of Banks in taking possession of the assets of a bank under the

Banking Law is merely a receiver in the nature of a liquidator.

"The corporation is not deprived of its assets and no title is vested in the Superintendent. (*Mechanics & Metals Nat. Bank* v. *Banque Industrielle,* 205 App. Div. 543)."

and again, on the same page:

"The general rule is that a liquidator in one State acquires no title to assets in another State. (*Hibernia Nat. Bank* v. *Lacombe,* 84 N. Y. 367; *Matter of People* (*City Eq. Fire Ins. Co.*) 238 *Id.* 147, 152; *Rhawn* v. *Pearce,* 110 Ill. 350.) Under exceptional circumstances the courts of this State, while recognizing this rule, have as a matter of comity accorded recognition to a foreign liquidator. (*Matter of Waite,* 99 N. Y. 433; *Wulff* v. *Roseville Trust Co.,* 164 App. Div. 399.)

"The criterion upon which this submission turns, therefore, is the attitude which would be taken by the Illinois courts in recognizing the claim of the New York Superintendent of Banks, as a matter not of legal right, but of comity. We could only speculate as to what this attitude would be. Whether the court of Illinois would regard the New York liquidator, the Hongkong liquidator, or either of them, as vested with title to this fund is a question of Illinois law as yet undetermined by the courts of that State. To this court, that is a question of fact."

The policy of this State with respect to actions of this kind has been declared by the Legislature in Section 94-b of the Corporation Act hereinafter referred to.

(B) A Receiver has no extra-territorial jurisdiction or power of official action, and is not entitled, as a matter of right, to sue in a foreign jurisdiction, and refusal of another State to entertain such suit does not amount to a failure to give full faith and credit to the laws

and judgments of the State of the appointment, within the meaning of the Federal Constitution.

High, Receivers, § 239, *Booth* v. *Clark,* 17 How. 322, 15 L. ed. 164; *Filkins* v. *Nunnemacher,* 81 Wis. 91, 51 N. W. 79; *Farmers' & M. Ins. Co.* v. *Needles,* 52 Mo. 17; *Brigham* v. *Ludding-ton,* 12 Blatchf. 237; Fed. Cas. No. 1,874; *Hazard* v. *Durant,* 19 Fed. 471.

(C) A Receiver is often permitted, through comity or courtesy of a sister State to maintain an action therein (chiefly in cases where he has title to an asset within that State), but never where the Courts of such sister State have declared the maintenance of such an action to be against the public policy of that State. In *Pond* v. *Cook,* 45 Conn., 126, the Court said:

> "Thus it appears that the property was in the possession of the defendant as receiver when it came into this State. He was invested with it, and was legitimately performing the duties of his appointment in completing the contract by its use when it was attached by the plaintiff. In these circumstances comity among the States requires that the case should be regarded by our Courts precisely as it would have been by the Courts of New Jersey if the controversy had arisen there."

The significant feature of the above quotation is that the Receiver was invested with title to the property which he was seeking to recover, which is not so in the case at bar, as the Superintendent of Banks of the State of New York does not have title to the cause of action which he now seeks to enforce in this State. See also numerous cases cited in Annot. at 56 L. Ed., p. 751, Column 2.

Both the courts and the legislature of the State of New Jersey have established a policy against the enforcement of obligations arising from the statutes of another State whether such statutory obligations be deemed penal or contractual.

Derrickson v. *Smith,* 27 N. J. L. 166.

Section 94B of the Corporation Act of N. J., 2 Comp. Stat. p. 1656, P. L. 1897, p. 125.

II.

Section 94b of the New Jersey Corporation Act is a bar to the maintenance of this action.

The statute relied upon by the appellees and applied by Justice Parker as a bar to this action brought at law, provides as follows:

> "No action or proceeding shall be maintained in any Court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any Court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties."
>
> P. L. 1897, p. 125; 2 Comp. Stat. 1656.

The appellant seeks to show that the statute does not in anyway apply to the case at bar because the action is not brought "by any creditor of the Bank of the United States." The argument on this point is specious. The language of the act is "by or on behalf of any creditor." Certainly the action is brought on behalf of all the creditors and therefore on behalf of any and all creditors. The appellant further seeks to show that the statute is not applicable because it is not brought "for or upon any debt, default or obligation of such corporation." It is brought upon the default of such a corporation upon all of its obligations. Furthermore, our statute, above quoted, in order to be all-inclusive, refers to "any statutory personal liability of such stockholder." It is obvious that the statute contemplates this action, for it is brought on behalf of creditors upon the default of the corporation upon all of its obligations and to enforce the statutory personal liability of all of its stockholders.

The appellant seeks to make a point, in his argument that the statute is not applicable to this action, of cases where the statute was applied as a bar to other types of stock assessment suits. Appellant cites the case of *Western National Bank* v. *Reckless,* 96 Fed. 70, which admittedly has no bearing upon the present action, for it deals with the enforcement of a stock assessment liability where the liability sought to be enforced arose before the passage of the section of our Corporation Act above quoted. The appellant states that the type of action illustrated by that brought in the Western National Bank case and in *Marshall* v. *Sherman,* 42 N. E. 419, is the type against which this statute was directed. It is conceded that the

statute is applicable to the type of suits illustrated in those cases, that is, a suit by an individual creditor against an individual stockholder, but we submit that the statute is also applicable to the present suit. Its force, applying to suits upon "*any statutory personal liability*—whether such statutory personal liability be deemed penal or contractual," is not exhausted because one type of suit has been found upon which the statute clearly operates.

Appellant gives very slight consideration (appellant's brief, page 13) to the case of *Cochrane* v. *Morris,* 10 N. J. Misc. 82. Appellant seeks to determine for the Court the basis of the decision by Judge Oliphant in that case. The situation presented to Judge Oliphant was a direct parallel to the case at bar. The liquidator of a Florida bank sought to maintain an action in New Jersey to recover from a stockholder, a resident of New Jersey, a 100% statutory assessment. Judge Oliphant held that the statute (Section 94b of the Corporation Act) was passed to protect the citizens of New Jersey in just such a situation as was there presented.

Appellant points to a striking difference in the attitude of the New York courts regarding the enforcement of stock assessments by receivers from other jurisdictions. We submit that the situation in New York does not govern our Courts in their disposition of similar cases here presented, for the New York legislature has not seen fit to declare a policy against the enforcement of such liabilities, and has not passed a statute limiting the enforcement of such assessments, as has our legislature.

Further commenting (appellant's brief, page 18) upon the construction of Section 94b of our Corporation Act, it is stated that the section must be strictly construed being in derogation of the common law. In making this statement, appellant is confusing the common law liability for unpaid stock subscriptions with the so-called double liability for an assessment equal to the par value of the stock of a corporation. The last named liability did not exist at common law and is strictly a creature of statute; without a statute creating this double liability it does not exist. We submit that Section 94b of the Corporation Act is not in derogation of the common law, but is a remedial statute and should therefore be liberally construed to give effect to its obvious and expressed intent to bar actions *at law* brought to enforce *any statutory personal liability,* if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country.

III.

Appellant's remedy is in the Court of Chancery of New Jersey and not in a court of law of this state.

(A) The cases cited by appellant arising under the National Bank Act, and in New York under its statutes, and in other states under the New York statutes, are impertinent and not applicable.

Appellant in his brief, (Point II, pages 19-25), has relied upon the cases in the United States Supreme Court and lower Federal Courts in support of the liability of the defendant. These cases, arising under the National Bank Act, while construing an act similar in intent and

form, cannot be said to be dispositive of the matters here involved. The Federal law is binding upon the Courts of the several states wherever the power of Congress to enact legislation is exercised within its constitutional limits. Neither the Courts of New Jersey by their decisions, nor the legislature by its enactments, could limit the force of the National Bank Act. The fact that the Comptroller by the provisions of the National Bank Act has been given wide discretionary powers as to the determination of assessments, and his receivers wide authority as to the enforcement of the assessments, when lawfully made, is no basis for the conclusion that the Superintendent of Banks of New York State has similar powers and prerogatives, and that the Statute of New York State dealing with similar subject matter is entitled to the same weight in this or any other State. It is conceded that Section 94B of the Corporation Act, could not, even if it sought to limit the power of the Comptroller of the Currency, be effective for that purpose. The Act, by its very terms does not seek to limit the Comptroller's power, as it only regulates the enforcement of a statutory personal liability created by or arising from the statutes or laws of another state or foreign country.

The fallacy in appellant's argument that the decisions in the Federal Courts construing the provisions of the National Bank Act are of prime authority on the questions here involved is that the State of New York is not the Federal Government, and that the statutes of New York do not supersede the statutes of New Jersey when they may conflict. The Federal cases to the effect that the action under the National Bank Act double liability provisions is

at law are numerous and conclusive. As above stated, Section 94b of the Corporation Act does not seek to limit any action brought under the National Bank Act to the jurisdiction of the Court of Chancery, nor would its attempt so to do be effective. The argument that the rule of the Federal Courts, applicable to assessments levied by the Comptroller of the Currency applies and controls the assessment enforcement through the office of the Superintendent of Banks of the State of New York is a *non sequitur*.

Appellant cites (appellant's brief, page 32), a Pennsylvania case upholding his right to sue in that State, and (appellant's brief, page 33), two Connecticut cases, one affirming and the other denying his right to sue at law in that State. We submit that these cases are not controlling upon this Court, especially in the absence of a statute in those states similar in tenor to Section 94b of the Corporation Act.

(B) The cases cited by appellant dealing with enforcement of unpaid stock subscriptions are impertinent and not applicable.

Under Point II of his brief, subheading B (appellant's brief, pages 34-36), the appellant cites several New Jersey cases as authority for the maintenance of the present action at law, and allegedly holding that a Court of Chancery does not have jurisdiction in this type of case. We submit that appellant is again confusing the liability on an unpaid stock subscription with the statutory double liability. The case of *McDermott, Receiver,* v. *Woodhouse,* 87 N. J. Eq. 615, is concerned with the question of the enforcement of a stockholder's liability on unpaid stock, and not with the question of a statutory personal liability on stock already fully paid. It

is conceded that an action for the balance of the subscription price of stock may be maintained at law in New Jersey. This case does not deal with the right of a Receiver to sue in another jurisdiction, and is not pertinent.

The case of *Chicago Title & Trust Co.* v. *Young,* 90 N. J. Eq., 27, was an action brought to levy an assessment on behalf of creditors upon the holders of stock of an Illinois Corporation for the unpaid subscription price of said stock, and is not applicable for that reason. The case of *Graham* v. *Fleissner,* 107 N. J. L. 278, was also an action against stockholders for the purpose of enforcing the "Trust Fund" liability against individual shareholders. The defendant sought to bar that action under the authority of Section 94b of the Corporation Act. In Justice Parker's Opinion, speaking for this Court, he said

107 N. J. L., at page 280—

> "We do not take this view of the matter: on the contrary, we agree with counsel for respondent that the phrase 'statutory personal liability' in the statute means personal liability imposed by statute *extra* the common law liability to make up a deficit of par value, i. e., the so-called 'trust fund' theory of capital stock."

Appellant argues (appellant's brief, p. 34, par. 3). that it is well settled in this State that this action cannot be brought in the Court of Chancery. As above noted, the authorities in support of this argument do not deal with an assessment for double liability against stockholders, but with the common law liability exclusively. The legislature has the power to authorize the Court of Chancery to hear and determine matters involving the double liability of

stock holders, and by clear and unmistakeable language in Section 94b of the Corporation Act, has authorized the Court of Chancery to entertain such an action.

IV.

Section 94b of the Corporation Act does not violate the Constitution of the United States, nor amendments thereof.

Appellant has abandoned the grounds of appeal urging as reasons for reversal that the order and judgments entered in the Supreme Court impair the obligations of contract and abridge the priviliges and immunities of citizens of the United States, and deny to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution, and the ground that the appellant is denied the privileges and immunities of a citizen of the State of New York secured by Article 4, Section 2, of the United States Constitution, and has confined himself to two objections on Constitutional grounds. Under Point III he argues that the due process clause of the Fourteenth Amendment is violated if he is compelled to bring an action as directed by Section 94b of the Corporation Act, and under Point IV he argues that the full faith and credit clause of the United States Constitution is violated if his action at law is denied him by said section of our Corporation Act.

Appellant urges that there is no public policy in New Jersey against compelling New Jersey stockholders of foreign corporations to pay assesments levied against them under the laws of foreign states. As we have heretofore stated under Point I of this brief, the courts and leg-

islature of the State of New Jersey, have established a policy against the enforcement of personal liability arising from the statutes of another state whether such statutory liability be deemed penal or contractual. It is obvious from Section 94b of the Corporation Act that there is a definite prohibition against the institution of a suit at law on a claim of this nature, and a policy is thereby established against the enforcement of the double liability of stockholders of foreign corporations in any other manner than that therein provided. The public policy of New Jersey has been established by the statute as permitting the enforcement of such an obligation in an equitable action. We deny that the appellant is deprived of his property rights in the assessments without due process of law. In the first instance it conclusively appears that contrary to the situation existing under the statutes of some other states, the appellant has not been invested with title to the causes of action arising by virtue of the stock assessment and for the enforcement thereof.

Appellant argues that under the authority of *Relf* v. *Rundle* (*supra*) he is the statutory successor of the corporation just as was the plaintiff in that case. We have previously (under Point I of this brief) distinguished the factual situation and the statutory qualifications of the receiver in the case of *Relf* v. *Rundle* from the situation in the case at bar. Briefly, as there stated, Relf was given title to the assets of the defunct corporation, and the Superintendent of Banks of the State of New York is not given such title.

Appellant argues that the case of *Clark* v. *Willard,* 78 L. Ed. 743, a recent opinion of the United States Supreme Court, is additional

authority on this point. That case was not one of a stock assessment liability, but was a case concerning assets of the corporation to which Clark was given title by the statute appointing him. We submit that the cases involving the rights of receivers of foreign corporations must be examined carefully in every instance to determine whether the liquidating officer is given actual title, as that has an important bearing upon his status when appearing in the court of another state.

It is probably a point well taken that the State of New Jersey could not, or at any rate, should not, close its courts to the enforcement of a valid obligation arising under the laws of another state, unless that obligation be penal in its nature or opposed to the public policy of this state. We have heretofore shown that there is a public policy against the enforcement of a stock assessment liability otherwise than in an equitable accounting. It is also important to observe that our statute does not close the courts of this state to the appellant, but prescribes reasonable restrictions regarding the enforcement of this obligation, The appellant argues that the restrictions as to him are unreasonable and recites figures concerning the number of defendants and the expense of the institution of his suit in the manner prescribed by our statute. We submit that the so-called difficulty confronting appellant in this cause is not because of the unreasonableness of the statute, but because of the size of the case which he is handling. The suit involves $25,250,000.00, divided into units of $25.00 and owned by a correspondingly large number of shareholders. Any suit involving a sum of this size, and such a large number of shareholders, is a difficult mat-

ter to litigate. It would seem that the appellant's argument, by indirection, seeks to avoid the effect of a reasonable restriction imposed by our statute and to obtain special consideration for his suit because of the difficulty he will encounter in enforcing the liability of the shareholders. We submit that any relief to him because of the difficulty which he will have should properly come from the legislature and not from the courts. Because his case is large and complicated does not entitle the appellant to special consideration in the matter of a remedy.

We have urged (under Point I of this brief) and here repeat, that the appellant is not entitled as a matter of right to access to our courts. This is recognized and conceded by the appellant on page 41 of his brief, where *Finney* v. *Guy,* 187 U. S., 335, is quoted as authority for that proposition, and which appellant concedes as a general proposition is true. Appellant goes on to state that the denial of the right to sue in a law action flies in the face of a recent decision of the United States Supreme Court in *Hartford Accident & Indemnity Company* v. *Delta & Pine Land Company,* 78 L. Ed. 767. The opinion is annexed to the appellant's brief. The pertinence of the case as authority is largely destroyed by the fact that it is not a case involving a statutory stock assessment liability, nor is the action brought by a receiver of a failed corporation and the important points at issue here are not involved. There is no question but in that case the plaintiff had title to the cause of action which it was seeking to enforce. In addition to this distinction we refer particularly to the closing words of the Opinion of the Supreme Court in that case, "Cases may occur in which enforcement of a contract as made

outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. * * * But clearly this is not such a case."

Due process of law under the United States Supreme Court decisions does not mean any particular form of process applicable to all cases in all jurisdictions, but means any reasonable process under which a litigant may have a fair trial in a court of justice. This is summarized in appropriate language in the case of *Davidson* v. *The Board of Administrators,* 24 L. Ed. 616, 96 U. S., 97, where the court said,

(24 L. Ed. at page 620):

> "It is not possible to hold that where, by the laws of the State, the party aggrieved has, as regards the issues affecting his property, a fair trial in a Court of Justice, according to the modes of proceeding applicable to such case that he has been deprived of that property without due process of law." (Citing further cases).

Appellant, as above noted, further contends that the denial of his right to sue at law in the courts of New Jersey is a failure to give full faith and credit to the public acts, records and judicial proceedings of another state, and maintains that if Section 94b of the Corporation Act denies him this right it is unconstitutional, as violative of Article 4, Section 1, of the United States Constitution.

It is well established that whether or not a right exists depends upon the law of the state where it was created. This is the effect of *Converse* v. *Ayer,* 84 N. E., 98, cited under Point IV of plaintiff's brief, and which deals only with the determination of the liability and not with its enforcement. But the remedy for enforcing

any such right depends upon the law of the state where it is sought to be enforced.

De La Vega v. *Vianna,* 1 Barn. & Ad., 284, (K. B. 1830); *Herrick* v. *Minneapolis & St. L. R. Co.,* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; *Northern P. R. Co.* v. *Babcock,* 154 U. S. 190, 197, 38 L. ed. 958, 960, 14 Sup. Ct. Rep. 978; *Marshall* v. *Sherman,* 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; *Leucke* v. *Tredway,* 45 Mo. App. 507.

New Jersey is not obligated to give the New York Superintendent of Banks the same mode of procedure under which he may sue in his home state. A special tribunal may be designated before which the action must be brought and the procedure may be circumscribed by regulations such as New Jersey deems necessary for the orderly procedure of the administration of justice in its courts.

Plaintiff cites in support of his argument on this point the case of *Converse* v. *Hamilton,* 224 U. S. 243, 56 Fed. 749, a suit by a Receiver under sequestration proceedings in Minnesota against stockholders of an insolvent corporation, which stockholders were resident in Wisconsin. The case is distinguishable from the case at bar in that the Receiver under the Minnesota Statute to quote the language of the U. S. Supreme Court in this case, "became a quasi-assignee and representative of the creditors, *was invested with their rights of action* against the stockholders," and further the Receiver was "clothed with *adequate title* for the occasion." The Superintendent of Banks in New York, as above noted, does not have such title.

The public policy of the State of Wisconsin in that case had not been declared by any

Statute to be contrary to enforcement of such a liability, and an attempt was made to close the doors of all the Courts of the State to a Receiver attempting to enforce his right of action to which he had title. Our situation is different in that as above noted the public policy has been firmly established, by the Statute, as permitting the enforcement of such an obligation in an equitable action. No attempt is made to bar any action upon this claim, but merely to regulate the mode in which the action shall be enforced.

The same reasoning distinguishes the cases *Selig* v. *Hamilton, Bernheimer* v. *Converse,* and *Converse* v. *Aetna National Bank,* cited under Point IV of appellant's brief, page 46, which deal with the same statute which was involved in the above case.

The full faith and credit clause only requires that the public acts, records and judicial proceedings of another state be given full faith and credit in the courts of another state designated for the enforcement of such an obligation under the procedure of that state.

V.

The cases cited by appellant under Point V of his brief are not applicable.

The appellant, under Point V of his brief, has listed, without any detailed statement or without careful analysis of the provisions of the Statutes in the state of the appointment of the liquidating officer, or of the state in which the officer was seeking to enforce the assessment liability, a number of cases from various jurisdictions. Some of these cases have already been

distinguished in our argument upon the ground that there was no vesting of title to the cause of action in the liquidating officer, and some of them have, and all of them may now, be distinguished because of the fact that a statute directing a mode of procedure by an equitable accounting has not confronted the receiver in these cases. We submit that whether or not a receiver having title to a cause of action, (which the New York Superintendent of Banks does not have,) can enforce his obligation in any other state, has no bearing upon the enforceability of this assessment by the appellant in the State of New Jersey, and that the cases listed under this point are not applicable and are impertinent to the issues here involved.

CONCLUSION.

The appellant, Superintendent of Banks of the State of New York, has no standing in the New Jersey courts as a matter of right, but only such privilege as may be accorded him on principles of comity.

The action brought by the appellant is clearly within the purview of Section 94b of the Corporation Act, being brought for the enforcement of a statutory personal liability created by and arising from the statutes or laws of another state. The appellant's action is clearly barred by the aforementioned section of our Corporation Act, and the appellant is relegated to his remedy by an action in the nature of an equitable accounting.

Section 94b of the Corporation Act is not unconstitutional, since it does not deprive appellant of any property without due process, nor deny full faith and credit to the public acts,

records and judicial proceedings of another state, nor does it in any other respect violate the provisions of the United States Constitution, or the Amendments thereof.

We respectfully submit that for the reasons above stated and herein set forth the action of the Supreme Court should be in all respects affirmed.

Respectfully submitted,

HARRISON & ROCHE,
Attorneys for Defendant-Appellee,
The Bobdon Company.

ARTHUR H. BISSELL,
Attorney for and of Counsel with
Defendant-Appellee, Herbert Cooper.

AUGUSTE ROCHE, JR.,
Of Counsel for The Bobdon Company.

CHAMBERLIN, KAFER, WILDS & JUBE, ESQS.,
of the New York Bar,
Of Counsel for The Bobdon Company.

New Jersey Court of Errors and Appeals

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, *Plaintiff-Appellant,* *vs.* BENJAMIN ABRAMS, *et als.*, *Defendants-Appellees.*	Action at Law On appeal from Supreme Court

BRIEF OF DEFENDANT-APPELLEE EMANUEL GROSS

Preliminary Statement

In view of the fact that the appellant has set out at length the material facts herein involved, we shall not burden the court with a repetition thereof, and shall proceed forthwith to deal with the points raised by the appellant, upon which he relies to move this court to reverse the decision of Mr. Justice PARKER in the Supreme Court. We shall hereinafter deal with the points raised by the appellant in the order in which they appear in his brief.

POINT I

The judgment of the Supreme Court correctly applies the law of this state as it is specifically set forth in Section 94-B of the Corporation Act.

Section 94-B of the Corporation Act (which is set out at length in appellant's brief, p. 10), expresses in no uncertain terms the policy of this state insofar as the statutory personal liability of stockholders of a foreign corporation is concerned. The legislature has seen fit to debar any suit such as the plaintiff herein has instituted, for a very obvious reason, namely, this state frowns upon the bringing of an action against a stockholder to collect a statutory personal liability which has been fixed in an arbitrary or capricious manner. Wherefore the legislature enacted that any proceeding brought against a stockholder in this state must be in the nature of an equitable accounting which would give the stockholder an opportunity to be heard, and which proceeding would be fair, equitable and just. We respectfully submit that Section 94-B of the Corporation Act is a far-sighted piece of legislation and is aimed at precisely the situation we find in the case *sub judice,* where the plaintiff has seen fit to levy an assessment against the stockholders of the bank *ex parte* as a result of his own investigation without any judicial proceeding and without affording the parties to be charged an opportunity to be heard.

The appellant has attempted to interpolate Section 94-B of the Corporation Act, and is endeavoring to place thereon a strained and tor-

tured interpretation of the policy behind the said statute. We respectfully submit that the clear language of the statute does not permit of any such construction of policy as the appellant asserts. It cannot be denied that the appellant flies "directly in the face of our statute" (Case, p. 29) because admittedly the suit is brought "by or *on behalf of any creditor*" and "*for* or upon *any* debt, *default or obligation of such corporation.*"

The language which we have italicized above "on behalf of any creditor" and "for any default or obligation of such corporation" answers both points made by the appellant on page 11 of his brief. This action is brought "on behalf of any creditor" since "all creditors" certainly is tantamount to "any creditor" and the plaintiff professedly represents all creditors. The action is brought also "for * * * any * * * default or obligation of such corporation," since were it not the fact that the bank could not pay its depositors and its other creditors, there would be no necessity for the assessment. Hence the action is brought "for * * * any * * * default or obligation of such corporation." Manifestly the plaintiff here does not represent the stockholders in this action. His rights are antagonistic to theirs, and to say that he represents them in a suit against them, is specious. It is entirely clear that Section 94-B fits this case precisely.

This court has dealt with Section 94-B in the case of

Graham v. *Fleissner's Executors,* 107 N. J. L. 278, 153 A. 526,

in which case this court pointed out the purpose of Section 94-B, and indicated that in its opinion, from the clear language of the statute, this section was meant to deal with the situation of personal liability imposed by the statute of a foreign state (which is the precise situation in the case *sub judice*), and that of course this section had no bearing whatsoever upon the unpaid stock subscription cases which could be instituted in this state upon the well-settled "trust fund theory." In view of that decision in this court, we do not consider that the appellant's argument concerning the policy of this state has any merit. The policy of our law has been consistently against imposing double liability upon stockholders. We do not impose such burden even upon stockholders of moneyed corporations such as banks and insurance companies, created under our own laws.

POINT II

A

Plaintiff's remedy is in the Court of Chancery, which has jurisdiction under Section 94-B of the Corporation Act, and the courts of law have no jurisdiction.

Plaintiff seeks to avail himself of the courts of the State of New Jersey, and we respectfully submit that plaintiff must comply with the procedural rules promulgated by our legislature. The law of the forum always has governed procedure.

See

Northern Pacific RR. Co. v. *Babcock,* 154 U. S. 190, at page 197; 38 L. Ed. at page 960;

Covell v. *Fowler,* 144 Fed. 535.

The cases cited by the appellant under this point do not support the proposition that *lex loci* shall govern procedure. As a matter of fact, *Shriver* v. *Woodbine Savings Bank,* 285 U. S. 467 (Brief, p. 24) is authority for the proposition that special stautory forms of remedy given by the local statute (*lex loci*) could not be resorted to elsewhere.

We admit that in the absence of statute, the plaintiff would undoubtedly have the right to resort to any method of procedure allowed by the courts of this state, but we respectfully submit that Justice PARKER correctly interpreted Section 94-B as a bar to plaintiff's right to maintain this action at law. As a matter of fact, Justice PARKER left the door wide open to the plaintiff to remove the cause to the Court of Chancery in compliance with Section 94-B (Case, p. 32). Plaintiff does not choose to avail himself of the procedure in this state because it happens not to be to his liking, and he therefore seeks to evade the effect of the statute by attacking it on numerous grounds, all of which we respectfully submit are without merit.

B

The Court of Chancery has exclusive jurisdiction by virtue of Section 94-B of the Corporation Act.

The appellant cites *McDermott* v. *Woodhouse* and *Graham* v. *Fleissner's Executors.* as author-

ity for the proposition that our Court of Chancery will not cast up the assets and liabilities of a foreign corporation in order to determine whether an assessment should be made against stockholders. We do not quarrel with this proposition in so far as the facts in both of these cases are concerned. Those two cases dealt with liability for unpaid subscriptions to the stock of a foreign corporation and the court said, in both cases, that it would not entertain jurisdiction under the well-settled "trust fund theory" where the affairs of a foreign corporation were being administered in our jurisdiction. But this is vastly different from our case where the asserted liability is not for unpaid subscriptions, but for stockholders' double liability imposed by a foreign statute upon all occupying the status of stockholders. In fact this distinction was clearly pointed out in the *Fleissner* case in which Mr. Justice Parker, construing 94-B of the Corporation Act, said that it applied to the latter situation and not to the former.

Whatever our policy may be regarding casting up of assets and liabilities of a foreign corporation in the stock subscription cases, as laid down by our courts, we have, however, the express legislative mandate of Section 94-B of the Corporation Act, when we come to deal with stockholders' double liability. This section declares for all purposes the policy of our state on this subject and our courts are bound thereby.

POINT III

The due process clause of the Fourteenth Amendment is not violated by Section 94-B of the Corporation Act.

At the outset, appellant is barred from asserting that Section 94-B is violative of the due process clause of the Fourteenth Amendment of the United States Constitution, and is therefore unconstitutional and void, because appellant is asserting this proposition for the first time in this court, the point not having been raised in the Supreme Court nor considered by Justice PARKER below. Appellant is not saved this point by virtue of the fact that he attacked Section 94-B as unconstitutional in the court below, because this court has held in the case of

> *Borough of Park Ridge* v. *Reynolds,* 74 N. J. L. 449,

that where a statute is attacked as unconstitutional in the Supreme Court upon specific grounds, the losing party cannot, on appeal, advance broader grounds for the purpose of attacking the constitutionality of the particular statute. This court said, at page 451:

> "This was the sole attack with respect to unconstitutionality in the Supreme Court. The objections made in this court on that score are much broader, but evidently they cannot operate to produce a reversal of the judgment of the Supreme Court on other grounds than those presented to that court."

The judgment of the Supreme Court was affirmed, and we respectfully submit that the same

course should be followed by this court in the case *sub judice.*

Aside from this serious technical objection, Point III is without substance, for the reason that appellant's argument is based upon fallacious premises. In the first place, it is apparent from Exhibit A (*Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*) that appellant assumes that the right which he asserts is a vested sacred right based upon a solemn formal contract universally recognized as valid and enforcible in any court of law anywhere. Such an assumption is necessary if the case cited in Exhibit A is at all applicable, because such was the fact in that case.

We respectfully submit that the right of the appellant springs from the status of the defendants as stockholders, and it is a far cry from the right asserted by the parties to the *contract* in the *Hartford Accident & Indemnity Co.* case. Appellant cites the case of

Bernheimer v. *Converse,* 206 U. S. 516,

as authority for the proposition that the right of the appellant is a contractual right (Brief, p. 20), but it is significant that the court went on to say *"although the obligation is not entirely contractual and springs primarily from the law creating the obligation."* Certainly the nature of such a right is not clear and free from doubt.

In taking the above position with respect to the nature of appellant's rights, we rely strongly upon the learned comment of that great jurist, Justice Holmes, who appended the following opinion to the above cited case of *Bernheimer* v. *Converse,* which is short enough to be set out at length. 206 U. S. 535:

> "I regret that the court has thought it unnecessary to state *specifically what contract the stockholder is supposed to have made,* as different difficulties beset the different views that might be taken. It seems to me hard to reconcile the construction adopted with that given to the stronger words of Sec. 5151 of the national bank act (U. S. Rev. Stat. Sec. 5151, U. S. Comp. Stat. 1901, p. 3465) in McClaine *v.* Rankin, 197 U. S. 154, 161, 49 L. Ed. 702, 25 Sup. Ct. Rep. 410. But, under the circumstances, I shall say no more than that I doubt the result." (Italics ours.)

The above constitutes the first ground of distinction between the *Hartford Accident* case, and the case *sub judice.* The next distinction lies in the fact that the statute of this state does not bar the action asserted by the plaintiff against the defendants. It merely promulgates a rule of procedure, which we submit is well within the province of the legislature of the state of the forum, and does not violate any principle of constitutional law. In the *Hartford* case, the Mississippi statute destroyed the vested bar to the action which the contract created, whereas the New Jersey statute affirmatively establishes the right of the plaintiff to maintain the action by setting forth the manner in which the action must be brought.

The argument advanced by the appellant that the New Jersey statute is arbitrary and unreasonable is without substance. This can best be demonstrated by indicating that if instead of a large number of stockholders and creditors, there were but five stockholders and ten creditors, the procedure outlined by Section 94-B would be perfectly adequate and would not be character-

ized as unreasonable or arbitrary. The fortuitous circumstance that in the particular case the procedure is more difficult and complicated, by reason of the factual situation existing therein, does not furnish a basis for an argument that the statute is unreasonable or arbitrary. If this argument were sound, we would constantly be faced with the question "where shall we draw the line?" Shall we say one hundred fifty creditors and stockholders would make the statute arbitrary, and so on *ad infinitum*.

As a matter of fact, we respectfully submit that if the State of New York had such a statute, as many other states have, the plaintiff would of necessity be compelled to comply with it in order to levy the assessment against stockholders, and in this manner satisfy the due process clause of the United States Constitution by affording all creditors and stockholders an opportunity to be heard in a judicial proceeding, the purpose of which is to affix and impose a liability upon each stockholder of the corporation. The argument of hardship would be accorded no weight in the New York courts should the plaintiff have advanced it there.

The appellant mentions in his brief the fact that he has instituted suit in Pennsylvania and Connecticut, and that in each of these jurisdictions his right to maintain the action was upheld. We respectfully submit that these decisions are not *stare decisis* for this court, for the obvious reason that neither Connecticut nor Pennsylvania has any legislation similar to Section 94-B of the Corporation Act. The same applies with equal force to the decision of the New York courts with respect to appellant's rights.

POINT IV

Section 94-B of the Corporation Act does not violate the full faith and credit clause of the Constitution of the United States.

Appellant asserts that Section 94-B is null and void because of the fact that it violates Article 4, Section 1 of the Constitution of the United States, popularly known as the full faith and credit clause. In support of this contention, appellant cites several cases including *Converse* v. *Hamilton, Rolfe* v. *Rundle,* and others. We have examined all of the cases cited by appellant and find that each case is distinguishable from the case *sub judice,* on exactly the same basis. In each of the cases cited we find that the assessment against the stockholder was made in accordance with and pursuant to a judicial proceeding in which the stockholder was made a party, and after judicial hearing a judicial decree was actually entered in a court of record adjudicating the right of the receiver of the insolvent corporation as against the stockholder. Obviously such proceedings must be given full faith and credit in every state in the United States, and if such were the situation in the case *sub judice,* the courts of this state would give full faith and credit to the plaintiff's asserted right, but it is clear from the allegations of the complaint herein filed that there never was any judicial proceeding, there was no hearing, there was no judicial determination of the amount to be assessed against each stockholder and, finally, there was no judicial decree adjudicating the amount due from each stockholder. From all that appears from the

complaint, the Superintendent of Banks of the State of New York may have acted arbitrarily and capriciously, and he may have seen fit to have placed an assessment against each stockholder for the full amount from some ulterior motive and not in compliance with the statute for the purpose of paying the creditors of the bank. Such action cannot possibly be considered as a judicial proceeding entitled to full faith and credit in the courts of a sister state.

Conversely if such action was accorded full faith and credit in the courts of every other state, it would be a denial of due process to the stockholder.

See:

Coe v. *Armour Fertilizer Works,* 237 U. S. 413; 59-60 L. Ed. 1027,

in which case an execution issued against a stockholder of a Florida corporation pursuant to the Florida law, which provided that where an execution issued against a corporation and was returned unsatisfied, the judgment creditor could levy execution against any stockholder of the corporation for the unpaid stock subscription. The United States Supreme Court held that such a statute was violative of the Fourteenth Amendment, since no hearing was afforded to the stockholder who was thereby deprived of his day in court and could not interpose any personal defenses or question the validity of the judgment. The court said, at page 424:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitution for the due process of law that the constitution requires."

No greater hearing was afforded to the defendants by the plaintiff than is held to be a denial of due process by the United States Supreme Court in the above cited case.

The contention of appellant that Section 94-B is a violation of the full faith and credit clause is further vulnerable on the ground that where a plaintiff seeks to assert a right in a foreign jurisdiction, he cannot compel the courts of the forum to assume jurisdiction and hear the cause where they are prohibited from so doing by statute of the forum, by resorting to the full faith and credit clause of the Constitution. In other words, it is well settled that the law of the forum cannot be compelled to set up machinery to enforce every right created by every statute of each state in the Union. Mr. Justice Brandeis states the rule in the case of

Bradford Electric Co. v. *Clapper,* 286 U. S. 145, 76 L. Ed. 1026,

as follows:

> "It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another state. There is room for some play of conflicting policies. Thus, a plaintiff suing in New Hampshire, on a statutory cause of action arising in Vermont, might be denied relief because the forum fails to provide a court with jurisdiction of the controversy (citing cases); or because it fails to provide procedure appropriate to its determination (citing cases); or because the enforcement of the right conferred would be obnoxious to the public policy of the forum (citing cases); or because the liability is deemed a penal one (citing cases)."

The legislature of the State of New Jersey has undertaken to set up machinery for the enforcement of the right which plaintiff asserts against these defendants, and we respectfully submit that plaintiff cannot compel the courts of this state to assume jurisdiction over litigation in such manner and in such forum which the supreme power of the statute has denied it. We insist that plaintiff must avail himself of the procedure as laid down by the statute of this state.

POINT V

We admit that whatever right the plaintiff has is a transitory right.

We agree with appellant that such right as he has is transitory and enforcible in this state, but we respectfully submit that it is enforcible only in the manner in which the legislature of this state has provided by Section 94-B of the Corporation Act.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court is sound in all respects, and that it should be affirmed.

Respectfully submitted,

GROSS & GROSS,
Attorneys and of Counsel with
Defendant-Appellee, Emanuel Gross.

BENJAMIN GROSS,
Of Counsel.

BAR PRESS, INC., 47 WEST STREET, NEW YORK. BO. 9 – 0157-8
[4124]

New Jersey Court of Errors and Appeals

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York, Plaintiff-Appellant, *vs.* BENJAMIN ABRAMS, *et als*, Defendants-Appellees.	Action at Law. On Appeal From Supreme Court. Sat Below: Honorable Charles W. Parker Supreme Court Justice.

BRIEF OF DEFENDANTS-APPELLEES: MARY ROSNER, et als.

(Parenthetical and italicized matter ours except as otherwise indicated.)

This action is brought by the Superintendent of Banks of the State of New York against the defendants, as stockholders of the Bank of United States, a monied corporation organized under the Banking Law of the State of New York. The suit is based upon the express provisions of the Banking Law of the State of New York, and seeks to enforce the stockholders' liability, created by Section 120 of that statute. The pertinent language of that section is as follows:

> "The stockholders of every bank shall be individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of the bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

In this suit, plaintiff seeks to enforce against the defendants the full extent of their liability under said law, that is to say, an amount equal to the total par value of shares of stock held by the defendants, respectively.

Defendants moved to strike out the complaint on the various grounds set forth in the Notice of Motion printed in the State of Case. After a hearing on the motion, Justice Parker ordered the complaint stricken, and the entry of judgment in favor of the defendants and against the plaintiff.

The argument hereinafter set forth takes up separately the various grounds upon which defendants' motion rested and discusses in appropriate places the counter-arguments advanced by plaintiff-appellant in its Brief.

POINT I.

The provisions of Section 94b of the Corporation Act of the State of New Jersey preclude and prohibit the maintenance of this suit.

Section 94b of our Corporation Act provides as follows:

> "No action or proceeding shall be maintained in any court of law of this State against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this State other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties."
>
> N. J. Statutes, Vol. 2, page 1656.

The applicability of the foregoing statutory provision, by its express terms, to the action at bar, is too plain to admit of doubt. The provision of our statute speaks of a suit against "any stockholder * * * of any * * * foreign corporation." The defendants-appellees in this action are sued as stockholders of the Bank of United States, which is a foreign corporation, to wit, a corporation of the State of New York. Our statute refers to an action brought "on behalf of any creditor of such corpo-

ration." This action is brought on behalf of the creditors of the Bank of United States. That this is so is demonstrated by the pertinent provisions of the New York Banking Law, and is declared by the pronouncements of the New York courts relating thereto.

Section 80 of the New York Banking Law provides as follows:

> "Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists, and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation *is not* sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in *part.* * * * "

Manifestly, the enforcement of the liability of the stockholders is *for the benefit of creditors;* hence, the suit which, by the very same section, the Superintendent of Banks is authorized to bring against stockholders is an action *on behalf of creditors of the bank.* Indeed, the matter is put beyond the possibility of dispute by a later provision of the very same section of the law in question, which provides that if the Superintendent refuses to institute such a suit "upon proper request in writing made by any creditor * * * such action or proceeding may be taken by any creditor of the bank." That such suit by the Superintendent of Banks is brought by him on behalf of the creditors of the bank is declared by the New York courts in the cases of:

Van Tuyl v. *Lewis,* 150 N. Y. Supp. 786
and
Van Tuyl v. *Schwab,* 150 N. Y. Supp. 786

To the same effect is the case of:

Assets Realization Co. v. *Howard,* 211 N. Y. 430, at page 442.

As a matter of fact, under previously existing provisions of the Banking Law of New York, which likewise authorized the Superintendent of Banks to bring such a suit but did not (as now) expressly provide that such suit should be brought only by him (except in case he refuses to sue, as above stated), it was held by the New York Court of Appeals that *a creditor* also had a right to bring *such a suit.*

Mosler Safe Co. v. *Guardian Trust Co.,* 208 N. Y. 524

In using the phrase "on behalf of any creditor," our legislature obviously had in mind and had reference to just such a suit as the present one brought by the Superintendent of Banks of New York, as well as to a suit which might be brought by the receiver of such a bank in similar circumstances, for statutory provisions similar to that in the New York Banking Law in question had been in existence in many states for a long period of time prior to the date of the enactment of our statute (1897). Indeed, in New York such a liability was imposed upon stockholders of a banking corporation as early as the Constitution of 1846, which was made effective by statutory enactment in the year 1849,

U. S. Fire Insurance Co. et als. 18 N. Y. 199;

and in New York a suit to enforce such stockholders' liability was authorized to be brought by the receiver of the bank as far back as 1849,

Person, et al. v. *Gardner, et al.* 56 N. Y. Supp. 822.

In passing, it should be remarked that the suggestion of plaintiff's counsel that the phrase "on behalf of any creditor" is applicable only to a suit on behalf of one creditor, is not only inherently unreasonable but is completely overcome by controlling authority.

In re: *Carson* v. *Scully,* 90 N. J. Law 295 our Court of Errors and Appeals had occasion to construe the word "any" as used in a statute and held that:

> "The word 'any' means 'one out of many' * * * and is given the full force of 'every' or 'all.' (at page 299).

The same definition of "any" was adopted by the United States Supreme Court in the case of

McMurray v. *Brown,* 91 U. S. 265.

Taking up the language of our statute, further, we come to the clause "action * * * to enforce any statutory personal liability of such stockholder." That the action at bar is one to enforce a "statutory liability" is established by the plaintiff-appellant's complaint itself, which bases the suit entirely upon the above quoted provisions of the New York Banking Law. The very language of those statutory provisions (hereinabove quoted) manifests the creation by the New York Legislature of a new liability, and not the mere recognition of a pre-existing one. Of course, the liability did not exist at common law. Our own Supreme Court in the case of:

Salt Lake City National Bank v. *Hendrickson,* 40 N. J. Law 52

declared that:

> "The personal liability of the officers and stockholders of a corporation, for a debt contracted by the corporation, must, of necessity, be the creature of a statute. Personal responsibility of stockholder is inconsistent with a body corporate at common law, and can arise only out of some positive prescription by legislative act." (at pages 54 and 55).

The words "personal liability" contained in our statute aforesaid are exactly synonomous with the words "individual liability" as contained in Sections 80 and 120, respectively, of the New York Banking Law, Supra; the word "personal" means the same as "individual."

Genung v. *Best,* 100 N. J. Eq. 253
and
48 *Corpus Juris,* 1045.

The liability dealt with by our statute is therein defined as "a liability * * * for or upon any debt, default or obligation of such corporation"; the liability mentioned in the New York Banking Law is therein stated to be "liability * * * for the contracts, debts and engagements of the bank." If the language of these two phrases is not exactly synonomous, as we believe it is, then it is certain that the broader signification must be accorded to the language of our own statute, which, undeniably, includes everything that could possibly be intended by the quoted language of the New York law.

That the action at bar is one "to enforce" such a liability needs no argument, for this action is brought by the Superintendent of Banks of New York under a New York statute, which expressly speaks of such a suit as being one "to enforce the individual liability" of the stockholders.

The statement made by plaintiff-appellant's counsel on page 11 of their brief, that

> "This action is not brought against a stockholder 'for or upon any debt, default or obligation of such corporation'—The Bank of United States."

misrepresents the language of our statute, making it appear as if our statute prohibited an action against a stockholder "for or upon any debt, default or obligation of such corporation," whereas in truth and in fact our statute prohibits an action against a stockholder "to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation."

It is, therefore, plain upon the very face of things that Section 94b of our Corporation Act is, by its very terms, precisely applicable to the case at bar. Nor can its applicability be escaped by the plaintiff-appellant through any effort of interpretation. For the principle is long settled by the decisions of our state that when the words of a statute and their meaning are clear, and they are not rendered dubious by the context, they cannot be controlled by judicial construction.

> *McGowan* v. *Metropolitan Life Insurance Co.* (Court of Errors and Appeals) 60 N. J. Law 198.
>
> *State* v. *Woodruff,* 68 N. J. Law 89.
> *In re City of Passaic,* 94 N. J. Law 384.

In the case of:

> *Douglass* v. *Chosen Freeholders of Essex County,* 38 N. J. Law 214,

the court, at page 216, says:

> "But, placing the question in a legal light, all these considerations in their present connection, are of no weight whatever, for the lawmakers, with respect to the point involved, have

> expressed their purpose in language so plain that *no argument* derived from induction can be of any avail. Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity of the result, is out of place. It is no province of the courts to supervise legislation, and keep it within the bounds of propriety and common sense, so that even if in this case it could be demonstrated that the regulation in question was incommodious, or even hurtful, an appeal for relief to the judicial power would be utterly in vain."

In the case of:

> *Van Kleek* v. *O'Hanlon,* 21 N. J. Law 582
> (Court of Errors and Appeals)

the court, at page 591, says:

> "The *supposed* general intention of the legislature is to be considered in *due* subservience to the actual *language used;* and the language is not to be strained to support such supposed *intention.*"

In the case of:

> *Rudderow* v. *State,* 31 N. J. Law 512,
> (Court of Errors and Appeals)

the court, at page 515, says:

> "No principle is better settled, or more important to be faithfully adhered to by courts called upon to enforce written statutes, than that *in the absence* of ambiguity in the language used, no exposition shall be made which is in opposition to the *express* words; or as the maxim is sometimes expressed, it is not allowed to interpret what has no need of interpretation. The rule, with its limitation, is stated by Judge Washington in the case of United States *v.* Fisher, 2 Cranch. 399, as fol-

lows: 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly *expressed*, and consequently no room is left for construction!"

In *McGowan* v. *Metropolitan Life Insurance Co.*, 69 N. J. Law 198 (Court of Errors and Appeals)

the court, at page 200, says:

"It may be true, as argued, that this act works confusion; that it produces absurd results; that it never would have been enacted if its consequences had been foreseen. But whence arises any authority in the judicial department to nullify legislative action because of these or similar reasons? Admitting without examination the force of all these criticisms of the act, it still remains as a perfectly plain and explicit legislative mandate to be obeyed accordingly until it is repealed by the authority that brought it into existence."

In the case of

State v. *Woodruff*, 68 N. J. Law 89,

the court, at page 93, says:

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction."

In the case of

In re City of Passaic, 94 N. J. Law 388,

the court, at page 386, says:

"Where an act is plain and unambiguous in its terms the rule is fundamental that there is no room for judicial construction, since the language employed is presumed to evince the legislative intent. Douglass *v.* Freeholders, 38 N. J. L. 214; State *v.* Brewster, 42 Id., 125; Heston *v.* Atlantic City, 93 Id. 317."

In the case of

In re Hudson County, 144 Atl. 169 (Court of Errors and Appeals)

the court, at page 174, says:

> "The language under discussion is so obvious in its meaning that there is no occasion for exploring the intention of the draftsmen of the Constitution. In fact it is not permissible. It is quoted only because counsel refers to it.
>
> The Supreme Court In re Murphy, 23 N. J. Law, 180, held that the intention of the draftsman of a statute, or of the Legislature who passed it, not expressed in the statute itself, affords no legitimate ground to control or influence the judicial construction of it.
>
> "And the Supreme Court, in State *v.* Sooy, 38 N. J. Law, 324, speaking by Chief Justice Beasley, used the following significant language, at page 327: 'In construing laws, the court is bound by legal rules, and, in order to discover the legislative intent, we must look to *the statutory* language *alone,* in its application to its subject. We cannot go for such a purpose to the journals or debates of the Legislature, nor to our own memory; the statute must speak for itself, and we cannot add a syllable to what it speaks.'"

By the authority of these decisions, any argument that plaintiff-appellant's counsel might conceive, which seeks to arrive at the intention of our legislature in this enactment by a process of conjecture and supposition, disregarding the plain language of the act, is utterly condemned and precluded.

Therefore, plaintiff-appellant's conjectural assertion (on pages 11 and 12 of their brief) that Section 94b was designed and intended only to prevent actions by individual creditors, does not even need to be considered. But if it were necessary to deal with this contention, a complete and ready re-

futation would be furnished by the fact that the later portion of Section 94b of our Corporation Act prohibits categorically the maintenance *of any action at law* "to enforce any such statutory personal liability" *by whomsoever brought,* viz:

> " * * * and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties."

By this language the Legislature of our state makes two things unmistakably plain:

1. By enacting Section 94b of our Corporation Act, *supra,* our Legislature was prohibiting all actions at law to enforce a stockholder's statutory liability, whether brought by or on behalf of one creditor or all creditors;

2. That it was requiring that all actions to enforce such a liability should be brought for the benefit of all parties interested and should be in the nature of an equitable accounting.

Consequently, any question as to whether or not the earlier portion of Section 94b, prohibiting the bringing of any action at law "by or on behalf of any creditor," prevents only a suit by or on behalf of a single creditor and not one by or on behalf of all creditors, is plainly academic and immaterial.

In arguing that Section 94b of our Corporation Act was passed only to prevent suits by a single creditor against a stockholder, plaintiff-appellant's counsel cites, inter alia, the cases of

Western National Bank v. *Reckless,* 96 Fed. 70,

and

Henley v. *Meyers,* 215 U. S. 373; 54 L. Ed. 240,

(plaintiff-appellant's brief, pages 11 and 12). Neither of the cases lends the remotest vestige of support to the argument.

In the first of the two cited cases, the Court held that Section 94b of our Corporation Act did not prevent an action in New Jersey to enforce the statutory liability of a New Jersey stockholder of a foreign corporation, *where plaintiff's cause of action against defendant had existed prior to the enactment of Section 94b, supra,* for the reason that to hold otherwise would violate the provision of the New Jersey Constitution forbidding the Legislature to enact a law impairing the obligation of contract.

The Court was of the opinion that a denial of plaintiff's right to bring suit in this state would deprive him of a remedy which was available to him against defendant in New Jersey previous to 1897 and, therefore, would impair the obligation of his contract with the defendant antecedent to the date of said enactment, the fact being that plaintiff was a creditor of the said corporation and the defendant one of its stockholders a number of years prior to the enactment of Section 94b, *supra.*

The second of the cited cases (*Henley* v. *Meyers, supra*), was a suit in a Kansas court by the receiver of a Kansas corporation against a Kansas resident to enforce against the defendant, as stockholder of said corporation, his statutory liability for the corporation's debts. Defendant contended that when he became a stockholder, the Kansas law did not provide for the enforcement of such a liability by a receiver, but only by a creditor, and that the

subsequent amendment of the law in that regard was, as to him, unconstitutional, because it impaired the obligation of his contract. The Court held to the contrary.

Obviously, neither of the cited cases is in point on plaintiff-appellant's argument aforesaid.

Section 94b of our Corporation Act has previously been applied in this state to a case exactly like the one at bar, and held to prohibit the maintenance of the action. That was the case of:

Cochrane v. *Morris,* 10 N. J. Misc. 82, 15 Atl. 652 (S. Ct. 1931).

In that case the liquidator of a Florida bank brought suit at law against the defendant as the record stockholder of stock in such bank for one hundred per cent (100%) assessment based upon a Florida statute, which provided:

> "Stockholders of every banking company shall be individually responsible, equally and ratably and not for one another, for all contracts, accounts, debts and engagements of such company to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares."

In referring to the said case of *Cochrane* v. *Morris, supra,* plaintiff-appellant's counsel say (plaintiff-appellant's brief, page 13):

> "In that case Judge Oliphant struck out an answer filed to a complaint based upon a cause of action similar to the one at bar. The Court relied upon Western National Bank *v.* Reckless, 96 Fed. Rep. 82, and Marshall *v.* Sherman, 148 N. Y. 9."

Counsel errs in saying that the Court "relied upon" the two last-mentioned cases. On the contrary, the Court based its decision on the express provisions of Section 94b of our Corporation Act. The Court

referred to the case of *Western National Bank* v. *Reckless, supra,* only to distinguish it by saying of it:

> " * * * the suit was based on the defendant's statutory liability, and section 94b of the Corporation Act was raised as a defense by way of demurrer. The court overruled the demurrer, holding in that particular case that the statute was passed subsequent to the creation of the statutory liability, and therefore constitutional provisions prevented its use as a defense."

The Court's reference to the case of *Marshall* v. *Sherman,* 148 N. Y. 9, can only be understood as an argument (albeit obiter dicta) in favor of the *justice* of requiring (as Section 94b of our Corporation Act does) that a stockholder's statutory liability be enforced *only in a court of equity,* for the Court, immediately after mentioning the cited case, says:

> "Justice requires that a stockholder at best pay only his proportionate share of the liabilities and that can only be determined in a proper proceeding in a court of equity, which the statute contemplates."

Consequently, to say, as plaintiff-appellant's counsel do, that the Court, in the case of *Cochrane* v. *Morris, supra,* relied upon the case of *Marshall* v. *Sherman,* is demonstrably inaccurate.

The case of *Marshall* v. *Sherman, supra,* moreover, has no pertinence whatever to the question presented in the case at bar. For in that case, where the Court denied the right of a creditor of a foreign corporation to enforce in the courts of New York the statutory liability of a stockholder residing in New York, the decision was based, not upon a prohibitory statute (of the forum state), as in the case at bar, but upon the grounds that:

> "It is a principle of universal application, recognized in all civilized states, that the statutes of one state have, ex proprio vigore, no force or effect in another. The enforcement in our courts of some positive law or regulation of another state depends upon our own express or tacit consent."

and that

> "It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without, at the same time, neglecting the duty that it owes to its own citizens or subjects."

Whether or not that case would be authority for a refusal by our courts to entertain plaintiff's suit *if Section 94b of our Corporation Act did not exist,* or whether in such hypothetical circumstances the cited case could be distinguished from the case at bar, is a purely academic question, the solution of which would be a matter of complete indifference to the determination of this case. For the same reason, it is unnecessary to consider the case of *Howarth* v. *Angle,* cited by counsel.

In another case in our courts, Section 94b of the Corporation Act was unsuccessfully invoked by a defendant, viz: the case of *Graham* v. *Fleissner's Executors,* 107 N. J. Law 278, 153 Atl. 525; where the Court held that that section was inapplicable *to that case.* The action there was one brought by a trustee in bankruptcy of an insolvent Delaware corporation, to collect from stockholders of a corporation resident in this state, the amount which had been assessed against them by the bankruptcy court *on the ground that their stock was not fully paid for.* The liability sought to be enforced, therefore, was clearly a *common law liability* and not a statutory liability, and for that reason our court held that the case did not come within the provi-

sions of Section 94b. The Court, remarking that the said provision related only to a "*statutory* personal liability" said:

> "the phrase 'statutory personal liability' in the statute means personal liability imposed *by statute* extra the common law liability *to make up a deficit of par value;* i. e., the so-called 'trust fund' theory of capital stock. Johnson *v.* Tennesseee Oil Co., 74 N. J. Eq. 32, 37, 69 A. 788."

The case, therefore, is clearly distinguishable from the case at bar.

POINT II.

An action at law cannot be maintained in our Courts to enforce the stockholders' liability under the New York Banking Law because such a suit requires the Court to determine the value of the assets of the bank and the amount of its liabilities, and involves the possibility of a determination by the Court that the amount of the assessment made by the Superintendent of Banking is excessive and that a smaller assessment against the stockholders should be made, which matters and questions can only be adequately and properly dealt with by a Court of Equity.

Under Point II of plaintiff-appellant's Brief, counsel, although they do not say so, undertake to deal with the above stated proposition advanced by defendant-appellee on the motion to strike out the complaint, a proposition, be it noted which is separate from and independent of the proposition that plaintiff-appellant's suit is prohibited by Section 94b of the Corporation Act. Since plaintiff-appellant's argument is thus necessarily responsive, we shall set forth our own argument before taking up that of plaintiff-appellant's counsel under this Point.

This suit is brought by plaintiff-appellant pursuant to the authority conferred on the Superintendent of Banks of New York to enforce a stockholder's liability under the statute, by Section 80 of the New York Banking Law. That section is as follows:

> "Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists, and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified

creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in part. In case he determines to enforce such liability, he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid, to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation or at their last known address if no address appears in said ledger. Such demand shall state the total amount assessed by the superintendent against the stockholders and the equal and pro rata share assessed against each stockholder for each share of stock, and the total amount of such assessment for all the shares of stock of such stockholder. Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholder shall be required to pay such assessment to the superintendent. In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action, in his own name, as superintendent of banks, against such stockholder either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable. In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examina-

> tion and investigation, shall be presumptive evidence of such facts as therein stated."

It is at once apparent that this provision of law prescribes a distinctly extra-judicial procedure whereby (1) the superintendent of banks determines the reasonable value of the assets, (2) passes upon creditors claims and determines the amount of the bank's liabilities, (3) makes an assessment against stockholders of the amount which *he* finds necessary to make up the deficiency between assets and liabilities which *he* has ascertained and determined. Now, it is incontestable that these determinations of fact by the superintendent of banks, which he is empowered by this statute to make, can have no binding effect upon stockholders in the courts of other States; for the Superintendent *is not a court* but a mere administrative official. Thus, the assessment by the superintendent, under this provision, is to be contrasted with an assessment *made by a court* in a sequestration suit in which the court itself adjudicates all matters necessary to fix the amount of stockholders' liability, as was the case, for instance, in Converse *v.* Hamilton, 56 L. Ed. 749. Indeed, the very provisions of this Section of the New York Law make it clear that the Superintendent's determinations, aforesaid, are extra-judicial, because the section provides that in an action brought by the Superintendent to enforce such assessment:

> "the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation, and the liabilities thereof, as determined by him after examination and investigation, *shall be presumptive evidence* of such facts as therein stated."

In other words, the statute plainly recognized and contemplates that in an action against the stockholder, the Superintendent will have to *prove* the value of the assets of the corporation, and the amount of its liabilities, in order to make out a case against the stockholder; and the above quoted provision merely facilitates such proof by him, by according to his written statement in that regard, the character of presumptive evidence. That the provisions of this Section were not intended to foreclose a stockholder in such suit from taking issue with the Superintendent's allegations as to the amount of the bank's liabilities, and the value of its assets, is not only evinced by the very provision which constitutes the superintendent's written statement "presumptive evidence" of such facts, but it is declared by the New York Court of Appeals in the case of:

Assets Realization Co. v. *Howard*
211 N. Y. 430

where the Court, in dealing with a suit to enforce the stockholders' liability says:

> "But whatever the technical nature of the liability may be, there can be no question that in its practical aspects and consequences it is of a secondary and exceptional character which is developed only by the unusual contingency that the corporation has become insolvent and unable to pay its debts.
>
> * * * Therefore, it comes about that unless in the action to charge him the stockholder may dispute and try the issue of indebtedness, he may very easily and probably be subjected to this onerous and unusual liability and compelled to pay an alleged debt which never existed and which has never been contested."

Although the suit in that case was instituted by a judgment creditor of the bank instead of the superintendent of banks, as here, the principle in-

volved was identical, namely, the right of the stockholder to take issue on those facts whose existence were conditions precedent to the accrual and ascertainment of his liability.

But this provision of the New York statute investing the Superintendent's written statement with the character of "presumptive evidence" is one which, on elementary principles, is not binding upon and would not be recognized by the courts in other states. It is a mere rule of procedure. Obviously, the Legislature of one state cannot, by saying that a certain written statement shall be prima facie evidence of the truth of that which it asserts, impose upon the courts *of other states* an obligation to treat that written statement as even *competent evidence* in its own courts, let alone accord it the probative effect of prima facie evidence.

Plainly, such a statement is not merely hearsay, but is hearsay with reference to a matter as to which the writer, himself, (the Superintendent of Banks) even has no personal knowledge.

Now, inasmuch as the Superintendent's written statement aforesaid would not be accorded the character of prima facie evidence in the courts of other states, it follows that in our courts of law, competent primary evidence as to such facts would have to be adduced by the Superintendent of Banks, and, of course, opposing evidence could be adduced by the defendant stockholders. Consequently, our court of law not only would be called upon to pass upon each of the alleged liabilities of the bank, but would have to adjudicate as to the value of the bank's assets, in order to determine finally whether or not the amount of the assessment which the Superintendent sought to collect from the defendant stockholders was excessive, with the manifest possibility of the court's finding that the amount necessary to assess against the stockholders

of the bank was less than what the Superintendent claimed. Obviously, such matters and questions cannot possibly be dealt with and determined in a *Court of Law* but appertain to the jurisdiction and procedure of a *Court of Equity.* The only court in which the necessity for and amount of an assessment to be levied against stockholders can possibly and properly be determined and adjudicated is a court of equity, and the only proper proceeding in which such determination can be made is a suit to which the corporation and all of its creditors and stockholders are parties. This proposition is clearly and fully sustained in the cases of:

McDermott v. *Woodhouse,* 87 N. J. Eq. 615,
and
Chicago Title & Trust v. *Young,* 90 N. J. Eq. 27.

In all of the cases in the United States Supreme Court involving actions to enforce stockholders' liability, it is notable that the assessment against the stockholders sought to be enforced had been previously *made by a court* in an equity suit *against the corporation* to which its creditors and stockholders were made parties. When our own courts in the above cited cases of *McDermott* v. *Woodhouse* and *Chicago Title & Trust Co.* v. *Young,* say that a stockholder's liability is to be enforced in a *court of law,* they are referring explicitly to a stockholder's liability as ascertained and fixed by the order of a court previously made in an equity action against the corporation, and to which all of its creditors and stockholders are made parties.

In the case of *McDermott* v. *Woodhouse, supra,* the Court says that since the stockholder's liability to an assessment (to pay creditors) is limited to the amount necessary to satisfy creditors,

> "It follows that the amount must be ascertained by a tribunal which has the power to ascertain the total amount of the debts and the total amount of the assets of the corporation. * * * It is manifestly quite as necessary to ascertain the total assets of the corporation as its total liabilities in order to fix the amount needed to pay creditors."
>
> "From the necessity of ascertaining the amount of assets and liabilities it follows that the corporation itself is a necessary party to the suit."

It is clear that the court was alluding to an equity suit.

In the case of *Chicago Title & Trust Co.* v. *Young, supra,* what the Court decided was that

> "an action to make an assessment for the benefit of creditors upon holders of unpaid stock in a foreign corporation, cannot be maintained in New Jersey but must be brought in a court of the domicile of the corporation."

In the course of its decision the Court says . . .

> "The complainants seem to have assumed that they are in the same position as if they were asserting in this cause a direct liability for a *liquidated amount* to them and the other creditors of the Illinois corporation from the defendant executors. They are doing nothing of the kind. Only *after* an accounting has been had of all the assets and liabilities of this Illinois corporation, in a suit in which the court has jurisdiction of the corporation, can it be ascertained whether the defendant executors are liable at all, or if they are liable, what the extent of such liability is. * * * *After* the suit for an account of the assets and liabilities has been conducted to a finish in the State of Illinois, and the assessment of the stockholders has been *therein* ordered, to which proceedings all the stockholders wherever resident are privy, and by which they are bound, *then* for the first time an action can be main-

> tained in a court of competent jurisdiction in New Jersey to enforce the assessment against the executors of the former stockholder, Mr. Young.
>
> "It would seem from the opinion of the Court of Errors and Appeals in *McDermott* v. *Woodhouse, supra,* (at page 620), that such action would be a strictly legal action of which the court of chancery would have no jurisdiction."

It is plainly apparent that the court, in referring to the suit in which the liability of the stockholder *is to* be ascertained (before it can be enforced) is alluding to a suit *in equity.*

Since, in the case at bar, there has been *no judicial ascertainment* of the *amount* of the liability of the defendants (as stockholders), this court *would have to determine that amount* in this suit. But, since a determination of that amount involves necessarily a determination of the value of the assets of the Bank of the United States and the amount of its liabilities, it is manifest that this suit calls upon this Court to examine into and adjudicate *these matters.* And, what is more, as we have demonstrated above, this court will have to determine these matters upon *competent primary evidence* as to the value of the assets of the bank and all its liabilities, for the written statement of the Superintendent of Banks in that regard can have no probative value whatsoever in this court. To assert that this court, being a court of law, is incompetent to deal with such matters is to state the obvious. Such a suit plainly belongs only in a court of equity.

None of the cases cited by plaintiff's counsel for the proposition advanced by him that this action was properly brought at law is pertinent, because in each one of those cases the suit was brought after the assessment had been levied against stock-

holders *by an order of the court made in a judicial proceeding* in a court of equity, which Court order, being a foreign judgment, must, on constitutional grounds, be enforced by the Courts of other states.

Plaintiff-appellant's counsel argue (at pages 19, et seq. of their Brief) that the determination by the Superintendent of Banks of the State of New York as to the value of the bank's assets, the amount of its liabilities, and the amount of deficiency to be assessed against stockholders, is conclusive upon and incontrovertible by stockholders, because a similar finding made by United States Comptroller of Currency under the National Banking Act is held to be conclusive by the Federal Court. The force of this reasoning is not discernible. Plaintiff-appellant is not the United States Comptroller of Currency but the Superintendent of Banks of the State of New York, and the statute on which plaintiff's cause of action is based is not the National Banking Act but the Banking Act of the State of New York; and any argument from a supposed analogy is confuted merely by pointing out that the National Banking Act is the law of the land and is binding in every state of the United States and in the courts of every state, whereas the Banking Act of New York State is the law of New York State, but not of all other states.

In other words, the National Banking Act and the New York Banking Law may contain similar provisions but they do not possess similar territorial governing force. Hence, the argument of plaintiff-appellant's counsel (at page 20 of their Brief) that because the two laws contain similar provisions

> "Therefore, the decisions in the Federal Courts construing the provisions of the National Banking Act are of prime authority on the questions involved here"

is manifestly fallacious and erroneous. Moreover, in the case of determinations made by the United States Comptroller of the Currency with reference to a national bank, it is held by the Federal Courts that such determinations are conclusive in character *under and by virtue of the acts of Congress,* whereas the determinations of the Superintendent of Banks of the State of New York are plainly declared to be *not conclusive* in character by the express provision of Section 80 of the New York Banking Law, wherefrom it is unmistakably clear that his determinations as to assets and liabilities of the bank have merely a presumptive or prima facie probative character in a suit brought by him to assess stockholders.

Plaintiff-appellant's counsel assert (at page 25 of their Brief) that

> "The New York State Banking Act of 1909, as revised by the Laws of 1914, was enacted to conform the New York system of banking regulation, liquidation and assessment to the National Banking Act."

and that

> "It follows that the rule of the Federal Courts applicable to assessments levied by the Comptroller of Currency applies and controls assessment enforcement through the office of the Superintendent of Banks of the State of New York."

In other words, counsel's argument is that because the New York Legislature intended (according to counsel) that the Banking Act of New York should resemble the National Banking Act, therefore, the Federal law which makes the United States Comptroller's determination as to the assets and liabilities of a national bank conclusive upon stockholders, will operate to make the determination of the Superintendent of Banks of the State of New York as to the assets and liabilities of the New York

State bank conclusive on stockholders in the courts of all states. The mere statement of this reasoning is enough to demonstrate its utter invalidity.

Plaintiff-appellant's counsel (at page 26 of their Brief) assert that the present provision of the New York Banking Law, empowers the New York Superintendent of Banks to do what under previously existing provisions of that statute was done by the Courts of New York, viz, determine the value of the assets and the amount of liabilities of an insolvent New York State bank. From this, plaintiff-appellant's counsel deduce that the New York Legislature

> "clearly indicate an intention to invest the administrative determination with the same conclusive effect as the prior judicial determination." (Page 26 and 27 of plaintiff-appellant's Brief.)

We dispute the logic of counsel's reasoning; but even if the logic of the argument were sound, it would not avail plaintiff-appellant, for the decisive reason that the very language of the New York Banking Act declares the contrary, by providing that the certificate of the Superintendent of Banks, setting forth his determination as to the value of its assets and the amount of its liabilities, shall be presumptive evidence of such facts, thereby obviously negativing the notion that the Superintendent's determinations are to be conclusive and incontestible. But assuming for the sake of argument that the New York Legislature did intend to

> "invest the administrative determination with the same conclusive effect as the prior judicial determination,"

the fact remains that such intent of the New York Legislature is necessarily ineffectual and uncontrolling in *other states*. Thus, while the "judicial determination" of such matters by a *Court* of New

York would be conclusive in the courts of other states, this would be so for two reasons which would not exist in the case of the administrative determination of such matters by the New York Superintendent of Banks, to wit, that a "judicial determination" which necessarily would be made not *ex parte* but *inter partes,* would be *res judicata,* and in addition thereto the "judicial determination" in the Courts of New York would be binding and enforcible in the courts of other states by virtue of the "full faith and credit" clause of the United States Constitution. Indeed, it is doubtful whether the administrative determination of such facts by the New York Superintendent of Banks could be made conclusive upon stockholders, even in a suit in the Courts in New York, or whether on the contrary, the non-judicial and ex parte character of such administrative determination would not prevent it from being made or held to be conclusive on the ground that that effect would violate the "due process" clause of the United States Constitution. This question, however, is not pertinent and is therefore academic in the case at bar.

In support of their contention that the determination by the Superintendent of Banks of New York as to the value of the assets and amount of liabilities of an insolvent New York State Bank is conclusive, like a judicial adjudication, plaintiff-appellant's counsel cite, (at page 27 of their Brief) the cases of

Isaac v. *Marcus,* 258 N. Y. 257
and
Deweese v. *Smith,* 106 Fed. 438.

The first-mentioned case contains nothing which even remotely touches on the point in question. The nature of that case was stated by the court as follows:

> "The plaintiff, a stockholder of the Bank of United States, has brought an action in behalf of herself and all other stockholders similarly situated to compel directors of the bank to account for their conduct as such directors in committing alleged acts of waste of the moneys of the bank, by planning and carrying out a merger of the Colonial Bank with the Bank of the United States. The Bank of United States, the superintendent of banks, who is in possession of that bank for the purpose of liquidation, and certain officers, directors, and stockholders of the Colonial Bank, are joined with the directors of the Bank of United States as parties defendant. Upon motion of the superintendent of banks the complaint has been dismissed "on the grounds that the complaint does not state facts sufficient to constitute a cause of action, and the plaintiff has no legal capacity to sue."

The second-mentioned case is utterly inapplicable, because that was a suit by a receiver of a national bank appointed by the United States Comptroller of Currency under the National Banking Act. Therefore the fact that the acts of Congress and decisions of the Federal Courts thereunder, constitute the United States Comptroller of Currency, a quasi-judicial officer and invest his determinations under the National Banking Act with a conclusive character, obviously has no effect upon the Superintendent of Banks of the State of New York and the powers conferred upon him under the Banking Law of the State of New York.

On page 28 of plaintiff-appellant's Brief, counsel, without any supporting authority, make the amazing statement that

> "The execution of the certificate referred to in Section 80 of the Banking Law is purely optional and its use a mere privilege which the Superintendent may avail himself of or not. It is merely an additional method to

> which he may resort in the event that he does not care to invoke or rely upon the legal principle, which excludes attack upon his determination in the absence of clear error of law, fraud or mistake."

The certificate referred to, of course, is the one provided for in Section 80 of the New York Banking Law in the following language:

> . . . "In any such action, the written statement of the superintendent, under his hand and seal of office, reciting his determination to enforce the individual liability, or any part thereof, of such stockholders, and setting forth the value of the assets of such corporation and the liabilities thereof, as determined by him after examination and investigation, shall be presumptive evidence of such facts as therein stated."

This provision, counsel say, is merely a gratuitous privilege accorded to the Superintendent of Banks by the Legislature of New York, a mere extra convenience, of which the Superintendent "may avail himself or not" depending, we suppose, upon his whim or caprice,

> "in the event he does not care to invoke or rely upon the legal principle which excludes attack upon his determination in the absence of clear error of law, fraud or mistake."

An argument, which like this, assigns such reasons as this for a legislative enactment, seems to us to require no answer. What is more, the "legal principle" which is referred to as rendering the said provision of Section 80 of the New York Banking Law superfluous and gratuitous, is likewise asserted by counsel to exist without a citation of authority.

The cases cited by counsel apparently in that connection contain nothing on the subject of the alleged conclusive character of determinations by

a public official of facts upon which depend the existence and extent of the liability of any person in a suit brought against him either by such official or any other person.

In further support of their contention that the aforesaid determination of the New York Superintendent of Banks is judicially conclusive in its character, plaintiff-appellant's counsel cite (on page 29 of their Brief) the case of

> *Broderick* v. *Adamson,* 148 N. Y. Misc. 353, 265 N. Y. S. 804.

That was a decision by the *trial court* itself. In that case the question of the bank's insolvency (including of necessity the question of the value of its assets and the amount of its liabilities), was not treated as being conclusively established by the Superintendent's determination, but as a controversial matter. At the very outset of its opinion the court says:

> "The evidence presented by the superintendent established a prima facie case showing the insolvency of the bank. A number of defendants offered some evidence in support of their contention that the bank was not insolvent at the time of the notice of assessment, but those defendants during the trial entered into a stipulation of settlement with the superintendent. No other evidence was offered on that issue."

Nevertheless, it is true that the court thereafter gives expression to the following avowedly obiter dicta opinion:

> "While the question was not presented upon the trial, it would seem appropriate, in view of the large body of litigation pending and prospective involving the enforcement of assessments against bank stockholders, to state my views with respect to the effect and weight to be given to the certificate provided for un-

> der section 80 of the Banking Law. It is my opinion that this certificate, in the absence of a showing of fraud, illegality, bad faith, or obvious error, constitutes conclusive evidence of the facts therein stated."

As to this statement, it is only necessary to say, first, that it is purely obiter, second that it is the opinion of a court at nisi prius, third, that it is expressly based by the court upon the argument that since the determination made by the United States Comptroller of Currency with reference to a national bank under the provisions of the National Banking Act, is held to be conclusive by the Federal Courts, the determination made by the Superintendent of Banks of the State of New York with reference to banks of that state under the provisions of the banking law of that state must therefore be held to be conclusive—an argument which we have hereinabove demonstrated to be utterly fallacious. It is only necessary to add one more comment on the cited case, viz, that the court asserts that

> "The rule applied in the federal jurisdictions rests upon no positive statute but merely upon the presumption of good faith and regularity attending the performance of official acts,"

and in support of that assertion cites cases *not in the Federal Courts, but in the New York Court.* When the cited cases are examined, they are found to make no reference whatsoever, either to the rule of the Federal Courts to which the court refers, or to the proposition that determinations of fact made by a public official are conclusive. In any event, however, that case can have no effect in suits outside the state of New York, for the point under discussion is one of adjective law, as to which, of course, the decision of the courts of one state are not authoritative or controlling in the courts of other states.

As further authority for the proposition that the determination made by the New York State Superintendent of Banks as to the value of the assets and the amount of liabilities of the bank is conclusive on stockholders outside of the State of New York, counsel for plaintiff-appellant (at page 32 of their Brief) cite the case of

Broderick v. *Stephano,* 171 Atl. 582

In that suit plaintiff sought to enforce against a stockholder resident in Pennsylvania, the same statutory liability which is involved in the case at bar. That case is absolutely devoid of any holding to the effect that the determination made by the Superintendent of Banks of the State of New York as to the value of the assets and the amount of liabilities of the insolvent bank are *conclusive* upon the Pennsylvania stockholder. The court in the cited case does seem to hold that certain matters involved in that case were conclusively adjudicated as to defendant by reason of *the decision of the "courts of New York in Broderick* v. *Adamson,* 148 Misc. 353, 265 N. Y. S. 804." Without pausing to consider the validity of such a holding, we need only observe that it imputes conclusiveness, not to the determination made by the Superintendent of Banks of New York, but *to the decision of the New York Court in Broderick* v. *Adamson.* This of course, demonstrates that the cited case is no authority for the contention of plaintiff-appellant's counsel above-mentioned. This, we submit, is sufficient to dispose of the cited case so far as it concerns the proposition above-mentioned for which plaintiff-appellant's counsel cite it. But in view of counsel's extensive quotation from that case, we feel justified in a further brief discussion of it. Defendant in that suit raised two questions: one, "the right of plaintiff to maintain an action for the recovery of stock assessments in this (Pennsylvania) jurisdiction," and the

other, "that the statement of claim (in plaintiff's pleading) does not set out the facts necessary to establish a cause of action of the character here alleged." As to the first question, the court held the action was maintainable in the Pennsylvania courts because

> "the full faith and credit clause of the Federal Constitution (article 4, sec. 1) requires us to allow the action here."

The court cites as its authority in that connection

> "*Converse* v. *Hamilton,* 224 U. S. 243, 32 S. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292."

and the following excerpt from the Re-Statement of Conflict of Laws, Section 203:

> "The existence and extent of the liability of a shareholder for assessments or to contribute to the corporation for the payment of debts of the corporation, is determined by the law of the state of incorporation."

As to the proposition that the "full faith and credit" clause required the courts of Pennsylvania to allow the action, we need only refer to that portion of our Brief in which we discuss fully that very question, and point out, inter alia, that the cited case of *Converse* v. *Hamilton, supra,* was a case in which the suit in question was based upon an assessment *made by a court in a judicial proceeding in the foreign state,* which, being a *judgment* of a foreign court, was, of course, required to be recognized and enforced by the courts of other states under the "full faith and credit" clause of the United States Constitution. As to the above quoted excerpt from the Re-Statement of the Conflict of Laws, Section 203, it is obviously a mere declaration that *the legal basis* of the liability of a shareholder for assessments is to be found in and determined by the law

of the State of incorporation, but not that the question of whether or not a suit against a foreign stockholder must be entertained by the courts of the foreign state is determined by the law of the state of incorporation. Finally, the excerpt from 14 *Corpus Juris* 998, which the court quotes, is, we submit, utterly inapplicable to the case before that court, for the reason that the statement in *Corpus Juris* plainly has reference to a *judicial proceeding* in the state of the corporation's domicile, in which the amount of the stockholder's liability "has been ascertained." We concede, of course, that in such a case *the judicial decree* operating as res judicata, and the "full faith and credit" clause being strictly applicable, a suit *based upon such a judicial decree* must be entertained by the courts of other states.

Counsel for plaintiff-appellant (at page 34 of their Brief) assert that

> "The Court of Chancery does not have jurisdiction."

In support of this proposition counsel cites the cases of

McDermott v. *Woodhouse,* 87 N. J. Eq. 615,

Chicago Title & Trust Co. v. *Young,* 90 N. J. Eq. 27.

Graham v. *Fleissner,* 107 N. J. L. 278.

As to the first and second cited cases, it is enough to point out that both were actions, not to enforce a statutory liability of stockholders of a foreign corporation but a common law liability of the stockholders as for an unpaid stock subscription, and of course, in neither case was the question raised as to whether or not a State Superintendent of Banks, who was the statutory representative of both the corporation and its creditors could institute a suit in a court of equity in this state to en-

force the statutory liability of stockholders of the corporation residing here.

It is significant moreover, that in the case of *McDermott* v. *Woodhouse, supra,* the court lays stress upon the fact that the *corporation was not a party to that suit* and held that that fact alone made it impossible for the court to adjudicate as to the corporation's assets and liabilities and the necessity for a stock assessment. In a suit in our Court of Chancery by the New York Superintendent of Banks, who is the statutory representative of the corporation as well as its creditors, this jurisdictional requirement is fully met. The same comments are applicable to the case of *Chicago Title & Trust Co.* v. *Young, supra.* The case of *Graham* v. *Fleissner, supra,* was one brought to enforce a *judicial decree* entered in the New York Bankruptcy Court levying an assessment against New Jersey stockholders upon an unpaid stock subscription. Since the suit was one based on "the common law liability to make up a deficit of par value, i. e., the so-called 'trust fund' theory of capital stock," section 94b was properly held inapplicable. (See also discussion of this case at page 16 of this Brief.)

Proceeding further under the same heading, counsel for plaintiff-appellant assert that

> "under the New York statute the duty of casting up the assets and liabilities of a New York bank is reposed exclusively in the Superintendent of Banks, *and his determination is conclusive upon all parties.*"

This assertion, which is merely a repetition of counsel's previous contention has already been fully dealt with by us hereinabove and needs no further refutation.

Counsel says further (at page 36 of plaintiff-appellant's Brief) that

> "Under the decision in Bernheimer *v.* Converse, 206 U. S. 516, the stockholder upon acquiring his stock incurred an obligation created under the New York laws, contractual in its nature, to pay any assessment that *might be levied by the Superintendent of Banks.*"

The cited case is destitute of anything which lends support to counsel's assertion. In that case the court says in the course of its opinion:

> "The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder." (206 U. S. 530; 51 L. Ed. 1174.)

but the Court does not say that a foreign stockholder is bound to pay whatever "amount" *a state superintendent of banks* may determine to be necessary to pay to the creditors. In that case the assessment against stockholders was made in a *judicial proceeding wherein the court adjudicated as to the amount of assets and liabilities of the corporation;* and this *judicial decree* was held to be enforceable *in the foreign state because of the full faith and credit clause of the United States Constitution.*

Counsel suggests (at page 36, *supra*) that our Court of Chancery might make a determination as to the assets and liabilities of a New York Bank different from that arrived at by the New York Superintendent of Banks. That is possible; but it furnishes no argument against the jurisdiction of our Court of Chancery.

Counsel begs the question by *assuming* that the determination made by the Superintendent of Banks of New York is binding and conclusive upon stockholders. We grant that if the Superintendent of Banks' determination as to the deficiency of assets of the bank were conclusive upon stockholders, there would be no reason for our Court of Chancery to take jurisdiction for there would remain no necessity for an *equitable accounting.* The point is, however, that the Superintendent's determination is not conclusive by the very language and provisions of the New York Banking Law, and, we contend,

being merely an administrative finding and not a *judicial adjudication,* could not be conclusive upon New Jersey stockholders even if the New York Banking Law invested such administrative finding with a conclusive character.

Counsel says further (at page 36 of appellant's Brief):

> "If this is not so, and if our Court of Chancery has jurisdiction again to cast up the assets, it must necessarily follow in a case like the present where there are stockholders in nearly every State of the United States, the plaintiff might be forced by such statutes as this to go through such an equitable accounting in each of the forty-eight States in which stockholders of the Bank reside."

The answer to this suggestion is, that if the Court of Chancery of our State made an adjudication in a suit to which the corporation and all its creditors and stockholders were parties, the matter of the amount of assets and liabilities of the corporation would be settled once and for all and would be res judicata, thereby precluding the maintenance of similar suits in equity thereafter in the courts of any other state.

Counsel's final statement (at page 36 of appellant's Brief) on this matter of the jurisdiction of our Court of Chancery is as follows:

> "Since it is well established by the cases above mentioned that the Court of Chancery of New Jersey does not have jurisdiction in such a case, this statute *must fail* because it denies every other form of action, but the one which this Court has said may not be brought in the Court of Chancery."

Granting for the sake of argument that our Court of Chancery did not have jurisdiction over such a case, counsel's deduction therefrom that "that statute must fail" is obviously fallacious. Our Legis-

lature has stated in no uncertain terms in Section 94b of our Corporation Act that

> "No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory personal liability be created by or arise from the statutes or laws of any other state or foreign country."

And to this plain and clearcut provision the Legislature has added a further provision, which is manifestly separate and distinct, that

> "and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties."

There is not the slightest indication of any interdependence of these two provisions upon each other, and there is not the slightest basis for any inference of a legislative intent that if the later provision should not avail or benefit a litigant, the earlier provision should ipso facto become null and void. Consequently, plaintiff-appellant's action is prohibited by the first provision of Section 94b *supra,* regardless of whether or not plaintiff-appellant may be able to maintain an action in our Court of Chancery.

POINT III.

Argument in Answer to Plaintiff-appellant's Point III.

Under the Caption "Point III" (at page 37 of plaintiff-appellant's Brief), counsel assert the proposition that

> "If an equitable accounting must be brought, as provided by the Statute, it is so unreasonable and arbitrary in this case as to violate the due process clause of the Fourteenth Amendment."

Necessarily counsel's contention must be understood to be that Section 94b deprives the plaintiff of his property without due process of law. Now, it would seem to be sufficient answer to this contention merely to point out that Section 94b does not deprive plaintiff-appellant of anything; that is to say, it does not operate to take anything from him. That it prevents him from bringing the present action in our courts of law is in no sense a violation of the "due process" clause of the United States Constitution; nor do any of the cases cited by counsel under this point lend the faintest suggestion of support to it. The United States Supreme Court cases which counsel cite are not cases which involved a state law prohibiting the bringing of an action, but are all cases where one of the litigants claimed to be aggrieved in or by virtue of the very suit itself.

Counsel (at page 41 of plaintiff-appellant's Brief) cite the case of *Thompson* v. *Taylor,* 66 N. J. L. 253. That was a suit upon a promissory note made by a wife, in New Jersey, payable to her husband who negotiated the same with her knowledge and consent in New York. Defendant, inter alia, contended that the courts of New Jersey should not enforce the contract on the ground that it was in-

consistent with the existing public policy of New Jersey. The Court recognized and approved the principle (at page 258) that,

> "When the legislature has declared the policy of the state in relation to a given subject-matter, it is the duty of the courts to give effect, so far as possible, to that policy,"

and further, that,

> "There can be no doubt as to the duty of our courts under the condition thus predicated."

The Court thereafter reached the determination that the enforcement of the contract would not contravene the public policy of New Jersey. Obviously the case is not an authority in favor of plaintiff-appellant's contention but directly against it.

Plaintiff-appellant's counsel cite (at page 41) the case of

Hartford Accident & Indemnity Company
v. *Delta & Pine Land Company*

decided by the United States Supreme Court on April 9, 1934, and at pages 53 et seq. of their Brief, counsel set forth the text of that opinion in toto. That case is manifestly inapplicable to the case at bar. That suit was one brought in the courts of Mississippi by a Mississippi corporation against a corporation of Connecticut upon a contract entered into between plaintiff and defendant in the State of Tennessee. The contract contained a provision limiting the time within which the plaintiff could make claim upon defendant under the contract (which was one of indemnity). In the suit brought on the contract, the defendant set up the defense that the plaintiff had failed to make a claim within the time so limited by the contract, such being the fact. Plaintiff sought to avoid the effect of the defense by claiming that under a statute of the State

of Mississippi (the forum) that provision of the contract was nullified. The state court sustained plaintiff's contention. On appeal to the United States Supreme Court the defendant contended that the Mississippi law which plaintiff had successfully invoked, violated the "full faith and credit" clause of the United States Constitution. The United States Supreme Court sustained defendant's contention holding that

> "The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (Hooper *v.* California, 155 U. S. 648; Orient Insurance Company *v.* Daggs, 172 U. S. 557, 565-7; New York Life Insurance Company *v.* Cravens, 178 U. S. 389, 398-9); *but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where* made. New York Life Insurance Company *v.* Head, 234 U. S. 149; Aetna Life Insurance Company *v.* Dunken, 266 U. S. 389, 399. *Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord* with every local statutory policy solely upon the ground that one of the parties is its own citizen. *Home Insurance Company* v. *Dick,* 281 U. S. 397, 407-8.

The distinction between that case and the case at bar is so obvious that it hardly needs elucidation. There, the attempt was to adjudicate upon defendant's contractual rights and by such adjudication to impose a liability upon defendant. In the case at bar there is no attempt to adjudicate upon the plaintiff's rights or to impose any liability upon him. On the contrary, there is a refusal on the part of the court to *make any adjudication whatsoever.*

The difference between the two cases is strikingly pointed out by the following language used by the United States Supreme Court in the cited case:

> *"A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment."*

POINT IV.

SECTION 94B OF NEW JERSEY CORPORATION ACT DOES NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.

Any attempt to invoke the full faith and credit clause against the New Jersey statute in question must necessarily proceed upon the basis of a proposition that where a person has a cause of action, which is based upon the laws of another state, he has a constitutional right to prosecute that cause of action in the courts of this state, which the State Legislature is powerless to defeat. Let us consider, therefore, the cases, to discover whether there is any support whatsoever for such a contention.

The full faith and credit clause of the Constitution is as follows:

> "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U. S. Constitution, Article 4, Sec. 1.

Manifestly, the only feature of this clause, which is pertinent to the present inquiry is the reference therein to the full faith and credit which shall be accorded to the "public acts" of another state. The question, then, is what has been held to be the nature and extent of the Constitutional obligation imposed by this clause on each state with reference to the statutes of another State?

One of the earliest cases in the United States Supreme Court involving a suit instituted in one state upon a cause of action, which arose in and was based upon the laws of another state, was the case of:

Texas & Pacific Railroad. v. *Cox,* Reported in 36 Law Ed. 829, 145 U. S. 593.

That was an action brought by a citizen of Texas in the Federal Court in Texas against the receivers of the railway company to recover damages for the death of plaintiff's husband in an accident, which occurred in the State of Louisiana. Plaintiff claimed a right to recover under the law of Louisiana as well as under the law of Texas, alleging that the laws of both states *were substantially the same.* The defendants demurred, claiming that the Texas court lacked jurisdiction because the decedent's death occurred in Louisiana. In adverting to this ground of demurrer, the United States Supreme Court said:

> "Counsel further urge, with much earnestness, that the cause of action founded upon the statute of *Louisiana* conferring the right to recover damage for an injury resulting in death, *was* not enforceable in *Texas.*
>
> The action, being in its nature transitory, might be maintained if the act complained of constituted a tort at common law, but as a statutory delict, it is contended that it must be justiciable not only where the act was done, but where redress is sought. If a tort at common law where suit was brought, it would be presumed that the common law prevailed where the occurrence complained of transpired, but if the cause of action was created by statute, *then* the law of the forum and of the wrong must substantially concur in order to render legal redress *demandable.* * * * * * * a right arising under a liability imposed by either the common law or the statute of a State may, where the action is transitory, be asserted and enforced in any court having jurisdiction of such matters and of the parties.
>
> * * * the rule thus stated is generally recognized and applied *where the statute of the State in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced."* (at page 833.)

This plain and unqualified declaration by the court that where "a cause of action was created by statute" of one state, "legal redress" is not "demandable" in another state unless the foreign law in question, and the law of the state where suit is brought "substantially concur," is, obviously, another way of stating the proposition that a person may not demand redress in one state in respect of a cause of action created by the laws of another state *where such law is in conflict with or contrary to the law of the forum.* That there was no such conflict between the laws of the two states in that case was declared by the Supreme Court in the following language:

> "The statutes of these two states on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the State of Texas." (page 833.)

The above mentioned rule enunciated in the case of *Texas Railroad Company* v. *Cox, supra,* was explicitly recognized by the Supreme Court of the United States in the case of

> *Spokane, etc. Railroad Company* v. *Whitley,* 59 L. Ed. 1060, 237 U. S. 487,

where the Court said:

> "In determining the question now presented, it is apparent that the fundamental consideration is that the right to recover damages for the killing of the decedent was created by the Idaho statute. That right could be enforced in another state, *if the enforcement was not opposed to its policy* (Dennick *v.* Central R. Co. 103 U. S. 11, 26 L. ed. 439; Texas & P. R. Co. *v.* Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905)." (page 1067.)

The rule was again recognized by the United States Supreme Court in the case of

Atchison, Topeka, etc. Company v. *Nichols,*
68 L. Ed. 720, 264 U. S. 348.

This was an action brought in the State Court of California and removed on the round of diversity into the Federal Court of California. The suit was based upon a Statute of the State of New Mexico, where the cause of action arose. The defendant railroad company contended that its liability was not enforceable in the State of California because the New Mexico law was "in conflict with the policy of the State of California." The Supreme Court construing both the laws of New Mexico and the pertinent laws and decisions of the State of California, held that the laws of California did not manifest any policy of that State which was in opposition to the enforcement by its Courts of the New Mexico law in question.

This careful consideration by the Supreme Court of the question of whether or not there was any conflict between the public policy of California and the law of New Mexico which was sought to be enforced in the California Courts, is the most emphatic recognition and endorsement of the rule laid down in the case of *Texas Railroad Company* v. *Cox, supra.*

The fact that in *none* of the foregoing cases involving the question as to when a cause of action created by the laws of one state can be sued upon in the courts of another state, was there any contention or even suggestion that the full faith and credit clause of the United States Constitution was applicable, has an unmistakable significance; nor have we been able to find any United States Supreme Court case in which such a contention was advanced. Indeed in a case decided by the Courts of Missouri involving this very question, the Court makes the following assertion:

"It has never been held under this full faith and credit clause of the United States Constitution that a State is compelled to enforce in its courts the statute of another when such statute is penal in its character or contrary to the policy of the State. Considering the large number of States of this Union and their separate and distinct governmental policies, great confusion would result if a right of action created by the peculiar policy of one State under its peculiar statute could be carried into another State and the State to which it is carried be compelled to enforce it through its own courts although contrary to the policy of its own laws. Carey *v.* Schmeltz (1909) 221 Mo. 132, 119 S. W. 946."

A case in the Illinois Supreme Court passes on the question squarely, viz, the case of

Dougherty v. *American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619.

The Court states the case as follows:

"This is a suit brought in the circuit court of Will county by the administrator of the estate of John Dougherty, deceased, to recover damages for the death of plaintiff's intestate. The declaration avers that the deceased, while a citizen and resident of Illinois, was injured while in the employ of the American McKenna Process Company at Elizabeth, New Jersey, and died in the latter state from the effect of his injury. Letters of administration on his estate were granted by the probate court of Will county. This suit is based upon the injuries act of New Jersey, which is set out in the declaration. A general demurrer thereto was sustained by the trial court on the ground that Section 2 of the injuries act of Illinois, which provides that 'no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state.'

(Hurd's Rev. Stat. 1911, p. 1290), prohibited the bringing of this action in Illinois."

* * * * * *

"A further contention of counsel is that if this statute applies to actions brought here, based upon the statute of another state, then it is in contravention of Section 1 of article 4 of the United States Constitution, which provides that 'full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state,' and also of paragraph 1 of Section 2 of said article, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'

Whatever force and obligation the laws of one country have in another depend solely on the laws and municipal regulations of the latter. Story, Confl. L. 8th ed. Section 23. The several states of the Union are not in every respect independent; many of the rights and powers which originally belonged to them being now vested in the government created by the Federal Constitution. Except, however, 'as restrained and limited by that instrument, they possess and exercise the authority of independent states.' Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. It was not intended by the provisions of the Federal Constitution relied on by counsel, to give to the laws of one state any operation in other states except by a permission, express or implied, by those states. Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357. Laws are without force beyond the jurisdiction of the state which enacts them, and can have no extraterritorial effect except by a comity of other states. Huntington *v.* Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

This rule applies with full force to statutes giving a right of action for death by the wrongful act of another. If they are administered outside of the state where they are enacted, it is only on the principles of comity. In this country the courts will generally enforce the law of the place where the injury occurred,

unless to do so is contrary to the law, morals, or policy of the forum (citing cases). If the policy of the forum has been expressed positively in a statute, that policy must prevail. When the legislature speaks upon a subject upon which it has constitutional power to legislate, public policy is what the statute indicates (citing cases). Each state, subject to restrictions of the Federal Constitution, determines the limits of the jurisdiction of its courts, the character of the controveries which shall be heard in them, and how far its courts having jurisdiction of the parties shall hear and decide transitory actions where the cause of action has arisen outside of the state. St. Louis, I. M. & S. R. Co. *v.* Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464. Different states may have different policies, and the same state may have different policies at different times, provided that any policy the state may choose to adopt must operate the same way on its own citizens and those of other states. Chambers *v.* Baltimore & O. R. Co. 207. U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34. In this last case it was held that a statute of Ohio providing that no action could be maintained in that state for wrongful death occurring in another state, except where the deceased was a citizen of Ohio, did not violate the Federal Constitution. A dissenting opinion, joined in by three members of the court in effect conceded that, had the Ohio court excluded from the courts of that state all actions for personal injuries arising in other states, it would have been constitutional. The reasoning of that decision as to the right of a state to exclude actions of the kind here in question fully sustains the validity, under the Federal Constitution, of the provision of the injuries act above referred to."

On the other hand, there is a line of cases in the United States Supreme Court in which the full faith and credit clause of the Constitution was in-

voked in favor of *rights* arising under the laws of another state than that in which the suit was brought.

The latest in this line of cases is the case of

Bradford Electric Light Company v. *Clapper,* 76 L. Ed. 1026, 286 U. S. 145.

In that case, plaintiff brought an action in the Court of New Hampshire under the Employers' Liability and Workmen's Compensation Act of that State to recover for the death of plaintiff's intestate, alleged to have been caused by the defendant's (his employer's) negligence. The case was removed to the Federal Court in New Hampshire on the ground of diversity of citizenship by the defendant, which was a Vermont corporation. To quote the language of the Court:

> "The Company, invoking the full faith and credit clause of the Federal Constitution, set up as a special *defense* that the action was barred by provisions of the Vermont Compensation Act; that the contract of employment had been entered into in Vermont, where both parties to it then, and at all times thereafter resided; and that the Vermont Act had been accepted by both employer and employee as a term of the contract.
>
> The District Court ruled that the action was properly brought under the laws of the State of New Hampshire; that the action was based on a tort occurring in that State; and that the Vermont Workmen's Compensation Act had no extra-territorial effect." (page 1031).

The Vermont Workmen's Compensation Act contained a provision that:

> "Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the

> course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement, Section 5774; that every contract of employment made within the State shall be presumed to have been made subject to its provisions, unless prior to the accident an express statement to the contrary shall have been made, in writing, by one of the parties, Section 5765; and that acceptance of the Act is 'a surrender by the parties . . . of their rights to any other method, form or amount of compensation or determination thereof,' Section 5763." (page 1031).

Under the New Hampshire Workmen's Compensation Act an injured employee was entitled to elect whether to claim compensation under that Statute or to sue for damages at common law and it was under this provision that plaintiff brought his suit. Thus the Supreme Court was called upon to decide *whether the rights of the parties were controlled by the Vermont Statute or the New Hampshire Statute.*

The Court put the question thus:

> "May the New Hampshire courts disregard the relative rights of the parties as determined by the laws of Vermont where they resided and made the contract of employment; or must they give effect to the Vermont Act, and to the agreement implied therefrom, that the only right of the employee against the employer, in case of injury, shall be the claim for compensation provided by the statute?" (page 1032).

The Court goes on to say:

> "The conflict here is between the laws of two States; and the Company *in setting up as a defense* a right arising under the Vermont statute, invokes Art. 4, Section 1, of the Federal Constitution, which declares that 'full faith and credit shall be given in each State to the public acts . . . of every other State.' That a statute is a 'public act' within the mean-

ing of that clause is settled." (citing cases.) "A federal court sitting in New Hampshire is bound equally with courts of the State to observe the command of the full faith and credit clause, where applicable. The precise question for decision is whether that clause is applicable to the situation here presented." (pages 1032-1033).

The Court proceeds with the discussion of the question as follows:

"The administratrix contends that the full faith and credit clause is not applicable. The argument is that to recognize the Vermont Act as a defense to the New Hampshire action would be to give to that statute an extra-territorial effect, whereas a State's power to legislate is limited to its own territory. It is true that full faith and credit is enjoined by the Constitution only in respect to those public acts which are within the legislative jurisdiction of the enacting State. (citing cases). But, obviously, the power of Vermont to effect legal consequences by legislation is not limited strictly to occurrences within its boundaries. It has power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders, compare Quong Ham Wah Co. *v.* Industrial Acci. Commission, 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373, dismissing writ of error, 184 Cal. 26, 12 A. L. R. 1190, 192 Pac. 1021, and likewise has power to exclude from its own courts proceedings for any other form of relief for such injuries. The existence of this power is not denied. It is contended only that the rights thus created need not be recognized in an action brought in another State; that a provision which Vermont may validly enforce in its own courts need not be given effect when the same facts are presented for adjudication in New Hampshire.

The answer is that such recognition in New Hampshire of the rights created by the Vermont Act, can not, in any proper sense, be

termed an extra-territorial application of that Act. Workmen's compensation acts are treated, almost universally, as creating a statutory relation between the parties—not, like employer's liability acts, as substituting a statutory tort for a common law tort. (citing cases). The relation between Leon Clapper and the Company was created by the law of Vermont; and as long as that relation persisted its incidents were properly subject to regulation there. For both Clapper and the Company were at all times residents of Vermont; the Company's principal place of business was located there; the contract of employment was made there; and the employee's duties required him to go into New Hampshire only for temporary and specific purposes, in response to orders given him at the Vermont office. The mere recognition by the courts of one State that parties by their conduct have subjected themselves to certain obligations arising under the law of another State is not to be deemed an extra-territorial application of the law of the State creating the obligation. (citing cases).

By requiring that, *under the circumstances here presented,* full faith and credit be given to the public act of Vermont, the Federal Constitution *prevents* the employee or his representative from asserting in New Hampshire rights which would be denied him in the State of his residence and employment. A Vermont court could have enjoined Leon Clapper from suing the Company in New Hampshire, to recover damages for an injury suffered there, just as it would have denied him the right to recover such damages in Vermont. (citing cases). The rights created by the Vermont Act are entitled to like protection *when set up in New Hampshire by way of defense to the action brought there.*" (pages 1033-1035).

After having thus decided that the rights of the parties as fixed by the controlling Vermont Statute "are entitled to protection in New Hampshire *when*

set up by way of defense," the Court goes on to discuss the plaintiff's contention that:

> "The provision of the Vermont statute which forbids resort to common law remedies for injuries incurred in the course of employment is contrary to the public policy of New Hampshire; that the full faith and credit clause does not require New Hampshire to enforce an act of another State which is obnoxious to its public policy; and that a federal court sitting in that State may, therefore, decline to do so." (page 1035).

On this question, the Court says:

> "It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies. *Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy (citing cases); or because the enforcement of the right conferred would be obnoxious to the public policy of the forum (citing cases), or because the liability imposed is deemed a penal one (citing cases). But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply (citing cases).* A State may, on occasion, decline to enforce a foreign cause of action. *In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere.* But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, *subjects the defendant to irremediable liability.* This may not be done." (pages 1035-1036).

Here, it seems to us, is a statement of all of the legal principles which must control the case at bar. The plain meaning of the Court's ruling in that case, is that the full faith and credit clause of the Constitution is applicable to the public acts of one State in the Courts of another State only when such Court has entertained a suit between parties involving a subject matter in respect of which the rights of the parties have been fixed and settled by and under the laws of the other State, and notwithstanding this, the Court of the forum proceeds to adjudicate between the parties as to such subject matters in disregard of and without reference to the controlling foreign law.

The distinction between such a case and one where the court of one state *refuses to entertain a suit* based wholly upon the laws of another state "leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere" (in the language of the Court, *supra*), is too obvious to require comment.

In addition, however, it is notable that the Court in the cited case takes into consideration the question of whether or not the enforcement of the rights of the parties as fixed by the Vermont Statute "would be obnoxious to the public policy of New Hampshire," and after considerable discussion of this question, the Court comes to the conclusion that:

> "There is no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire. No decision of the state court has been cited indicating that recognition of the Vermont statute would be regarded in New Hampshire as prejudicial to the interests of its citizens."
>
> * * * * * * *
>
> "The mere fact that the Vermont legislation

> does not conform to that of New Hampshire does not establish that it would be obnoxious to the latter's public policy to give effect to the Vermont statute in cases involving only the rights of residents of that State incident to the relation of employer and employee created there." (pages 1036-1037).

This would almost seem to indicate that in the Court's opinion a conflict between the laws of two States would have affected the Supreme Court's decision as to the applicability of the full faith and credit clause, even to the *limited extent* to which it was held to be operative in that case, as if to say that the Courts of one State are under no constitutional obligation to have any regard whatsoever for the laws of another State, when the latter are in conflict with its own laws. In this connection, the concurring opinion by Mr. Justice Stone is highly pertinent, viz:—

> "I agree that in the circumstances of the present case, the courts of New Hampshire, in giving effect to the public policy of that state, would be at liberty to apply the Vermont statute and thus, by comity, make it the applicable law of New Hampshire. In the absence of any controlling decision of the New Hampshire courts, I assume, as does the opinion of the Court, that they would do so and that what they would do we should do. Hence, it seems unnecessary to decide whether that result could be compelled, *against the will of New Hampshire,* by the superior force of the full faith and credit clause." (page 1037).

Whether or not such an additional rule is to be deduced from the cited case, however, it is unnecessary for us to consider for present purposes.

Another case in the United States Supreme Court which is of the greatest pertinence and importance

to the question under discussion is the case of

Chamber v. *Baltimore & Ohio Railroad Company,* 52 L. Ed. 143, 209 U. S. 142.

In that case, plaintiff brought suit in the State Court of Ohio against the defendant, to recover for the death of her husband, a citizen of Pennsylvania, as a result of defendant's alleged negligence. The accident occurred in the State of Pennsylvania and the action was based upon the laws of the State of Pennsylvania. The defendant contended that the action could not be maintained in the Courts of Ohio, because on the one hand the common law of Ohio did not give such a cause of action, and on the other hand a Statute of the State of Ohio permitted suit upon such a cause of action only in respect of the death of a citizen of the State of Ohio. The State Court sustained the defendant's contention. The plaintiff appealed to the United States Supreme Court on the ground that the decision of the State Court violated the clause of the Constitution of the United States which secured to the citizens of each State equal privileges and immunities. While it is manifest that no question was raised in that case as to whether or not the law of Ohio and the decision of its State Court thereunder was unconstitutional as failing to give full faith and credit to the Pennsylvania Statute in question, the following pronouncement of the Supreme Court in the course of its opinion has the greatest relevance and value:

> "In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states *to the*

> *precise extent that it is allowed to its own citizens.* Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution (citing cases).
>
> But, subject to the restrictions of the Federal Constitution, *the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions."* (page 146).

Here is the plainest and fullest recognition of the right of a State to refuse the aid of its Courts to enforce a cause of action created by the laws of another State where such law is contrary to the policy adopted by the State in which the suit is brought (and expressed, as in the case at bar, by an explicit act of the Legislature). And of decisive significance is the pronouncement by the Supreme Court that the only qualification upon that right which each State has, is the constitutional obligation to accord "equality of treatment" to all citizens, whether of its own or other States. The Supreme Court, finding that the Ohio law did not discriminate in favor of its citizens in respect of the law in question, affirmed the decision of the State Court. In this connection, the Court said:

> "The courts were open in such cases to plaintiffs who were citizens of other states if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another state. So far as the parties to the litigation are concerned, the state, by its laws, made no discrimination based on citizenship, and offered precisely the same privileges to citizens of other states which it allowed to its own." (page 147).

In concluding its opinion, the Court uses language which cannot fail to exercise a decisive influence upon a judgment of the question under discussion in the case at bar.

> "It appears clearly, therefore, that the cause of action which the plaintiff sought to enforce was one created for her benefit and vested originally in her. She has not been denied access to the Ohio courts because she is not a citizen of that state, *but because the cause of action which she presents is not cognizable in those courts.* She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. In excluding her cause of action from the courts the law of Ohio has not been influenced by her citizenship, which is regarded as immaterial. *We are unable to see that in this case the plaintiff has been refused any right which the Constitution of the United States confers upon her, and accordingly the judgment is affirmed.*" (page 147).

The Case of *Converse* v. *Hamilton,* 56 L. Ed. 749, 224 U. S. 243, is distinguishable from the case at bar.

The above mentioned case was an action at law brought in the State Court of Wisconsin by a receiver of an insolvent Minnesota corporation to enforce an asserted double liability of two of its stockholders, resident in Wisconsin. In the receiverhip suit, the Minnesota Court had adjudicated the insolvency of the company, the amount of its liabilities and the necessity of resorting to the double liability of its stockholders, and *had made an order* levying upon its stockholders an assessment of a sum equal to the full par value of their respective shares, and directed the receiver to institute suits to recover said assessments, *within and without the State.* The defendants had been notified of the application for the orders levying assessments, by publication

or mail, as the Court directed. The Wisconsin Court sustained a demurrer to the complaint on the ground that the receiver had no right (that is authority) to sue in a foreign jurisdiction, the Court relying upon the case of *Finney* v. *Guy,* 189 U. S. 335, 47 L. Ed. 839, to sustain its position.

Plaintiff appealed to the United States Supreme Court on the ground that the decision of the Wisconsin Court violated the full faith and credit clause of the Constitution of the United States. At the outset, the Supreme Court considers the pertinent Minnesota Statutes and decisions and finds, among other things, that under the Minnesota law the *order* made by the Minnesota Court levying the assessment was conclusive upon the defendants as stockholders "as to all matters relating to the amount of and the propriety of and necessity for the said assessment," and that the Minnesota law expressly authorized the plaintiff as receiver to institute suits against stockholders to collect such assessment in any *State or Country,* and that under the Minnesota law, as interpreted by its Courts, and the Court's order levying the assessment, the receiver was:

> "invested with the creditors' rights of action against the stockholders, and with full authority to enforce the same in any court of competent jurisdiction in the state or elsewhere." (page 754).

The Supreme Court then proceeds to hold that the Wisconsin Court

> "failed to give full faith and credit to those laws and *to the proceedings* thereunder, upon which the receiver's *right to sue* was grounded." (page 754).

Immediately thereafter, the Court sets forth clearly and fully the grounds of this decision, and it is from an examination of these grounds that the true

meaning and scope of the decision is to be ascertained. The Court's language in this connection is as follows:

> "It is true that an ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions. (citing cases). But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere. So, when he invoked the aid of the Wisconsin court, the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce, for the benefit of his cestuis que trustent, a right of action, transitory in character, against one who was liable contractually and severally, if at all. *The receiver's right to maintain the actions in that court was denied in the belief that it turned upon a question of comity only,* unaffected by the full faith and credit clause of the Constitution of the United States, *and this view of it was regarded as sustained by the decision of this court in Finney* v. *Guy,* 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558. But that case is obviously distinguishable from those now before us." (page 754).

From this language it is clear that the Supreme Court considered that it was dealing with the question of whether or not the plaintiff, receiver, was *"clothed with adequate title"* to enforce the stockholders liability. That this was the precise question which the Supreme Court had in mind, is conclusively attested by the fact that it refers to

the decision of the Wisconsin Court as having been rested *by that Court* upon the decision of the United States Supreme Court in *Finney* v. *Guy,* 189 U. S. 335, 47 L. Ed. 839, where the Supreme Court had affirmed the State Court in holding that a receiver of an insolvent Minnesota corporation, under the then-existing Minnesota law, *was not clothed with any right to sue* to enforce a liability of stockholders. In disposing of that case (*Finney* v. *Guy, supra*) as an alleged authority in the case before it, the Supreme Court says:

> "We perceive nothing in the decision in that case which makes for the conclusion *that when the representative character, title and duties of a receiver have been established by proceedings in a Minnesota court conformably to the altogether different provisions of the later statute,* embodied in chapter 272, *his* right to enforce in the courts of another state the assessments, *judicially levied,* in Minnesota depends upon comity, unaffected by the full faith and credit clause." (page 755).

This language places beyond doubt that the Supreme Court was addressing itself solely to the question of whether or not the plaintiff as receiver was *invested with a right* to enforce the stockholders liability in the courts of other States, that is to say, whether the receiver was vested with title to the cause of action against the stockholder so that he would have a standing in the courts of other states to sue thereon (At common law only the owner of a legal right or chose in action can sue thereon, 47 *Corpus Juris* 22.) This question is to be sharply distinguished from the altogether different question of whether or not, granted that a foreign receiver is by the laws of the foreign state invested with a right to sue in other states, such other states are bound to afford him a tribunal in which he can exercise his admitted right to sue,

a question which manifestly was not involved in the case under discussion.

Indeed, in its decision of the cited case the Court was merely following its previous holding in the case of *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, where the Court dealt with the objection *that the receiver could not bring the action.* What the Court decided in that case is plainly indicated by the following language quoted from that decision by the Supreme Court in the case under discussion:

> "It is objected that *the receiver cannot bring this action,* and Booth *v.* Clark, 17 How. 322, 15 L. ed. 164; Hale *v.* Allison, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; and Great Western Min. & Mfg. Co. *v.* Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770, are cited and relied upon. But in each and all of these cases it was held that a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. In this case the statute *confers the right upon the* receiver, as a quasi assignee and representative of the creditors, and as such vested with the authority to maintain an action. *In such case we think the receiver may sue in a foreign jurisdiction."* (page 755).

In short, the precise point decided by the Court in the case under discussion, was that the Wisconsin Court could not refuse to entertain the suit by the Minnesota receiver, *on the ground that he was not "vested with the authority to maintain an action,"* in view of the fact that the Minnesota law *expressly vested him with such authority,* and that, *therefore,* the full faith and credit clause required the Wisconsin Court to recognize the Minnesota receiver *as being vested with authority to sue.* This, of course, has nothing whatsoever to do with the question of whether or not one State is bound to

permit *a cause of action* created by the laws of another State to be sued upon in its own Courts, a question which manifestly goes *to the enforceability of the foreign cause of action* and *not* to the legal authority or capacity of any particular plaintiff *to institute suit thereon.* In the case at bar the question is whether or not a State may enact a law which prohibits its own Courts from entertaining suit *upon a particular cause of action created by the laws of another State,* regardless of *who* brings the suit and regardless of the legal capacity or authority of the suitor to sue upon the prohibited cause of action. Section 94B of our Corporation Act is plainly directed not against any particular suitor but against a particular cause of action.

But wholly aside from the foregoing considerations, the case under discussion is demonstrably inapposite to the case at bar for three additional reasons: First, that case did not involve any conflict between the laws of Minnesota (on which the cause of action was based) and the laws of Wisconsin (where it was sought to be enforced); another, that in that case *it was conceded that the Wisconsin Court "was possessed of jurisdiction" to entertain the suit;* and the third, that the Supreme Court regarded and treated the plaintiff's cause of action as based not only upon the laws of Minnesota *but upon the "judicial proceedings"* in that State, and held that a denial of the plaintiff's right to sue in that case was a denial of full faith and credit to the *judicial proceedings* of Minnesota.

With respect to the first of these distinguishing features, it is to be noted that the Supreme Court itself gave it special and explicit emphasis when, in referring to the "well recognized exceptions" to the full faith and credit clause of the Constitution, the court says:

> "But the laws and proceedings relied upon here come within the general rule, which that clause establishes, and not within any exception, * * * what the law of *Wisconsin* may be respecting the relative rights and obligations of creditors and stockholders of *corporations of its creation,* and the mode and means of enforcing them, is apart from the question under consideration."

This reference to the Wisconsin law is an allusion to the contention made by defendant that the Minnesota law in question was opposed to the public policy of Wisconsin as evinced by the latter's laws relating to the liability of stockholders in Wisconsin corporations. Hence, the court, in pointing out here that the law of Wisconsin, relative to the obligations of stockholders of *Wisconsin corporations,* and their enforcement, is *irrelevant* to the question of enforcing the obligations of stockholders of a foreign corporation under a foreign law, is plainly dealing with the question of an alleged *conflict of laws,* and is expressing its view that *there was no conflict* between the Minnesota law and any relevant Wisconsin law. When regard is had to the fact that this remark occurs in the very course of the court's discussion of the *exceptions to the full faith and credit clause,* it can only be understood as the plainest recognition of the rule laid down in *Texas & Pacific Railroad Co.* v. *Cox, supra,* that a person can not demand redress (that is, insist upon the right to sue) in one state in respect of a cause of action created by the laws of another state where such law is in conflict with or contrary to the laws of the forum. In the case at bar, on the other hand, plaintiff's cause of action, based upon the New York Banking Law, is in direct and square conflict with the law of our state, whose plain and express terms forbid the maintenance of plaintiff's suit in our courts of law.

With reference to the second of the above mentioned distinguishing features of the case under discussion, viz: that there was no question but that the Wisconsin court "was possessed of jurisdiction" to entertain the suit, it is to be noted that this, too, was emphatically mentioned by the Supreme Court in the course of its discussion of the exceptions to the full faith and credit clause, thereby plainly implying that if any *want of jurisdiction* in the Wisconsin court had existed in that case, that fact would have taken the case out of the operation of the full faith and credit clause. In this connection, the court says:

> *"It is not questioned* that the Wisconsin court in which the receiver sought to enforce the causes of action with which he had become invested under the laws and proceedings relied upon *was possessed of jurisdiction which was fully adequate to the occasion.* His right to resort to that court was not denied *by reason of any jurisdictional impediment,* but because the Supreme Court of the State *was of the opinion* that, as to such causes of action, the courts of that state 'could, *if they chose,* close their doors and refuse to entertain the same'." (page 756).

In other words, says the Supreme Court, the case is not one where the Wisconsin court had no jurisdiction to entertain the suit but merely one where the court thought it had *discretion to refuse to entertain the suit.* In the case at bar, our New Jersey Corporation Act (Section 94b) flatly denies jurisdiction to our courts of law to entertain this suit.

The third of the above mentioned distinguishing features is the fact that the Supreme Court regarded the plaintiff's cause of action as based not only upon the laws of Minnesota but *"upon the judicial proceedings"* of that state, and held that a denial of plaintiff's right to sue was a denial of full faith

and credit to the *judicial proceedings* of Minnesota. This feature, alone, renders that case utterly inapplicable to the case at bar. For the full faith which is required by the Constitution to be accorded to a *foreign judgment* is fundamentally and totally different from that which applies to a *foreign statute*. Thus, the rule laid down in the case of *Texas & Pacific Railroad* v. *Cox, supra,* (and which controls the case at bar) in terms applies only to suits upon causes of action arising under the laws of another state, and not to foreign judgments. Thus, too, a suit upon a *foreign judgment* must be entertained in the courts of another state even though a suit could not have been instituted therein on the cause of action upon which the foreign judgment was recovered.

Thomas T. Fauntleroy vs. *J. J. Lum*
210 U. S. 230, 52 Law Ed. 1039

A long line of cases in the United States Supreme Court hold that no State can constitutionally refuse to enforce (that is, entertain suits based upon) the *judgments* of the courts of other states; but no case can be found in the Supreme Court, which has ever held that a state cannot constitutionally refuse to entertain a suit based upon the *statute* of another state. That the Supreme Court, in the case under discussion, regarded that case as one involving a suit based not merely on a foreign statute but on foreign *"judicial proceedings"* is unequivocally asserted by the court itself in the following concluding paragraph of its decision:

> "In these circumstances, we think the conclusion is unavoidable that the laws of Minnesota *and the judicial proceedings in that* state, upon which the receiver's title, authority, and right to relief were grounded, *and by which the stockholders were bound,* were not accorded that faith and credit to which they were en-

> titled under the Constitution and laws of the United States." (at page 756).

If there were any doubt that the Supreme Court regarded that case as one in which the State court had failed to give the constitutional full faith and credit to the *"judicial proceedings"* of another state, such doubt would be finally and completely resolved by the language of the Supreme Court in the later case of *Marin* v. *Augedahl,* 62 Law Ed. 1038, 247 U. S. 142, wherein the case of Converse *v.* Hamilton, supra, is cited and followed. That case (Marin *v.* Augedahl, supra) was, in most respects, similar to the Converse case, supra, although the question of law raised was not precisely the same. In that case, the suit was brought in a North Dakota court by the receiver of an insolvent Minnesota corporation to enforce against a stockholder in North Dakota *an order of a Minnesota court* levying an assessment on the stockholders, generally. The only defense set up was that the Minnesota court had no jurisdiction to make the said order because, defendant claimed, the corporation in question was not embraced within that class of corporations upon whose stockholders such liability was imposed by the Minnesota law. The United States Supreme Court held that the defendant was foreclosed and concluded from raising this question by the said order of the Minnesota court itself. In discussing that court order, the United States Supreme Court says:

> "The order with which we here are concerned was made by a Minnesota court in a sequestration suit against a Minnesota corporation. Besides being a court of general jurisdiction, both at law and in equity, the court making the order had full jurisdiction of that suit. The suit was begun by a judgment creditor after an execution on his judgment was returned unsatisfied. The defendant corpora-

tion had its principal place of business in the county where the suit was begun, and was brought into the suit by due service of process. This much is not questioned. Nor is it questioned that a receiver was appointed, or that, by a petition in the suit, he sought an assessment on the stockholders, *or that public notice of the hearing on the petition was given as the court directed,* or that there was a *hearing* as contemplated." (at page 1041) * * *

"The order making the assessment is 'necessarily based upon a determination that the corporation is of the class whose stock is assessable, and not of the excepted class.' Whether the *decision* was right or wrong is not open to discussion here. If wrong it was subject to correction on proper application to the court which made it, or on appeal, but it was not void or open to collateral attack. (at page 1042) * * *

No doubt the order might be attacked collaterally by showing an absence of jurisdiction of person or subject-matter. The cases of Thompson *v.* Whitman, 18 Wall. 457, 21 L. ed. 897, and National Exch. Bank *v.* Wiley, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70, hold nothing more. Neither gives any warrant for saying that the order may be attacked collaterally by showing that error was committed in deciding the merits. One dealt with a judgment by a court having no jurisdiction whatever over the subject matter, and the other dealt with a personal judgment rendered without service of process or personal appearance, but confessed under a warrant of attorney which did not cover it,—in other words, a judgment rendered without jurisdiction of the person through a representative or otherwise. Both are inapposite here. By the law of its organization *the Minnesota court* was empowered to take cognizance of, hear and determine, the suit to sequestrate and the receiver's petition for an assessment. Thus it had jurisdiction of the subject matter. Cooper *v.* Reynolds,

> 10 Wall. 308, 316, 19 L. ed. 931, 932. The corporation was before it in virtue of process duly served, and the stockholders, as has been said, *were represented by the corporation.* Thus there was jurisdiction of the person.
>
> Under these circumstances, *the order* is entitled, under the Constitution and laws of the United States, to the same faith and credit in the courts of North Dakota as by law or usage are given to such an order in the courts of Minnesota. Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 Law. ed. 619, 20 Sup. Ct. Rep. 506; Converse *v.* Hamilton, 224 U. S. 243, 56 L. Ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cass. 1913D 1292." (at page 1043).

This is a conclusive demonstration that in this case (Marin *v.* Augedahl), the United States Supreme Court considered and dealt with the *order* of the Minnesota court, levying an assessment upon stockholders, *as a judgment,* within the meaning of the full faith and credit clause; thereby establishing that the similar *court order* involved in the case of Converse *v.* Hamilton, supra, was similarly treated and regarded by the Supreme Court in that case.

The case of Marin *v.* Augedahl, supra, is relied upon by plaintiff's counsel in the case at bar as authority for the proposition that Section 94b of the Corporation Act is unconstitutional as denying full faith and credit to the New York Banking Law. In view of the fact hereinabove demonstrated that that case involved the application of the full faith and credit clause, not to the statute of another state but to the *judicial proceedings* of another state, it is scarcely necessary to add anything further to dispose of plaintiff's contention. Yet additional grounds of distinction are obvious. The case did not involve any opposition between the laws of the two states, as does the case at bar; nor was it a case, like the present one, in which the court of

the forum lacks jurisdiction to entertain the suit by virtue of a statute which deprives it of such jurisdiction.

We therefore respectfully submit that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

BILDER, BILDER & KAUFMAN,

Attorneys for Defendants-Appellees, Mary Rosner, et als.

WALTER J. BILDER,
Of Counsel.

New Jersey Court of Errors and Appeals

JOSEPH A. BRODERICK, Superintendent of Banks of the State of New York,
Plaintiff-Appellant,

vs.

BENJAMIN ABRAMS, *et al.*,
Defendants-Appellees.

REPLY BRIEF OF APPELLANT.

The business of a bank is nation-wide. Its depositors are drawn from all parts of the country, including residents of many other states, and in the case of this particular bank embrace a large number of citizens of New Jersey. Similarly, the stock of the larger banks of one state is held by investors throughout the country. The interest and property rights which the assessment protects is, therefore, not local to the state of domicile of the bank, but extends throughout the entire nation. The entire Federal Reserve Bank System rests upon the familiar principle that banks as distinguished from ordinary businesses are affected with a nation-wide public interest, to which Congress has recently extended additional safeguards through legislation guaranteeing the payment of all deposits up to the amount of five thousand ($5,000) dollars. For many years the Constitution and laws of the State of New York and the statutes of many other states have also provided a safety fund for the repayment to depositors in the event of insolvency through the creation of an assessment liability against bank stock-

holders to the extent of the par value of their stock. The theory of the assessment liability is sound. In the case of ownership of bank stock, as in the case of ownership of any other form of property, the burdens must accompany the benefits. The right of management and control of a bank resides in its stockholders, and legally the responsibility for mismanagement and insolvency rests upon them. In view of the relative relationship to the corporation of its stockholders and creditors, it is just that the assessment should be levied for the benefit of creditors, the stockholder being a co-adventurer of the enterprise and the creditor being a complete stranger and entirely divorced from the management and control of the corporation.

The assessment liability is not thrust or imposed upon stockholders against their will, but arises from their voluntary purchase of the stock and the assumption of the accompanying statutory obligation attaching to the ownership of this form of property (*Bernheimer* v. *Converse,* 206 U. S. 516; *Converse* v. *Hamilton,* 224 U. S. 243; *Pulsifer* v. *Greene,* 96 Me. 439; *Hanson* v. *Harris,* 28 Pac. (2d) 649 (Ore. 1933)). There can be no such thing as effective enforcement of the assessment if the right is denied by foreign states to resort to their courts for that purpose. This was pointed out in *Lewisohn* v. *Stoddard,* 78 Conn. 575, at page 598, in the following language:

> "The United States are founded upon principles of freedom of commercial intercourse between citizens of the several states. Corporations of one state are commonly admitted by comity to do business in others * * *. When, as is true of most corporations with a considerable capital, some of the shareholders are citizens of the state granting the incorporation, and the rest are citizens of other states, no action to compel the discharge

of stockholders' liabilities for the benefit of creditors can be brought in any forum before which all parties in interest can be compelled to appear. Unless then such an action can be maintained in a state, of which all shareholders are not citizens, and in which they cannot all be personally served with process, *a fatal defect would exist in the American system of remedial procedure.* The courts of the United States would be as powerless as those of a state; for their jurisdiction *in personam* is also under the arrangement of Federal Districts measured by State lines." (Italics ours.)

The Doctrine of Comity.

Referring to the general doctrines of comity, Mr. Justice Cardozo said in *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, at pages 110, 111:

> "If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance: its presence shows beyond question that the foreign statute does not offend the local policy. *But its absence does not prove the contrary.* * * * The misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles. * * * The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. *They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal.*" (Italics ours.)

Since the underlying theory of the assessment liability is sound in purpose and just in result and obtains generally in most jurisdictions throughout the country, it should be recognized and enforced wherever stockholders reside. We have already in our main brief referred to numerous decisions representing the overwhelming weight of authority sustaining the right to enforce assessments in jurisdictions other than the state of incorporation (pp. 49-51). In addition to those already cited, we refer to *Duke* v. *Olson,* 240 Ill. App. 198, recognizing the conclusive effect of the determination by the Banking Commissioner of Washington of the necessity of an assessment and sustaining his right to enforce such assessment against Illinois stockholders of the insolvent bank, and *Hansen* v. *Harris,* 28 Pac. (2d) 649, (Ore. 1933), permitting suit in Oregon against its citizens owning stock of an insolvent Washington bank and also recognizing the conclusive effect of the determination of the necessity of the assessment by the Washington Supervisor of Banking.

In *Bernheimer* v. *Converse,* 206 U. S. 516, the court said, at page 533:

> "By becoming a member of a Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulations as the state might lawfully make to render the liability effectual."

In *Pulsifer* v. *Greene,* 96 Me. 438, the court pointed out the compelling considerations of policy and fairness which require courts of all states to permit enforcement of the assessment liability, saying:

> "The double liability of the stockholders of the corporation was created for the benefit of its creditors. While it is not an asset of the corporation, adds nothing to its pecuniary

resources, and is not available to or enforceable by the corporation itself, it does add to its commercial credit. It is enforceable by its creditors, and persons who contract with and give credit to the corporation may well be presumed to do so upon the faith of the liability of its stockholders. It is elementary that every person who voluntarily becomes a stockholder in a corporation thereby agrees to the terms of its charter. The law which created the defendant's liability was a part of the same system of laws which permitted him and his fellow stockholders to be a corporation. It is to be read into its charter. The two go together. He cannot with one hand grasp the benefit, and with the other reject the burden. When he voluntarily became a stockholder in the Clyde Banking Company, incorporated under the laws of the state of Kansas, he must be held to have contracted with reference to, and have agreed to be bound by, the laws of that state, which entered into and formed a part of the constitution of the company. The obligation which he thereby assumed, though statutory in its origin, was contractual in its nature, and as such not local, but transitory. It goes with him wherever he goes, and is enforceable in any court of competent jurisdiction. This result, which we believe to be consonant with reason and natural justice, is sustained by the weight of authority. Childs *v.* Cleaves, 95 Me. 498, 50 Atl. 714; Whitman *v.* Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; Bank *v.* Baker, 176 Mass. 294, 57 N. E. 603; Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Flash *v.* Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966; Paine *v.* Stewart, 33 Conn. 516; Bank *v.* Lawrence, 117 Mich. 669, 76 N. W. 105; Bell *v.* Farwell, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194; Ferguson *v.* Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Howell *v.* Manglesdorf, 33 Kan. 199, 5 Pac. 759; Mor. Priv. Corp. Secs. 869, 871, 874."

Refusal by the Courts of our State to permit enforcement of the assessment liability would undoubtedly encourage New York stockholders, after the insolvency and closing of the bank, and when liability had already attached, to escape payment by establishing a residence in this State and other states adapting a similar doctrine. This possibility is rendered real and serious because of the proximity of the two States. Such policies inevitably lead to retaliatory legislation with all of its attendant evils.

We have thus indicated the bases of the assessment liability and the considerations which require its enforcement in states other than the state of incorporation.

The Constitution of the United States.

Aside from the law of comity, this State is required, under the Constitution of the United States, to permit enforcement of the assessment liability created under the laws of New York. The assessment obligation, voluntarily assumed by New Jersey residents upon acquiring their stock in the New York bank, may not be nullified by denying the right of enforcement, without at the same time refusing full faith and credit to the public acts of New York and depriving the plaintiff and through him the depositors of The Bank of United States of property without due process of law. The United States Supreme Court has repeatedly held that all states must give full faith and credit to statutes of the state of incorporation imposing assessments upon bank stockholders. This principle rests largely upon the paramount importance of preserving rights acquired by creditors of corporations and enforcing liabilities assumed by stockholders under the laws of the state of incorporation, and the unmeasurable confusion and

havoc which would follow if peculiar and local statutes and policies were permitted to supersede or nullify the laws of the state creating the corporation.

In *Royal Arcanum* v. *Green,* 237 U. S. 531, the Supreme Council of Royal Arcanum, a fraternal beneficiary corporation organized under the laws of Massachusetts to establish a fund for the benefit of its members, was authorized under its charter to amend its laws and constitution. Pursuant to its constitution, a lodge was organized in New York State, and one, Green, a resident of New York, became a member of this lodge. At that time his assessment was fixed at $1.80 per month. Thereafter, the Supreme Council increased the assessment of all members in the same class as Green to $6.87 per month. Green paid the increased assessment under protest. An action was begun in Massachusetts by certain other members to vacate and set aside the increase of assessments on the ground that it was invalid and violative of contractual rights. The Massachusetts court held that, under the charter of incorporation and the laws of Massachusetts applicable thereto, the increase was valid (*Reynolds* v. *Supreme Council,* 192 Mass. 150). Several years later, Green ceased to make payments as required by the amended by-laws, and instituted an action in New York to vacate the increased assessment as illegal and void. The defense of the society was that New York must give full faith and credit to the Massachusetts laws under which the fraternity was incorporated, and the increased assessment proper. The New York Court of Appeals, however, followed its own precedents with regard to fraternal societies organized under the laws of the state of New York, and held "that a membership contract in a mutual benefit association, in which the member

agrees to comply with the laws of the order 'now in force or that may hereafter be adopted,' does not authorize a subsequent amendment of the by-laws without the member's consent if the effect of such amendment is to increase the rate of assessment or to reduce the amount of the benefit as fixed by the contract'' (206 N. Y. 591). In reversing the judgment of the New York Court of Appeals, the United States Supreme Court held:

> ''It is not disputable * * * that all the rights of the complainant concerning the assessment to be paid * * * had their source in the constitution and by-laws, and *therefore their validity could be alone ascertained by a consideration of the constitution and by-laws.* This being true, it necessarily follows that resort to the constitution and by-laws was essential unless it can be said that the rights in controversy were to be fixed by disregarding the source from which they arose, and by putting out of view the only considerations by which their scope could be ascertained. *Moreover, as the charter was a Massachusetts charter, and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that state, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws.* Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding, on the one hand, that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying, on the other hand, that the duty of members was to be tested isolatedly and individually by re-

sorting not to one source of authority applicable to all, but by applying many divergent, variable, and conflicting criteria. In fact, their destructive effect has long since been recognized. Gaines *v.* Supreme Council, R. A. 140 Fed. 978; Supreme Council, R. A. *v.* Brashears, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866. *And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, since an assessment which was one thing in one state and another in another, and a fund which was distributed by one rule in one state and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed.* * * *

"In addition it was by the application of the same principle that a line of decisions in this court came to establish: first, *that the law of the state by which a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make;* second, *that the state law and proceedings are binding as to the ascertaining of the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected;* and third, that putting out of view the right of the person against whom a liability for a stockholder's subscription is asserted to show that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which at law or equity he is entitled to set off against the corporation, or has any other defense personal to himself, a decree against the corporation in a suit brought against it under the state law for the purpose of ascertaining its insolvency, compelling its liquidation, collecting sums due by stockholders for subscriptions to stock and paying the debts of the corporation, in so far as it determines these general matters, binds the stockholder, although

he be not a party in a personal sense, because by virtue of his subscription to stock there was conferred on the corporation the authority to stand in judgment for the subscriber as to such general questions. Selig *v.* Hamilton, 234 U. S. 652, 58 L. ed. 1518, 34 Sup. Ct. Rep. 926; Converse *v.* Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415; Bernheimer *v.* Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Whitman *v.* National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; Hawkins *v.* Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739. * * *

"*The controlling effect of the law of Massachusetts being thus established and the error committed by the court below in declining to give effect to that law and in thereby disregarding the demands of the full faith and credit clause being determined,* we come to consider whether the increase of assessment which was complained of was within the powers granted by the Massachusetts charter, or conflicted with the laws of that state. Before doing so, however, we observe that the settled principles which we have applied in determining whether the controversy was governed by the Massachusetts law clearly make manifest how inseparably what constitutes the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that state, and therefore, as we have previously stated, *how necessarily the express assertion of the existence of a right under the Constitution of the United States to full faith and credit as to the judgment was the exact equivalent of the assertion of a claim of right under the Constitution of the United States to the application of the laws of the state of Massachusetts. We say this because, if the laws of Massachusetts were not applicable, the full faith and credit due to the judgment would require only its enforcement to the extent that it constituted the thing adjudged as between the parties to the record in the ordi-*

> *nary sense, and on the other hand, if the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized, the duty to give effect to the judgment in such case being substantially the same as the duty to enforce the judgment.* * *
>
> "Coming, then, *to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that state to determine the powers of the corporation and the rights and duties of its members,* there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the supreme judicial court of Massachusetts in the Reynolds Case. And this conclusion does not require us to consider whether the judgment *per se* as between the parties was not conclusive in view of the fact that the corporation, for the purposes of the controversy as to assessments, was the representative of the members. (See Hartford L. Ins. Co. *v.* Ibs, this day decided (237 U. S. 662, *post,* ....., 35 Sup. Ct. Rep. 692).) Into that subject, therefore, we do not enter" (237 U. S., p. 531.) (Italics ours.)

It is significant that this case is predicated upon the prior decisions of the United States Supreme Court in *Converse* v. *Hamilton*, 224 U. S. 243 (main brief, pp. 43-46), and *Bernheimer* v. *Converse*, 206 U. S. 516 (main brief, pp. 19, 20), requiring enforcement in states other than the state of incorporation of stock assessment liabilities. In the *Royal Arcanum* case, the Court held that New York was required to give full faith and credit to the statutes of Massachusetts, the domicile of the corporation, relying upon its established doctrine that states other than the state of

incorporation must recognize and permit enforcement of the stock assessment liability created under its laws.

In the subsequent case of *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, the beneficiary of a certificate issued by the fraternal society brought an action to recover because of the disappearance of the insured for more than ten years. The society was incorporated in Illinois, the certificate issued in South Dakota, and the action instituted in Nebraska. After the certificate had been issued, the by-laws of the society were amended to prohibit collection under certificates, even after long absence of the member, until the full term of the member's expectancy of life had expired. In Illinois the validity of the amendment was sustained (296 Ill. 104). The Nebraska court held that this amendment was unreasonable, and allowed recovery (111 Neb. 334). In reversing, the United States Supreme Court, in an opinion written by Mr. Justice Holmes, said:

> "The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced, and the consequence that their rights must be determined by a single law, is elaborated in Supreme Council, R. A. *v.* Green, 237 U. S. 531, 542, 59 L. ed. 1089, 1100, L. R. A. 1916A, 771, 35 Sup. Ct. Rep. 724. *The act of becoming a member is something more than a contract,—it is entering into a complex and abiding relation,—and as marriage looks to domicile, membership looks to and must be governed by the law of the state granting the incorporation.* * * * It does not matter that the member joined in another state. In the above cited case Green became a member of a Massachusetts corporation in New York, and the state court held on ordinary principles of contract that his rights were governed by New York law. Green *v.* Supreme Council, R. A., 206 N. Y. 591, 597,

> 100 N. E. 411. But the decision was reversed, and *it was held a failure to give full faith and credit to the Massachusetts charter as construed by the Massachusetts court that Green was relieved by decree from paying assessments increased by the corporation after his contract was made.* We are of opinion that the decision in that case governs this, and that the judgment must be reversed." (Italics ours.)

In *Converse* v. *Hamilton,* 224 U. S. 243 (referred to at pp. 43-46 of our main brief), the Wisconsin court refused to permit enforcement of an assessment levied against its citizens who were stockholders of an insolvent Minnesota corporation. The United States Supreme Court reversed on the ground that the Minnesota statutes must govern, saying:

> "Of course, we must look to the Minnesota Constitution, statutes, and decisions to determine the nature and extent of the liability in question, and the effect given in that state to the laws and judicial proceedings therein looking to its enforcement, * * *"

The court then reviewed the Minnesota statutes, and pointed out that a special and exclusive method of ascertaining the necessity of the assessment and enforcing it was provided "in order to secure a speedy, economical and practical method of enforcing the liability" (p. 254) by a summary proceeding to ascertain the deficiency. The statute there involved provided:

> "Sec. 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, *whether appearing or represented at said hearing, or having notice thereof or not,* as to all matters relating to the amount of and the propriety of and necessity for the said as-

sessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided." (Italics ours.)

The court held:

"The constitutional validity of chapter 272 has been sustained by the supreme court of the state, as also by this court; and this because (1) the statute is but a *reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation;* (2) while the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which, in law or equity, he is entitled to set off against the assessment, or has any other defense personal to himself, and (3) while the order is made conclusive as against a stockholder, even although he may not have been a party to the suit in which it was made, and may not have been notified that an assessment was contemplated, this is not a tenable objection, *for the order is not in the nature of a personal judgment against the stockholder,* and as to him is amply sustained by the *presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect to its debts.* Straw & E. Mfg. Co. *v.* L. D. Kilbourne Boot & Shoe Co., *supra;* London & N. W. American Mortg. v. St. Paul Park Improv. Co., 84 Minn. 144, 86 N. W. 872; Bernheimer *v.* Converse, *supra.*

"This statement of the nature of the liability in question, of the laws of Minnesota bearing upon its enforcement, and of the effect which judicial proceedings under those laws have in that state, discloses, as we think, that

> in the cases now before us the supreme court of Wisconsin *failed to give full faith and credit to those laws and to the proceedings thereunder,* upon which the receiver's right to sue was grounded. * * *" (Italics ours.)

Appellees construe *Converse* vs. *Hamilton* merely as a holding that the Wisconsin court was required to give full faith and credit to the order or decree of the Minnesota court directing the levy of an assessment, as distinguished from the obligation to recognize and enforce contractual obligations created pursuant to the public acts and statutes of that state (brief of Rosner, pp. 61-73). The order or decree of the Minnesota court was entered *ex parte* and without opportunity upon the part of any stockholder affected thereby to appear and contest the necessity of the assessment, and was *pro forma* in its nature and largely administrative in character [see *Matter of Bank of Winslow,* 287 Pac. 444 (Ariz., 1930), and, also, dissenting opinion of Mr. Justice Clarke in *Marin* v. *Augedahl,* 247 U. S. 142, at 154]. Indeed, the transfer of the power to determine the necessity of and levy an assessment by an administrative officer formerly exercised by the courts as a so-called judicial function, is sustained solely upon the theory that the power so conferred is administrative, as distinguished from judicial, in its nature. Thus, in *Hansen* v. *Harris,* 28 Pac. (2d) 649 (Ore., 1930), the court, relying upon a long line of decisions of the United States Supreme Court, said:

> "* * * 'This question has also been decided against appellant's contention by the United States Supreme Court. Bushnell *v.* Leland, 164 U. S. 684, 17 S. Ct., 209 (41 L. Ed. 589); *In re* Chetwood, 165 U. S. 443, 17 S. Ct. 385, 41 L. Ed. 782. In the case last cited, it is said: "It has been so often decided that the authority vested in the Comptroller to ap-

point a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders, *is not open to objection because vesting that officer with judicial power in violation of the Constitution,* that we have recently declined to re-examine that question." * * *'

"* * * It will be recalled that in Hanson *v.* Soderberg, *supra,* the court cited two decisions of the Federal Supreme Court to sustain its holding that the power possessed by the state bank examiner *is not judicial in nature.* As early as 1869 in Kennedy v. Gibson, *et al.,* 75 U. S. (8 Wall.) 498, 19 L. Ed. 476, the Federal Supreme Court sustained the action of the comptroller in appointing a receiver of an insolvent bank, and ever since that time has recognized the validity of the comptroller's authority, as appears not only from the two federal decisions cited by the Washington Court, but also from *Casey* v. *Galli,* 94 U. S. 673, 24 L. Ed. 168, and United States *ex rel.* Citizens' Nat. Bank *v.* Knox, 102 U. S. 422, 26 L. Ed. 216. * * *'" (Italics ours.)

These considerations and authorities dispose of the attempted distinction by appellees of *Converse* v. *Hamilton, supra.* Reasonably considered, the holding in this case cannot be restricted to the narrow principle contended for by the appellees. On the contrary, it broadly sustains the doctrine that all states must give full faith and credit to the constitution of the State of New York and the statutes based thereon, and the proceedings taken pursuant thereto, which create the assessment liability of stockholders of New York banks and define the method and procedure for its enforcement.

In *Hancock Nat'l Bank* v. *Farnum,* 176 U. S. 640, a creditor who had obtained a judgment against a Kansas bank, sued a stockholder thereof residing in Rhode Island. Under the Kansas statutes, such a judgment, if unsatisfied, gave the

creditor a cause of action to enforce payment of the judgment against any stockholder. Rhode Island refused to permit enforcement of this right as did the Courts of New York in *Marshall* v. *Sherman*. The Supreme Court held that, in refusing to permit its enforcement in Rhode Island, the court had violated the full faith and credit provisions of the United States Constitution, saying:

> "Now, as the judgment rendered in the Kansas court *is in that state* not only conclusive against the corporation, but also binding upon the stockholder, it must, in order to have the same force and effect in other states of the Union, be adjudged in their courts to be binding upon him, and the only defenses which he can make against it are those which he could make in the courts of Kansas. The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but *what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered.* Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured." (Italics ours.)

Rhode Island was not compelled to give full faith and credit to a judgment entered in Kansas against the Rhode Island stockholder of the Kansas bank. The Kansas *statutes* provided that an unsatisfied judgment against the corporation gives rise to a cause of action against any stockholder of the corporation to compel payment of the judgment. This decision required that Rhode Island give full faith and credit to the Kansas statutes by according to the judgment recovered against the corporation the same force and effect as that

provided for under the Kansas statutes. Here again, the full faith and credit clause was applied, not to compel one state to recognize a judgment entered in a sister state, but to recognize and give effect to the statutes and laws of a sister state.

After analyzing the cases above referred to and others, Professor Dodd, in an article reported in 39 Harv. Law Rev. 533, concludes as follows:

> "The result of all the cases, while not very clearly expressed in the opinions, seems to be substantially this: A state court may not refuse on grounds of policy to deny enforcement of a right which has vested elsewhere where the connection between the forum and the transaction in question is so slight that the matter ought to be regarded as a purely domestic question for the state granting the right; * * * *All that we know definitely so far is that the question of a shareholder's liability to pay an assessment levied in accordance with the law of the corporation's domicile is one as to which the Constitution forbids other states to have a local policy,* * * *" [E. M. Dodd, Jr., The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws. (This article was cited by Mr. Justice Brandeis in *Home Ins. Co.* v. *Dick,* 281 U. S. 397.)] (Italics ours.)

See also *Chicago & A. R. R.* v. *Wiggins,* 119 U. S. 615; *Smithsonian Institute* v. *St. John,* 214 U. S. 19; *Hartford* v. *Barber,* 245 U. S. 146; and main brief, pages 43-49, inclusive.

In any event, appellees' contention is without significance since, here, we have not only an official determination by the Superintendent of Banks of the State of New York of the necessity of the assessment, but also two judgments by the Supreme Court of New York County in which it is adjudged and decreed:

> "That the assessment in the sum of $25 for each share of the outstanding stock of the

> defendant, The Bank of United States, was levied by plaintiff against the stockholders of The Bank of United States in accordance with the provisions of the Banking Law of the State of New York, and was in all respects valid and proper and was required and necessary in order to pay and discharge the debts, contracts and obligations due and owing the creditors of The Bank of United States." (See *Broderick* v. *Adamson,* 148 Misc. 353; opinion in *Broderick* v. *Aaron,* N. Y. Law Jour., May 18, 1934, a copy of which is herewith submitted to the Court; judgment in *Broderick* v. *Aaron,* a copy of which is also submitted herewith.)

The decision in the *Aaron* action, a copy of which is herewith submitted, specifically states:

> "That the defendant, The Bank of United States, was a proper party defendant to this action and entitled to appear and defend such action for the benefit and protection of its stockholders."

Thus, all of the conditions which were present in *Converse* v. *Hamilton* and *Hancock Bank* v. *Farnum* (*supra*) are present here. In addition to the official determination by the Superintendent of the necessity of the assessment, the judicial tribunal of the State of New York having supervision of the liquidation of The Bank of United States (see *Isaac* v. *Marcus,* 258 N. Y. 257) has, in an action in which the Bank was a defendant, rendered judgment upholding this administrative determination and finding that the assessment was necessary and validly levied. In the face of this situation, the contention of appellees that the issue involved in the case of *Converse* v. *Hamilton, supra,* is distinguishable from the present controversy because of the absence of judicial action by the courts of the domicile, falls.

Turning to the New York law, which is set forth in detail in the main brief (pp. 19-33, inclusive), we find that the determination by the Superintendent under the New York statutes is conclusive on the question of the necessity of the assessment (*Broderick* v. *Adamson,* 148 Misc. 353), just as the *ex parte* order of the Minnesota court was conclusive upon the same question in *Converse* v. *Hamilton,* 224 U. S. 243. It follows that full faith and credit can be afforded to the New York laws, and the proceedings taken thereunder, by the New Jersey Court only by permitting the Superintendent to sue upon the basis of a binding and conclusive determination of the necessity of the assessment, and leaving personal defenses of individual stockholders as the only issuable matters (*Converse* v. *Hamilton,* 224 U. S. 243). Such an action may be maintained only upon the law side of the New Jersey Court (*McDermott* v. *Woodhouse,* 87 N. J. Eq. 615; *Chicago Title & Trust Co.* v. *Young,* 90 N. J. Eq. 27; *Graham* v. *Fleissner,* 107 N. J. L. 278; main brief, pp. 34-36).

It necessarily follows, from what has been already said, that denial by the State of New Jersey of the right to enforce the assessment would operate to deprive the creditors of the Bank of their property without due process of law. The assessment liability, although derived from statute, is voluntarily assumed by stockholders through the purchase of bank stock and is essentially contractual (*Bernheimer* v. *Converse,* 206 U. S. 516; *Whitman* v. *Bank,* 176 U. S. 559). This obligation, arising out of the free and voluntary contract entered into by stockholders resident in New Jersey, is in its nature an ordinary commercial obligation, and may not be destroyed through a denial of the right to pursue ordinary legal remedies in the Courts of this State (*Ins. Co.* v. *Dodge,* 246 U. S. 357; *Ins. Co.* v. *Head,* 234 U. S.

149; *Ins. Co.* v. *Dunken,* 266 U. S. 389; *Ins. Co.* v. *Dick,* 281 U. S. 397).

Re Van Tuyl v. Carpenter.

Several of the defendants rely upon *Van Tuyl* v. *Carpenter,* 188 S. W. 234 (Tenn. 1916). This case was begun under the New York Banking Law of 1909. Insofar as this decision prohibits enforcement of the assessment liability in states other than the state of incorporation, it is unsound under the decisions of the United States Supreme Court in *Bernheimer* v. *Converse,* 206 U. S. 516; *Converse* v. *Hamilton,* 224 U. S. 243; *Royal Arcanum* v. *Green,* 237 U. S. 531 and *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544. The courts declined to follow it in *Allen* v. *Prudential Trust Co.,* 242 Mass. 78; *Hanson* v. *Soderberg,* 105 Wash. 255 and *Hanson* v. *Harris,* 28 Pac. (2nd) 649 (Oregon, 1933). We have been unable to find any decision which follows *Van Tuyl* v. *Carpenter.*

Re the 14th Amendment.

In one or two of the briefs filed by the defendants it is contended that the plaintiff did not urge the due process clause at the argument before Mr. Justice Parker. Our notes of this argument show that the point was not in the printed brief, but was argued orally before Justice Parker, and the case of *Shriver* vs. *Woodbine Bank,* 285 U. S. 467, was cited in the argument before him.

Furthermore, it was Justice Parker's construction of Section 94b of the Corporation Act and the judgment entered thereon, which for the first time made it necessary for us to plead the Fourteenth Amendment as making Section 94b null and void.

In the first paper we were required to file we urged that the statute violated the Fourteenth Amendment (see Grounds of Appeal, Nos. 6 and 7, Case p. 44).

Plaintiff's rights in this respect are fully protected.

Section 94b.

Appellees rely almost exclusively upon the provisions of section 94b, which, they contended, governs and requires resort to equity. (Brief of Eichmann, *in toto;* brief of Geismar, *in toto;* brief of Bobdon Company, pp. 7-21; brief of Staples, pp. 3-10; brief of Rosner, pp. 3-17.)

We have already discussed, in our main brief, the underlying situation and historical reason for the enactment of section 94b (pp. 11-18). Considered in connection with its background and purpose, the use of the phrase "by *or on behalf of* any creditor" is of controlling significance and establishes that 94b was enacted for the sole purpose of prohibiting an action by a single creditor or his representative, whether it be his assignee, executor or administrator, to recover for his exclusive benefit and without regard to the existing deficiency and equal and pro rata liability of stockholders, the unpaid balance of his personal claim. Appellees have attempted to circumvent this construction by reference to *Section 4972, Comp. Stat., Sec. 9* (brief of Geisman, p. 4) and *Carson* v. *Scully,* 90 N. J. L. 295 (brief of Rosner, p. 6). The statute provides that the singular shall be construed to include the plural, and the case cited so holds. But, under the section referred to, it is provided that such construction shall not follow if "there be something in the *subject* or context repugnant to such construction." Here, we are dealing with a statute covering a special

subject and purpose, directed to the prevention of widespread and unfair litigation by an individual creditor for his personal benefit against individual stockholders. It has no relation to, or bearing upon, centralized enforcement on behalf of all creditors through the medium of a public official or officer acting under statutory or judicial sanction.

Other considerations support this view. Prior to the enactment of section 80 of the Banking Law and its predecessor statute, enforcement of the assessment under the New York law was based upon an order of the Supreme Court entered upon notice to the corporation determining the necessity of the assessment and directing its collection by the receiver (see main brief, p. 26). A similar procedure existed, and continues to exist, in many other jurisdictions (*Converse* v. *Hamilton,* 224 U. S. 243; *Matter of Bank of Winslow,* 287 Pac. 444 (Ariz., 1930)). Under this method of enforcement, as we have already shown, the order entered in the state of incorporation, even though without notice to the stockholder, is binding and conclusive and must be given full faith and credit wherever the stockholder may reside. In *Converse* v. *Hamilton,* 224 U. S. 243, and *Bernheimer* v. *Converse,* 206 U. S. 516, the United States Supreme Court held that no foreign state may compel a receiver in a suit or proceeding instituted by him to establish the deficiency or necessity of the assessment after these facts had once been established in the domiciliary state. Section 94b, however, as construed by appellees, would require the receiver to commence a proceeding in New Jersey to establish anew, through a bill in equity for an equitable accounting, the existence of the deficiency and the necessity of the assessment. So construed, section 94b and the decision of the United States Supreme Court in *Converse* v. *Hamilton,* 224 U. S. 243, con-

struing the full faith and credit clause of the United States Constitution, are irreconcilable, and, since the latter represents the supreme law of the land, section 94b is invalid.

Similarly, section 94b would require the Comptroller of Currency, in enforcing assessments levied against New Jersey stockholders of national banks, to proceed in a court of equity upon a bill for an accounting and establish the deficiency and necessity of the assessment. But it has been repeatedly held that the determination by the Comptroller of Currency, being made by a member of the executive branch of the government, is binding and conclusive and may not be reviewed by the courts (*Kennedy* v. *Gibson,* 8 Wall. 498; *Washington Nat'l Bank of Tacoma* v. *Eckles,* 57 Fed. 870; *Deweese* v. *Smith,* 106 Fed. 438, *aff'd* as *Smith* v. *Brown,* 187 U. S. 637; *Altman* v. *McClintock,* 20 F. (2d) 266, appeal dismissed 28 F. (2d) 1007; *Wilson* v. *Awalt,* 2 F. (2d) 465; *Wanamaker* v. *Edisto Nat'l Bank,* 62 F. (2d) 696). Section 94b, under appellees' construction, would invalidate the determination by the Comptroller of Currency, whether the actions were brought in the state or local federal courts (*Lewisohn* v. *Stoddard,* 78 Conn. 575). So construed, it nullifies Congressional enactments and the interpretation afforded such enactments by the Federal Courts.

These are but two illustrations of the manner in which the construction contended for by appellees renders section 94b invalid. But it is a universally-recognized doctrine that a statute will be given a construction which sustains and preserves its constitutionality (*Matter of McAneny* v. *Board of Estimate,* 232 N. Y. 377, 389). Applied to section 94b, such a construction is readily available. Under its very language, it is directed at preventing enforcement of an assessment by, or on behalf of, an individual creditor. It has no

application to official enforcement on behalf of the entire body of creditors.

Section 94b may possibly be so construed as to afford a workable and reasonable remedy. Thus, it is said that the Superintendent of Banks represents all of the creditors of a closed bank in the process of liquidation through him, and that, through his appearance, the requirement that all creditors be parties is complied with. Also, that the Superintendent of Banks represents the insolvent corporation itself, and, under section 71 of the New York Banking Law, he may appear in New Jersey and accept service of a copy of the summons and complaint on its behalf. The requirement that all stockholders be joined as parties applies only to stockholders residing in New Jersey upon whom service can be effected. Under this construction, the Superintendent of Banks, as plaintiff, stands as the representative of all creditors and the Bank. All New Jersey stockholders, for whose protection the statute was enacted, are parties. This action would proceed in the form of an equitable accounting, and the deficiency be reascertained by the New Jersey Court of Equity. This construction, however, may require substantial remolding of section 94b. However, even under this construction, the determination by the Superintendent of the necessity of the assessment is deprived of the conclusive effect to which it is entitled under the laws of New York as interpreted by the courts of that state (*Broderick* v. *Adamson,* 148 Misc. 353).

The foregoing considerations establish that section 94b, if applicable to the present action, and if construed literally, is unconstitutional. Section 94b not only deprives the official determination by the Superintendent of Banks of full force and effect, but also deprives the Superintendent of Banks of any recourse in the courts of New

Jersey to recover the assessment. Thus, section 94b specifically requires the joinder, as necessary parties, of (a) the corporation, (b) its legal representatives, (c) *all of its creditors,* and (d) *all of its stockholders.* It requires joinder, as a necessary party defendant, of a foreign corporation which has never transacted any of its business in New Jersey, of all creditors of a foreign bank who reside not only in all of the states of the Union, but in foreign nations as well, and of all stockholders of the Bank, the majority of whom always were, and continue to be, citizens of states other than New Jersey. We have already pointed out, in our main brief, the impossibility of attempting to comply with these requirements, and the prohibitive expenses entailed if compliance were practicable (pp. 37-42). Where a remedy is given which requires compliance with unreasonable and preposterous conditions, such as this statute imposes, it is no remedy at all. In *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, Chief Justice Taft so held, in the following language:

> "* * * such a result as that reached by the supreme court of Nebraska is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district."

It is obvious that jurisdiction cannot be obtained over stockholders or creditors of a bank who never resided in or owned any property in New Jersey. The foundations of jurisdiction are familiar and well-settled, and all attempts to effect service upon non-residents not conducting business or owning property in this State through the medium of publication or other forms of substituted service have been repeatedly rejected by

our courts (*Wilson* v. *Am. Palace Car Co.*, 65 N. J. Eq. 730; *Sielcken* v. *Sorenson*, 109 N. J. Eq. 397; *Papp* v. *Metropolitan Life Ins. Co.*, 113 N. J. Eq. 522; *Puster* v. *Parker Mercantile Co.*, 70 N. J. Eq. 771; *Cameron* v. *Penn Mutual Life Ins. Co.*, 111 N. J. Eq. 24; *Lanning* v. *Twining*, 71 N. J. Eq. 573; *Fraxam, etc., Corp.* v. *Skouras, etc., Corp.*, 113 N. J. Eq. 512; *Pennoyer* v. *Neff*, 95 U. S. 714). The only thing that could possibly be accomplished by making all of the 400,000 creditors and all of the 20,800 stockholders parties to such an action would be to give them notice of the action. There is absolutely no need of such notice, particularly since judgments have already been entered against over half of all the stockholders in New York alone. Thus, section 94b, under the guise of providing a remedy, actually prohibits enforcement of any assessment in New Jersey. This is repugnant to the Constitution of the United States under the doctrines already developed.

In the final analysis, the question of whether this action is properly in law or should be maintained in equity, depends upon the necessity of an accounting to determine the value of the Bank's assets and the amount of its liabilities for the purpose of ascertaining the amount of the deficiency upon which the assessment rests. Whether an accounting is necessary does not depend upon the provisions of section 94b, which we have already disposed of, but solely upon the effect to be given the determination by the Superintendent of Banks of the State of New York that the assessment is necessary. We have already pointed out that under the New York law, as construed by the New York courts, this determination is binding and conclusive (*Broderick* v. *Adamson*, 148 Misc. 353). A similar conclusion was recently reached by the Federal District Court of Maryland in

dismissing without opinion the action in equity by this plaintiff against stockholders of The Bank of United States residing in Maryland and requiring the filing of suit on the law side of the court. The dismissal was based upon the conclusiveness of the Superintendent's determination, which, of course, eliminates all bases of jurisdiction in equity (*Broderick* v. *American General Corp.*, not reported). That such is the proper effect to be given under the New York law to the Superintendent's determination is also indicated in *Duke* v. *Olson,* 240 Ill. App. 198; *Hansen* v. *Harris,* 28 Pac. (2d) 649 (Ore., 1933); *State Bank of Portland* v. *Gotshall,* 121 Ore. 92; *Gile* v. *Duke,* 5 F. (2d) 952; *Kennedy* v. *Gibson,* 75 U. S. 498; *Casey* v. *Galli,* 94 U. S. 673; *Citizens' Nat'l Bank* v. *Knox,* 102 U. S. 422; *Hanson* v. *Soderberg,* 105 Wash. 255, 177 Pac. 827; *Allen* v. *Prudential Trust Co.,* 242 Mass. 78. It is also shown by *Bernheimer* v. *Converse,* 206 U. S. 516, and *Converse* v. *Hamilton,* 224 U. S. 243, where similar determinations by justices of various courts were given like binding and conclusive effect (see main brief, pp. 19-33).

If, however, we are in error in this regard and the determination by the Superintendent has merely presumptive weight, or no effect at all except to furnish him with a right to sue, then, and only then, can it be fairly contended that there is any basis for resort to equity. The parties to such an action, however, could only be the Superintendent of Banks as plaintiff, and the New Jersey stockholders of The Bank of United States, as defendants, since these are the only parties over whom jurisdiction could be obtained. The question of the deficiency would then be an issuable matter of fact. Whatever view is adopted upon this question, the final judgment of the Court below dismissing the complaint was erroneous,

since it deprives the Superintendent of any remedy in New Jersey. It is insisted that the complaint should be sustained in its present form, and that this is properly an action at law. If, however, an equity action is required, the final judgment of the Court below should be reversed in part and the action transferred to the Court of Chancery.

Respectfully submitted,

McDermott, Enright & Carpenter,
Attorneys for Plaintiff-Appellant.

James D. Carpenter, Jr.,

Carl J. Austrian,
Arthur Ofner,
Harold N. Cohen,
Of the New York Bar,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

(8684)

At a special Term, Part VII, thereof of the Supreme Court of the State of New York, held in and for the County of New York, at the Court House, Centre and Pearl Streets, in the Borough of Manhattan, City and State of New York, this 11th day of April, 1934.

PRESENT:

HON. RICHARD P. LYDON,
Justice.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff, —against— MAX AARON, *et al.*, Defendants.	JUDGMENT COUNTY CLERK'S INDEX No. 4800—1933.

The issues in this action having been regularly brought on for trial before Mr. Justice Richard P. Lydon at a Special Term, Part VII of this Court, held on the 5th day of February, 1934, and thereafter, at the County Court House, Centre and Pearl Streets, in the Borough of Manhattan, City, County and State of New York, and plaintiff having appeared by CARL J. AUSTRIAN, his attorney (ARTHUR OFNER, HAROLD N. COHEN, WARREN C. FIELDING, EDWARD GARFIELD, MAURICE COHEN, EDWARD WEITZ and ISADORE H. COHEN, of counsel), and the defendants enumerated upon the schedules annexed hereto and made part hereof, opposite whose names the symbol "I" or "NAD" is set forth under the column entitled "Status" having appeared by their respective attorneys, and due proof having been made of the service of the summons and complaint upon the defendants enumerated in the said annexed schedules opposite whose names the symbol "D," "S" or "A" is set forth under said column entitled "Status" and said defendants having defaulted in appearance and pleading and the trial having proceeded by way of inquest against all of the said defaulting defendants,

NOW, on motion of CARL J. AUSTRIAN, attorney for the plaintiff, it is ADJUDGED AND DECREED:

1. That the assessment in the sum of $25. per share for each share of the outstanding capital stock of the defendant, The Bank of United States, was levied by plaintiff against the stockholders of The Bank of United States in accordance with the provisions of the Banking Law of the State of New York and was in all respects valid and proper and was required and necessary in order to pay and discharge the debts, contracts and obligations due and owing the creditors of The Bank of United States.

2. IT IS FURTHER ADJUDGED AND DECREED that plaintiff is entitled to a lien upon the moneys and dividends retained and withheld by him with the right to apply and set off such moneys and dividends against the amounts of the stock assessments levied against the defendants to whom such moneys and dividends would otherwise be payable and that the plaintiff apply and set off against the respective assessments of such defendants the amounts set forth opposite their names upon the said annexed schedules under the column entitled "Dividends Held."

3. IT IS FURTHER ADJUDGED AND DECREED that plaintiff recover from each of the defendants enumerated upon Schedules "A," "B," "C," "D," "E" and "F" annexed hereto the sum set opposite the respective names of such defendants upon said schdules under the column entitled "Amount Due."

AND on motion made on their behalf:

4. IT IS FURTHER ADJUDGED AND DECREED that the complaint be and the same hereby is dismissed against the defendants: EDWARD ABRAMS, ESTHER ABRAMS, JACQUELINE ABRAMS, RUTH ABRAMS, VIOLET ABRAMS, GERTRUDE ADAMS, FANNIE ATLAS, GEORGE BALDINGER, AARON BONDERMAN, REBECCA BOOKSPAN, BEATRICE BRAHMS, SEYMOUR BRAUMAN, ABRAHAM C. WEINFELD as a copartner of CARR & Co., THELMA DANN, FRANCES DeRAFFELE, MARVIN DIDINSKY, RUTH DWORETT, BEATRICE ENGEL, DOROTHY FINK, RICHARD FINK, ALBERT FRIEDMAN, ANNETTE FRIEDMAN, BETTY FRIEDMAN, JANE FRIEDMAN, RHODA FRIEDMAN, FLORENCE JANE GASNER, SYBIL GASNER, WILBUR GASNER, LOUIS GAUDIOSI, JULIET C. GILBERT, BERNARD GOODMAN, FRANCES GOODMAN, BENJAMIN GORDON, SALLY GREENBERG, MORTON HALBREICH, BERNICE C. HERSTEIN, ROSLYN C. HERSTEIN, ROXANNE HOLZMAN, ELIAS JACOBS, GLADYS JACOBS, MARK JACOBS, SHIRLEY JAFFE, MAX D. JOSEPHSON, ALVIN KASS, NORMAN KEIZER, SOLOMON N. KISCHNER, IRWIN KORN, BETTY KORNBLUM, ESTHER KORNBLUM, LESTER E. LEVINTHAL, HARVEY LEWIS, JULIAN MARANS, ESTHER MARCH, MARIAN MAYER, MONROE MEYERS, BERTRAM MOND, BEVERLY MORSE, E. MALCOLM DEACON, as copartner of MOYEL & HOLMES, IDA NAMAN, MAXINE NEUBARDT, HERBERT J. NEUMAN, HERBERT PANKIN, JEROME PANKIN, SHIRLEY PANKIN, FLORENCE PANKIN, EDWIN L. PHILIPS, LEONARD ROSENZWEIG, RICHARD J. ROTH, HARLEAN ROTHBERG, LESTER ROTHMAN, ABRAHAM RUDMAN, GRACE RUTCHIK, HOWARD RUTCHIK, BEATRICE W. SARNOFF, MAX SCHEMEL, MORRIS SCHERER, SAYRE B. SCHWARTZ, ARTHUR SHERR, IRENE FRANCES SHERR, FREDA SOKOLSKY, JACK SOKOLSKY, SONIA SOKOLSKY, ARTHUR SPIRO, RALPH STANZIONE, LEONARD STARK, PRISCILLA STARK, MOE STEIN, HYMAN STEINBERG, DORIS STERNLIEB, JACK SURUT, RUBIN TURETZKY, HARRIET VAN THYN, RUTH MAY WEINSTEIN and IRVING WEITZ.

5. IT IS FURTHER ADJUDGED AND DECREED that any party to this action may apply from time to time at the foot of this judgment for such directions and relief as may be proper.

6. IT IS FURTHER ADJUDGED AND DECREED that the plaintiff may apply at the foot hereof for such directions and orders of this Court as may be necessary affecting the administration and distribution of the moneys collected by him under this judgment.

7. Execution of this judgment against the defendants, STEVE ALEXANDER; ELI AUERBACH; SARA BARELL; IDA BINSKY; JOSEPH BREWER; JOHN P. BROGAN; MARY A. BROGAN; WALTER BRUNO; MAX F. FINKELSTEIN; THERESA GARGANI; BESSIE GASNER, as trustee; HENRY D. GASNER, as trustee; MAX GOOSEY; ROSE GREIF; DAVID HERSTEIN, as trustee; NATHAN HOCH; ADOLPH JABLONER; GODFREY JULIAN JAFFE; CHRIST A. KATSANTONIS; ABE KESSLER; YETTA KESSLER; KLEIN BROS.; LOUIS KOHN; WILLIAM KORNBERG; WILLIAM KORNBERG CO., INC.; WILCO-KORNBERG CO., INC.; ANNA KROWN; IRVING LEBOWITZ; AUGUST J. LEHNER; LEAH LEVY; HELEN H. LICHTENSTEIN; HARRIS LICHTMAN; LIPSKY & ROSENTHAL; LIPSKY & ROSENTHAL, INC.; WILLIAM MAIDMAN, as copartner of FASHION WEAR DRESS CO.; CHARLES MARGOLIS; PAUL MILSTEIN; ANNE MUZZILLO; NATIONAL CITY BANK OF NEW ROCHELLE; PAPAZIAN BROS.; SOL RAPHAEL; RENNIE & CO.; ARTHUR J. RIESER; IDA ROSEN; WALTER ROSS; SAUL ROTHFELD; FRANK RUBRICIUS; CATHERINE SAMUELS; BERNARD H. SANDLER; SAM SCHUSTER; ABRAHAM SCHWALBERG; AL SCHWARTZ; J. IRWIN SHAPIRO; PHILIP SHLANSKY & CO., INC.; PHILIP SHLANSKY & BRO., INC.; H. BERTRAM SMITH; JULIUS B. STILWELL; HARRY SURKES; DANIEL A. TOBIN; EUGENE VECSEY; HERMAN WANGROW; WATSON & WHITE; MORRIS WEISSMAN; and ISAAC ZWISOHN, is hereby stayed thirty days.

8. All parties are granted sixty days to make a case on appeal.

ENTER,

R. P. L.,
J.S.C.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

ALEXANDER ANDRIAN, being duly sworn, deposes and says, that on the 5th day of May, 1934, he served the within JUDGMENT upon the attorney for the defendant in the within action hereinafter named, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

.....

.....

.....

.....

and by depositing the same in the City Hall Branch of the Post Office regularly maintained by the United States Government at Broadway and Park Row, in the Borough of Manhattan, City of New York.

Deponent further says that the said attorney is the attorney for the above named defendant and that the address set forth on said wrapper is the office and post office address given by the said attorney upon the last paper in the within action.

Sworn to before me this }
5th day of May, 1934. }

County Clerk's Index No. 4800—1933.

Supreme Court of the State of New York

COUNTY OF NEW YORK.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York,
Plaintiff,

against

MAX AARON, *et al.*,
Defendants.

COPY

Judgment

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of the JUDGMENT duly signed, filed and entered in the above entitled action on the 11th day of April, 1934, in the Office of the Clerk of the County of New York, affecting the defendant or defendants represented by you.

Dated, New York, May 5th, 1934.

Yours, etc.,

CARL J. AUSTRIAN,
Attorney for Plaintiff,
Superintendent of Banks,
Office & P. O. Address,
111 Duane Street,
Borough of Manhattan,
New York City.

Supreme Court of the State of New York

COUNTY OF NEW YORK.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York, Plaintiff, against MAX AARON, *et al.*, Defendants.	DECISION COUNTY CLERK'S INDEX No. 4800—1933.

The issues of fact raised by the pleadings in this action having duly come on to be heard by this Court at a Special Term, Part VII thereof, on the 5th day of February, 1934, and thereafter, and the proofs and allegations of the parties having been duly presented, and the plaintiff having appeared by CARL J. AUSTRIAN, his attorney, (ARTHUR OFNER, HAROLD N. COHEN, WARREN C. FIELDING, EDWARD GARFIELD, MAURICE COHEN, EDWARD WEITZ and ISADORE H. COHEN, of counsel), and the defendants enumerated upon the schedules annexed hereto and made part hereof opposite whose names the symbol "I" or "NAD" is set forth, under the column entitled "Status," having appeared by their respective attorneys, and due proof having been made of the service of the summons and complaint upon the defendants enumerated in the said annexed schedules opposite whose names the symbol "D," "S" or "A" is set forth, under said column entitled "Status," and said defendants having defaulted in appearance and pleading and the trial having proceeded by way of inquest against all of the said defaulting defendants,

I hereby decide and find as follows:

FINDINGS OF FACT.

1. On and prior to the 11th day of December, 1930, plaintiff was and now is the duly appointed and acting Superintendent of Banks of the State of New York.

2. The defendant, The Bank of United States, was on and prior to December 11, 1930, and now is a monied corporation organized under the Banking Law of the State of New York, and having its office and principal place of business in the Borough of Manhattan, City, County and State of New York.

3. On December 11, 1930, the capital of The Bank of United States amounted to the sum of $25,250,000. represented by 1,010,000 shares of stock of the par value of $25. per share, all of which were on and prior to December 11, 1930, and now are issued and outstanding.

4. On the 11th day of December, 1930, The Bank of United States could not with safety and expediency, continue its business, and thereupon and on such day, plaintiff, pursuant to the provisions of Section 57 of the Banking Law of this State, took possession of the business and property of such Bank and has been and now is in possession and engaged in the liquidation thereof.

5. Upon the taking of such possession and on December 11, 1930, the Superintendent of Banks determined to liquidate the business and affairs of The Bank of United States.

6. That thereafter and prior to May 6, 1931, plaintiff, pursuant to Section 72 of the Banking Law determined that the period between May 6, 1931 and June 29, 1931, afforded creditors of The Bank of United States reasonable time to present and make proof of their claims against the Bank. Such period afforded a reasonable time for creditors to present and make proof of their claims. Thereafter and pursuant to the provisions of Section 72 of the Banking Law, plaintiff notified all creditors in writing, whose claims appeared upon the books of such Bank, to present such claims to him and make proper proof thereof on or before the 29th day of June, 1931, at various branch banks of The Bank of United States situate in the City of New York, the names and addresses of which were specified in such notice. Such notice designated June 29th, 1931, as the last day upon which claims could be presented and proved and were enclosed in securely sealed postpaid wrappers, addressed to the creditors appearing on the books of such Bank and were on May 2, 1931 and May 5, 1931, mailed at the General Post Office in the Borough of Manhattan, City of New York, to such creditors, and thereafter notices were inserted, pursuant to the direction of this plaintiff, in thirty-nine New York City newspapers designated by him, and published weekly for more than three consecutive weeks embracing a period of more than twenty-one days prior to

the 29th day of June, 1931, directing all persons having claims against The Bank of United States to present and make proof of such claims on and prior to June 29, 1931, the last day fixed for the

the 29th day of June, 1931, directing all persons having claims against The Bank of United States to present and make proof of such claims on and prior to June 29, 1931, the last day fixed for the presentation and making proof of claims.

7. In the month of June, 1932, and prior to July 1, 1932, plaintiff, after an examination of its affairs determined and ascertained that the reasonable value of the assets of defendant, The Bank of United States was not sufficient to pay its creditors in full and that there was due and owing by such Bank to its creditors over and above the reasonable value of such assets a sum in excess of $30,000,000. At the time of such determination such insufficiency of assets, as so fixed and ascertained, existed and has since continued.

8. Subsequent to such determination and prior to the 1st day of July, 1932, plaintiff decided that an assessment of $25.00 against each stockholder for each share of stock held by him was required and necessary to provide moneys toward the payment and satisfaction of the sums due and owing to the creditors of such Bank.

9. Thereafter and on July 6, 1932, plaintiff made demand in writing upon all of the stockholders of The Bank of United States appearing upon its stock ledger for the payment on August 8th, 1932, of $25.00 for each share of stock appearing upon such stock ledger to be held by such stockholder. Such demand stated the total amount assessed by the plaintiff against all of the stockholders, the equal and pro rata share assessed against each stockholder for each share of stock held by him, and the total amount of the assessment for all shares held by each such stockholder. These demands were enclosed in securely sealed postpaid wrappers addressed to each of such stockholders at his or its last known place of residence appearing upon the stock ledger of the Bank, and where no address appeared thereon the last known address of such stockholder. These demands so sealed and addressed and postpaid were, on July 1st, 1932, mailed to each said stockholder at the General Post Office in the Borough of Manhattan, City of New York.

CORPORATIONS.

10. The following defendants are domestic corporations: The Ad Press, Ltd., Aptakin & Ginsburg Corp., Arown Holding Corporation, Battery Place Securities Corporation, Baumgold Bros., Inc., Beinowitz Leather Co., Inc., Bernard Trading Co., Inc., Brand & Corman, Inc., Brand & Oppenheimer, Inc., Brickner & Bernfeld, Inc., Candee Smith & Howland Co., Carsel Holding Corp., Charlsid Realty Co., Inc., Harry Charnas & Co., Inc., Clandere Realty Co., Inc., The Coll-Clare Realty Co., Credit Investing Corporation, Crescent Furniture Mfg Co., Inc., Daisy Hat Co., Inc., Danlev Realty Corp., F. Del Balso & Son, Inc., Dickson & Turnbull, Inc., Elmo Realty Corporation, Etco Trading Corporation, F. R. Z. Garment Co., Inc., H. J. Feinberg & Co., Inc., S. Feinstein & Sons, Inc., Film Metal Box Corporation, 531 Fifth Avenue, Inc., 465 Fourth Avenue Corporation, Fransal Holding Corp., Fredray Holding Corporation, Friedland and Levine Bros., Gelles Advertising Agency, Inc., Genuine Sailor Pants Corporation, Gilmore Holding Co., Inc., Gilmore Realty Co., Inc., Gothamite Holding Company, Inc., H.R.H. Construction Corp., Harlem Center Corp., Oscar Heyman & Co., J. Hoffman & Co., Inc., Homestead Mortgage Corporation, Hookerman Furniture Co., Inc., I. & J. Holding Corporation, Industries Development Corporation, Irose Holding Corp., Irving Trust Company, as Trustee, Jakdel Construction Corp., Janet Co., Inc., Jesmire Realty Co., Inc., William Kornberg Co., Inc., Kronfeldt & Karlin, Inc., Lamport Mfg. Supply Co., Inc., Charles Landow, Incorporated, Landow Estates, Incorporated, Lee-Zurich Alloys Corporation, Saul Lewis Hosiery Co., Inc., Macdor Holding Company, Inc., The Majestic Neckwear Company, Manhattan Industrial Corp., Manrose Mercantile Co., Inc., Manwo Trading Corporation, Market Realty and Investors Corporation, Marlboro Securities Corporation, Marlboro Shirt Co., Inc., The Mastan Co., Inc., Maybaum Bros., Inc., Metropolitan Refining Company, Inc., H. Mirenburg & Co., Inc., Muriel Hat Co., Inc., Nally Plumbing-Contracting Company, Inc., New Style Hats, Inc., New York Security Corporation, Nudcon Holding Corporation, Ogus, Rabinovich & Ogus, Inc., 115 West 46th St. Corporation, Paragon Oil Co., Inc., Paramount Stitching & Pleating Co., Inc., Parkal Holding Corp., Peoples Assets Realization Corporation, Perlette Realty Corporation, Pidal Construction Corp., Plandome Securities Corporation, Rabmit Corporation, Raisin & Levine, Inc., Regal Finance Corporation, The Regent Dress Suit & Skirt Mfg. Co., Inc., Ronoaka Holding Corporation, Samuel Roseff & Sons, Inc., Abe Rosenblum Corporation, Rosenmond-Petrino Co., Inc., Rosing & Cohn, Inc., Samuel Rothstein Clothing Co., Inc., Royal Card & Paper Co., Inc., Rutland Plumbing Corporation, S. R. M. Realty Corporation, S. W. Holding Co., Inc., Alex Sabin & Sons, Inc., L. S. Saphier & Co., Inc., Sapsowits Bros., Inc., Sarnoff-Neaderland, Inc., Schinasi Commercial Corporation, Philip Shlansky & Co., Inc., Siegel Levy Co., Inc., Jacob Sincoff, Inc., Solar Holding Corporation, Standard Rolling Mills, Inc., Standard Tire Stores Company, Inc., Sterling Apparel Stores, Inc., Stern & Goldberg, Inc., James Stewart & Company, Incorporated, Samuel Strauss Sons & Co., The Style Curtain Co., Inc., Teps Realty Co., Inc., Tidmor Trading Corporation, Ullman & Hauser, Inc., Ulrika Realty Corporation, United Dress Co., Inc., United Properties, Inc., Samuel Valentine Company, Inc., Weill & Cohen, Inc., Weinman & Oelbaum, Inc., Weinstrum Watch Company, Inc., Wise Investing & Credit Corp., Zalud-Kaufman Co., Inc.

11. Defendant, Christjane Corp., is a foreign corporation, organized under the laws of the State of Delaware.

317. Each of the defendants enumerated upon Schedule "A" annexed hereto, other than the defendant, ARTHUR J. RIESER, was on and prior to December 11, 1930, the owner and holder of

317. Each of the defendants enumerated upon Schedule "A" annexed hereto, other than the defendant, ARTHUR J. RIESER, was on and prior to December 11, 1930, the owner and holder of record of the number of shares of the capital stock of The Bank of United States set opposite his name upon said schedule under the caption entitled "Number of Shares," and appeared and now appears under such name as such owner and holder upon the stock ledger of said Bank. Prior to December 11, 1930, the defendant, ARTHUR J. RIESER, purchased two hundred ten (210) of said shares and thereupon transferred said stock to his son, ARTHUR J. RIESER, who was then and on December 11, 1930, continued to be an infant under twenty-one years of age.

318. Each of the defendant corporations enumerated upon Schedule "B" annexed hereto, other than the defendant, WILIAM KORNBERG Co., INC., hereinabove in paragraphs "227" to "232" specifically referred to, and the defendant, PHILIP SHLANSKY & Co., INC., hereinabove in paragraphs "233" to "248" specifically referred to, was on and prior to December 11, 1930, the owner and holder of record of the number of shares of the capital stock of The Bank of United States set opposite its name upon said schedule under the caption "Number of Shares," and appeared and now appears under such name as such owner and holder upon the stock ledger of said Bank. On and prior to December 11, 1930, and thereafter, defendants, WILLIAM KORNBERG Co., INC., and PHILIP SHLANSKY & Co., INC., were the owners and holders of the number of shares set opposite the respective name of said defendants upon said schedule under the caption "Number of Shares."

319. Each of the defendant members of the copartnerships and joint ventures hereinabove referred to in paragraphs "12" to "226," inclusive, and enumerated upon Schedule "C" annexed hereto, was on and prior to December 11, 1930, the owner and holder of record as such of the number of shares of the capital stock of said Bank set opposite the name of such defendant as a member of such copartnership or joint venture upon said schedule, and appeared and now appears under such name as such owner and holder upon the stock ledger of said Bank.

320. On and prior to December 11, 1930, the defendants enumerated upon Schedule "D" annexed hereto were the joint owners of record of the number of shares of the capital stock of The Bank of United States set opposite their respective names upon said schedule under the caption "Number of Shares" and appeared and now appear upon the stock ledger of said Bank as such joint owners and holders. The individuals designated "Deceased" upon said schedule and now made parties hereto, died prior to the commencement of this action.

321. Each of the defendant corporations enumerated upon Schedule "F" annexed hereto, other than the defendant, THE NATIONAL CITY BANK OF NEW ROCHELLE, hereinabove in paragraph "172" specifically referred to, was prior to the commencement of this action and now is the owner and holder of the number of shares of the capital stock set opposite its respective name upon said schedule under the caption "Number of Shares."

322. Each of the defendant members of the copartnerships enumerated upon Schedule "F" annexed hereto, was prior to the commencement of this action and now is the owner and holder as such of the number of shares of the capital stock of said Bank set opposite the name of such defendant as a member of such copartnership upon said schedule.

323. Each of the defendants enumerated upon the schedules annexed hereto has made payments upon his or its respective assessment in the amount set opposite the name of such defendant upon said schedule under the caption "Payments." Except as so credited upon the annexed schedules, each of the defendants enumerated thereon has failed and omitted to pay his or its respective assessment or any part thereof.

324. Each of the defendants enumerated upon the schedules annexed hereto opposite whose names credits appear thereon under the caption "Dividends Held," on December 11, 1930, maintained deposit balances in The Bank of United States upon which liquidation dividends in the amounts set forth therein were retained and are now being withheld by plaintiff subject to the determination of this Court of the right of plaintiff to set off and apply such dividends against the amount due from the defendants upon said assessments.

CONCLUSIONS OF LAW.

1. That plaintiff has no adequate and complete remedy at law and that this action is properly commenced and maintained on the equity side of this Court.

2. That the defendant, THE BANK OF UNITED STATES, was a proper party defendant to this action and entitled to appear and defend such action for the benefit and protection of its stockholders.

3. That the assessment in the sum of $25. per share for each share of outstanding capital stock of The Bank of United States was levied by the plaintiff against the stockholders of defendant, THE BANK OF UNITED STATES, in accordance with the provisions of the Banking Law of the State of New York and was in all respects valid, proper and was required and necessary in order to pay and discharge the debts, contracts and obligations due and owing the creditors of defendant, THE BANK OF UNITED STATES.

4. That the plaintiff is entitled to a lien upon the moneys and dividends retained and withheld by him with the right to apply and set off such moneys and dividends against the amounts of the stock assessments levied against the defendants to whom such moneys and dividends would otherwise be payable.

282. Plaintiff is entitled to judgment against each of the defendants enumerated upon Sched-

282. Plaintiff is entitled to judgment against each of the defendants enumerated upon Schedules "A," "B," "C," "D," "E" and "F," annexed hereto and made part hereof, in the amount of the respective assessment levied against and set forth opposite the name of each said defendant upon said schedules under the caption "Assessment Amount," less the amount paid by or for the account of such defendant set forth upon said schedules opposite the name of such defendant under the caption "Payments," and less the amount which plaintiff has withheld and applied against the said assessments as set forth upon said schedules opposite the name of said defendant under the caption "Dividends Held," together with interest on the balance at the rate of six per cent per annum from August 8, 1932, set forth upon said schedules opposite the name of each said defendant under the caption "Interest," making a balance due and owing to plaintiff from each of said defendants in the amount set opposite their respective names upon said schedules under the caption "Amount Due."

283. Accordingly, I direct that judgment on the merits be entered against each of the defendants enumerated upon Schedules "A," "B," "C," "D," "E" and "F," annexed hereto, in the amount set opposite their respective names under the column entitled "Amount Due."

284. Where judgment is directed herein in favor of plaintiff against more than one defendant upon the assessment levied against the same share or block of shares of the capital stock of said Bank, payment by either of such defendants shall operate to the extent thereof to satisfy and discharge *pro tanto* the liability to plaintiff of the other.

285. I direct that judgment be entered in accordance with this decision.

286. No costs or disbursements are allowed to any of the parties.

287. I further direct that any party to this action may apply from time to time at the foot of this decision for such directions, instructions or relief as may be proper.

288. Plaintiff may apply at the foot hereof for such directions and orders of this Court as may be necessary affecting the administration and disposition of the moneys collected by him under this decision and the judgment entered thereon.

289. Execution of this judgment against the defendants, STEVE ALEXANDER; ELI AUERBACH; SARA BARELL; IDA BINSKY; JOSEPH BREWER; JOHN P. BROGAN; MARY A. BROGAN; WALTER BRUNO; MAX FINKELSTEIN; THERESA GARGANI; BESSIE GASNER, as trustee; HENRY D. GASNER, as trustee; MAX GOOSEY; ROSE GREIF; DAVID HERSTEIN, as trustee; NATHAN HOCH; ADOLPH JABLONER; GODFREY JULIAN JAFFE; CHRIST A. KATSANTONIS; ABE KESSLER; YETTA KESSLER; KLEIN BROS.; LOUIS KOHN; WILLIAM KORNBERG; WILLIAM KORNBERG CO., INC.; WILCO-KORNBERG CO., INC.; ANNA KROWN; IRVING LEBOWITZ; AUGUST J. LEHNER; LEAH LEVY; HELEN H. LICHTENSTEIN; HARRIS LICHTMAN; LIPSKY & ROSENTHAL; LIPSKY & ROSENTHAL, INC.; WILLIAM MAIDMAN, as copartner of FASHION WEAR DRESS CO.; CHARLES MARGOLIS; PAUL MILSTEIN; ANNE MUZZILLO; NATIONAL CITY BANK OF NEW ROCHELLE; PAPAZIAN BROS.; SOL RAPHAEL; RENNIE & CO.; ARTHUR J. RIESER; IDA ROSEN; WALTER ROSS; SAUL ROTHFELD; FRANK RUBRICIUS; CATHERINE SAMUELS; BERNARD H. SANDLER; SAM SCHUSTER; ABRAHAM SCHWALBERG; AL SCHWARTZ; J. IRWIN SHAPIRO; PHILIP SHLANSKY & CO., INC.; PHILIP SHLANSKY & BRO., INC.; H. BERTRAM SMITH; JULIUS B. STILWELL; HARRY SURKES; DANIEL A. TOBIN; EUGENE VECSEY; HERMAN WANGROW; WATSON & WHITE; MORRIS WEISSMAN; and ISAAC ZWISOHN, is hereby stayed thirty days.

290. All parties are granted sixty days to make a case on appeal.

Dated: April 11, 1934.

RICHARD P. LYDON,
Justice of the Supreme Court of the
State of New York.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

ALEXANDER ANDRIAN, being duly sworn, deposes and says, that on the 5th day of May, 1934, he served the within DECISION upon the attorney for the defendant in the within action hereinafter named, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

.....

.....

.....

.....

and by depositing the same in the City Hall Branch of the Post Office regularly maintained by the United States Government at Broadway and Park Row, in the Borough of Manhattan, City of New York.

Deponent further says that the said attorney is the attorney for the above named defendant and that the address set forth on said wrapper is the office and post office address given by the said attorney upon the last paper in the within action.

Sworn to before me this
5th day of May, 1934.

County Clerk's Index No. 4800—1933.

Supreme Court of the State of New York

COUNTY OF NEW YORK.

JOSEPH A. BRODERICK, as Superintendent of Banks of the State of New York,

Plaintiff,

against

MAX AARON, *et al.*,

Defendants.

COPY

Decision

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of the DECISION duly signed, filed and entered in the above entitled action on the 11th day of April, 1934, in the Office of the Clerk of the County of New York, affecting the defendant or defendants represented by you.

Dated, New York, May 5th, 1934.

Yours, etc.,

CARL J. AUSTRIAN,
Attorney for Plaintiff,
Superintendent of Banks,
Office & P. O. Address,
111 Duane Street,
Borough of Manhattan,
New York City.

NEW YORK LAW JOURNAL

May 18, 1934

SUPREME COURT - SPECIAL TERM, PART VII.

by MR. JUSTICE LYDON.

BRODERICK, as Supt. of banks, v. AARON et al. --- This is an action originally instituted against 15,843 defendants to recover upon the assessment levied by plaintiff, as superintendent of banks, against the defendants, as stockholders of the Bank of United States. Of the defendants originally named, default judgments have already been entered and the action severed against approximately 3,000 defendants and some 4,000 defendants have executed agreements, all of which were introduced in evidence upon the trial of this action, providing for the payment of their respective assessments in full upon stated terms and authorizing the entry of judgment. The action has been discontinued against some 2,000 defendants who have either paid their assessments in full or upon whom plaintiff was unable to effect service of the summons and complaint or for other reasons such as bankruptcy and death. Approximately 3,000 of the remaining defendants have failed to appear or answer, and against these the trial proceeded by way of inquest. An additional 3,000 defendants joined issue through service of their answers.

The allegations of the complaint with regard to the levy and necessity of the assessment are identical with the allegations of the complaint in Broderick v. Adamson et al. (148 Misc. 353), in which action decision was rendered by me after trial sustaining the sufficiency of the complaint and the validity and necessity of the assessment and judgment entered in favor of the superintendent. The sufficiency of the complaint in this action has been sustained against motions to dismiss (Broderick v. Aaron, Graf, 147 Misc., 854; Broderick v. Aaron, Feinbaum, N. Y. Law Journal, September 28, 1933).

The evidence introduced by plaintiff establishes the following facts: The Bank of United States was organized as a banking corporation under the laws of this state in April, 1913, and continued in business until December 11, 1930, at which date its authorized and outstanding capital stock amounted to 1,010,000 shares of the par value of $25 per share, representing a total capital of $25,250,000. Between December 1 and December 10, 1930, there was a steady shrinkage of deposits. On the 10th day of December, 1930, large runs and heavy and extraordinary withdrawals occurred at various branches of the bank resulting in a net decrease of deposits of more than $13,000,000 on that day. In order to provide cash to meet the demands of its depositors during this period the bank, which had borrowed steadily from the Federal Reserve Bank, was compelled on December 10, 1930, to borrow an additional $11,000,000 from that institution. These withdrawals, together with the outstanding checks and drafts payable in transit, left it with insufficient cash on hand to meet the present and prospective demand of its depositors. At a special meeting of the board of directors held early in the morning of December 11, 1930, a resolution was adopted directing its officers to request the superintendent of banks to take possession of the bank. In the face of this general situation the superintendent decided that the Bank of United States could not with safety and expediency or in fairness to its non-withdrawing depositors continue its business, and he thereupon and on December 11, 1930, took possession of its business and property pursuant to the provisions of section 57 of the Banking Law.

Upon taking possession plaintiff proceeded to liquidate the affairs of the bank and gave due notice to creditors to present claims in compliance with the provisions of the Banking Law.

Prior to July 1, 1932, the superintendent determined that the reasonable value of the assets of the bank was insufficient to pay its creditors in full to the extent of $30,000,000 and upwards. It appeared

indisputably that on July 1, 1932, the reasonable value of the assets of the bank was $41,774,017.11 and its liabilities to depositors and other

indisputably that on July 1, 1932, the reasonable value of the assets of the bank was $41,774,017.11 and its liabilities to depositors and other creditors amounted to $75,896,549.71, which with accrued interest thereon of $10,048,000 (Broderick v. Adamson et al., 148 Misc., 353, and cases cited) made the total aggregate liabilities $85,944,549.71, with a resulting net deficit of $44,170,532.60.

On July 1, 1932, the superintendent, in accordance with statute (Banking Law, sec. 80), made due demand in writing upon all of the stockholders of record of the Bank of United States for the payment on August 8, 1932, of an assessment of $25 for each share of stock held by each stockholder. The defendants so notified appeared as stockholders upon the stock ledger of the bank (Banking Law, sec. 120, subdiv. 1). Upon these facts I find that the assessment of $25 per share was validly levied and necessary for the payment of the debts and obligations of the bank.

Passing from the general issue, numerous questions of law and fact affecting individual and groups of defendants remain to be determined.

The Question of the Statute of Limitations. --- Section 120 of the Banking Law provides that the action to enforce the assessment must be instituted within six (6) years after the cause of action has accrued.

Section 80 of the Banking Law provides in part:

> "Whenever a liability of stockholders for the amount of their respective shares of any such corporation exists and the superintendent has duly taken possession of the property and business of such corporation, and has duly notified creditors to present and make proof of their respective claims and the last day to present such claims has expired, and he has determined from his examination of its affairs that the reasonable value of the assets of such corporation is not sufficient to pay its creditors in full, he may enforce the individual liability of such stockholders in whole or in part. In case he determines to enforce such liability he shall make demand in writing upon such stockholders by causing such demand to be enclosed in sealed envelopes addressed and mailed, postage prepaid, to said respective stockholders at their last known places of address as the same appear upon the stock ledger of such corporation, or at their last known address if no address appears in said ledger. * * * Such demand shall also fix a date, not earlier than thirty days from the date of such notice, upon which such stockholders shall be required to pay such assessment to the superintendent. In case any such stockholder shall fail or neglect to pay such assessment within the time fixed in said notice, the superintendent shall have a cause of action in his own name as superintendent of banks against such stockholder, either severally or jointly with other stockholders of such corporation, for the amount of such unpaid assessment or assessments, together with interest thereon from the date when such assessment was by the terms of said notice due and payable."

Under this statute the assessment becomes "due and payable" after the determination by the superintendent to assess and upon the maturity of the demand for its payment, and the right or cause of action to enforce the assessment accrues at that time.

This is the rule of the federal courts in actions to enforce the statutory liability of stockholders of national banks (Aldrich v. Skinner, 98 Fed., 375; Armstrong v. McAdams, 46 Fed., 2d, 931; Rankin v. Barton, 199 U.S., 228; McClaine v. Rankin, 197 U.S., 154; Beckham v. Hague, 38 Misc., 606, aff'd 80 App. Div., 626). In Aldrich v. Skinner (supra) the rule was stated as follows:

"To determine whether this action is barred by the section of the Code last referred to, it is only necessary to fix definitely the date when the cause of action accrued. The defendant con-

"To determine whether this action is barred by the section of the Code last referred to, it is only necessary to fix definitely the date when the cause of action accrued. The defendant contends that the liability became certain, and the cause of action accrued, at the time of suspension of the bank, or if not then, at the time when the receiver qualified and took charge of the assets and business of the bank. This position appears to me to be untenable. A cause of action cannot be said to have accrued until it exists as a complete right, which some person, as the owner of such right, or as the representative of others, may enforce immediately by going into court and filing the necessary papers, upon which process may issue, to bring the adverse party within the jurisdiction of the court. It is not true that the statutory liability of shareholders of national banking associations becomes absolute in all cases immediately upon the suspension of the bank. A bank may suspend payment because it has no money on hand to meet the demands of its creditors, nor ability to immediately convert other assets into money; and yet if, when an accounting is had, there is found to be an abundance of assets which may within a reasonable time be converted into money, so that all of the bank's indebtedness may be paid without an assessment upon shareholders, it would be wrong and unlawful to assess them. If, however, after such an accounting, with such a result, and before payment of the bank's indebtedness, valuable securities should be lost, destroyed, or shrink in value, so that the debts could not be paid in full without assessing shareholders, such a change in the conditions would render an assessment necessary. Considering the nature of the liability, and the purpose of the statute in creating it, it is obvious that it is essential to the right of a receiver of an insolvent national bank to sue the shareholders for assessments that the necessity for an assessment should first be ascertained by an accounting and appraisement of the assets, and the question as to the necessity for an assessment determined by competent authority. The law vests the authority in the Comptroller of Currency, and until he orders an assessment the receiver of an insolvent national bank cannot take the first step towards compelling shareholders to pay assessments.

The act of the Comptroller in ordering an assessment being indispensable as a precedent to the commencement of an action to enforce payment, the time limited for the commencement of such an action cannot commence to run until the assessment has been ordered. As this action was commenced in less than seven months after the assessment became delinquent, and therefore in less than seven months after the cause of action accrued, it is not barred by the Statute of Limitations." (Italics mine.)

The Banking Law of this state was amended and revised to conform generally our scheme of bank regulation, liquidation and assessment enforcement to the statutory system applicable to national banks conducted through the comptroller of currency (Matter of Union Bank, 204 N. Y., 313; Van Tuyl v. Scharmann, 208 N. Y., 53; see Report of the Commission on Banks, December, 1907; Report of Superintendent of Banks, 1908, Senate Document No. 6, 131 Session, page XXIX). The test of the accrual of the cause of action laid down by the federal courts should therefore control.

Van Tuyl v. Schwab (174 App. Div., 665, affirmed without opinion 220 N.Y.,661) is not inconsistent with this view. That case is solely authority for the principle that upon the closing of a bank by the superintendent because of its insolvency the liability upon the assessment has potential existence and sufficient certainty to render it provable in bankruptcy as an accrued claim, and therefore dischargeable although no actual levy of an

assessment has then been made. This holding was undoubtedly influenced by the policy of the Bankruptcy Act to afford to a debtor the right to free himself

assessment has then been made. This holding was undoubtedly influenced by the policy of the Bankruptcy Act to afford to a debtor the right to free himself from all dischargeable obligations.

Alleged Misconduct of the Liquidation--Three hundred and sixty defendants alleged that the deficiency was caused by losses sustained through negligence of the superintendent in the conduct of the liquidation. No evidence was offered upon the trial in support of this defense. Several of the defendants, however, have requested findings that the deficiency was so caused. In view of the entire absence of evidence upon the question such finding must be refused. In any event the defense is without legal merit (Broderick v. Betco Corp'n, 149 Misc., 245; Flynn v. American Bank & Trust Co., 104 Me., 141; Brinkworth v. Hazlett, 64 Neb., 592).

Infancy -- Eighty-eight defendants have alleged and proved that on the date of their acquisition of the stock and until the closing of the bank they were minors under twenty-one years of age. Under the decision of the Appellate Division in Broderick v. Aaron (Sternlieb; New York Law Journal, April 10, 1934) the complaint as against all of these infant defendants must be dismissed.

The defendants Walter Ross, Harry Surkes, Gladys Sherr and Leah Levy, although infants when they acquired their stock, became of age prior to the closing of the bank. The stockholders' liability constitutes a fund for the protection of depositors and creditors who are presumed to rely thereon in intrusting their moneys to the bank and for eventual reimbursement of their losses in case of insolvency. This peculiar relationship and situation requires that upon coming of age prompt and diligent steps be taken by a defendant asserting infancy as a defense to perfect his legal rights to rid himself of the status of stockholder by demanding the removal of his name from the stock ledger and disaffirming the transaction with his vendor. In my opinion the defendants have failed to discharge this duty and must therefore be liable for the several assessments imposed upon them.

The counterclaims of various of the infant defendants for a return of the purchase price claimed to have been paid by them to the Bank of United States upon the acquisition of the stock must be dismissed. These claims, if valid, must be asserted against the Bank of United States and not the plaintiff in this action, who occupies a separate and distinct status as trustee for creditors and whose rights and interest in that behalf may not be impaired or defeated through the assertion of claims against the bank (Van Tuyl v. Schwab, 165 App. Div., 412; Richards v. Schwab, 101 Misc., 128).

Fashion Wear Dress Company -- In 1929 one Ferbish and one Wertheim were copartners doing business under the name of Fashion Wear Dress Company and were the owners of twenty shares of stock which appear under such name upon the stock ledger of the bank. At that time the defendant Maidman became a member of the firm and the shares of stock became part of the capital of the copartnership as reorganized. Under a private arrangement between Ferbish and Wertheim on the one hand and Maidman on the other Maidman was to have no beneficial interest in the stock or the dividends declared thereon. It is claimed that this agreement exempts the defendant Maidman from liability upon the assessment. Under the arrangement the stock clearly became a partnership asset, and the title to the stock vested in each member of the firm, and this is in nowise altered or affected by the mere private or personal understanding of the parties with respect to the equities in the stock as between themselves.

William Kornberg Co., Inc., Wilco-Kornberg Co., Inc. -- I find from the evidence that on and prior to December 11, 1930, and until December 26, 1930, William Kornberg Co., Inc., was the owner of ten (10) shares of stock appearing upon the stock ledger in the name, "William Kornberg Co." Subsequent to the closing of the bank, and on December 26, 1930, the defendant Wilco-Kornberg Co., Inc., was organized and took over all of the assets

of William Kornberg Co., Inc., including the stock in question, and agreed to pay to all of its creditors seventy (70 per cent.) per centum of their claims. It appeared that the stock continued to sell on the open market at between $1 and $3 a share until after December 26, 1930. Plaintiff contends that under Section 120 of the Banking Law a purchaser even after closing is subject to liability upon the assessment, and stands in the same position as an owner or holder of record at the time the superintendent takes possession. I cannot accede to this. After closing, the institution ceases to conduct banking operations and no moneys are deposited or permitted to remain on deposit or credit extended upon the faith of the statutory liability, nor can creditors at the time of the closing of the bank reasonably claim a right to resort to the responsibility of purchasers subsequent to that time. I have not overlooked Matter of National Bank of Wales (1897, 1 Chan., 298, Court of Appeal). That case was decided under a special and peculiar statute, which specifically contemplated transfers after closing. Plaintiff, however, is entitled to judgment against the defendant Wilco-Kornberg Co., Inc., to the extent of 70 per cent. of the assessment under its agreement to pay that percentage to all creditors of William Kornberg Co., Inc.

The defendant William Kornberg Co., Inc., the holder of the ten (10) shares above discussed, and the defendant William Kornberg, the holders of certain other shares, were indebted to the Bank of United States at the date of its closing and thereafter settled and compromised their indebtedness and obtained a general release from any and all obligations to the Bank of United States. Defendants rely upon this release as a discharge from the payment of their assessments. The Bank of United States, however, has no title to nor right to enforce or release the assessment liability of its stockholders and the release, therefore, constitutes no discharge of the assessment liability (Van Tuyl v. Schwab, 165 App.Div.,412).

Moyse & Holmes -- In November, 1929, while the defendant E. Malcolm Deacon was a member of the firm of Moyse & Holmes, this copartnership purchased the thirty-five (35) shares of stock, which were registered in the name "Moyse & Holmes" upon the stock ledger of the bank. On December 31, 1929, Deacon retired from the copartnership, which was continued by the other members under the same name. There was no change made upon the stock ledger of the bank and the stock continued to appear in the name of Moyse & Holmes from November, 1929, until the date of its closing. I hold that the defendant E. Malcolm Deacon is not liable for the assessment and that to require the idle ceremony of registration of the stock in the same copartnership name after Deacon ceased to be a member is not in accord with rational business practice and would lead to a harsh and unreasonable result.

Rennie & Co., National City Bank of New Rochelle -- It appears that the defendants Burns, Butti, Cocks, Klein, Rennie, Shea, Shufelt and Vrionis were nominees of defendant National City Bank of New Rochelle in the holding of stocks and securities for the benefit of that bank, and operated under the name and style of Rennie & Co. While acting in such capacity two hundred (200) shares were placed in their name upon the stock ledger of the bank. Defendants contend that under the holding of Schumacher v. Davis (1 Fed. Supp., 959, E. D., N.Y.,1932) they cannot be held liable for the assessment. It was there held that a combination of employees acting as nominees without profit is not a copartnership, and that since its members were not owners of the stock they could not be held liable. This case seems to proceed upon the theory that liability for the assessment rests upon actual ownership. But this is not required under section 120, subdivision 1 of the Banking Law (Van Tuyl v. Robin, 160 App. Div.41; Richards v. Robin, 178 App. Div., 535). It has repeatedly been held in this state that an individual acting as a nominee and appearing as a stockholder of record is liable (Broderick v. Adamson, 148 Misc., 353; Shellington v. Howland, 53 N.Y.,371; Richards v. Schwab, 101 Misc., 128), and I see no

distinction between the registration of stock in the actual name of a nominee and the registration of stock under such title or description as a nominee or group of nominees may designate to represent him or them for that purpose.

A further question is presented by the defense of the defendant National City Bank of New Rochelle. It appears that on and prior to December 9, 1930, the National City Bank of New Rochelle was the owner of the two hundred shares of stock registered in the name of its nominee, Rennie & Co., and that on that date it sold and transferred the shares to purchasers in good faith and for a valuable consideration and ceased to be the equitable or beneficial owner of the stock prior to December 11, 1930, the date of the closing of the bank. Defendant contends that it was neither the record, legal nor beneficial owner of stock at the date of the closing, and cannot therefore be held liable. But it is a familiar rule that a principal is liable for all obligations incurred by its agents within the course of their employment. Rennie & Co. became the registered holder of the stock acting on behalf of National City Bank of New Rochelle and continued as its nominee until the closing of the Bank of United States, and upon thefacts as they appear could look to it for indemnity against loss. The liability of National City Bank of New Rochelle is coextensive with the liability of its agent, Rennie & Co. (McDonald v. Dewey, 202 U.S., 510; Geary v. Rolph, 189 Cal., 59; Davis v. Stevens, 17 Blatch., U.S., 259). Nor is it necessary in an action of this character for plaintiff to elect between the liability of the agent or principal. This doctrine applies only where the decision to pursue the principal is inconsistent with a concurrent cause of action against the agent and usually operates where contractual obligations are involved (Georgi v. Texas Co.,225 N.Y., 410; compare Phelps v. Wait, 30 N.Y. 78). The assessment liability is not contractual in the accepted legal sense of the term (Rogers v. Jorden, 3 Fed. Supp.,211), but is of statutory origin (Christopher v. Norvell, 201 U.S., 216; McClaine v. Rankin, 197 U.S., 154). A fixed and absolute liability is imposed by statute upon designated classes and categories of persons. Rennie & Co. is liable as a stockholder of record. Since the liability was incurred by Rennie & Co. acting in behalf of the defendant National City Bank of New Rochelle, it is also liable. Plaintiff, of course, is limited to one satisfaction (Mosler Safe Co. v. Guardian Trust Co., 208 N. Y., 524).

Moses D. Jabloner. -- The defendant was administrator of the estate of one, Adolph Jabloner, who died in 1928, owning twenty-eight shares of stock of City Financial Corporation, a domestic business corporation. Defendant converted the City Financial stock into ten shares of stock of the Bank of United States, now appearing upon the stock ledger in his name as administrator. Section 120 of the Banking Law provides that where in violation of his trust, a fiduciary invests in stock of a bank he becomes personally liable for the assessment. An administrator has no authority to invest in bank stock (In re Surpless' Estate, 143 Misc., 48; Banking Law, sec. 239; Decedent Estate Law, sec. 111). The exchange of City Financial Corporation stock constituted an unauthorized investment. It is no defense that the conversion may have been made with the consent of the beneficiaries of an estate. Rights and interests of creditors and others may be involved. Beneficiaries may not enlarge the powers of an administrator, trustee or other fiduciary, and under the express language of section 120, the unauthorized investment having been made, defendant became personally liable.

Julius B. Stilwell -- One Fannie B. Stilwell died possessed of certain shares of Central Mercantile Bank stock leaving a will appointing the defendant, Julius B. Stilwell, executor. The will contained no provision authorizing the defendant to retain or continue investments or to make investments other than those authorized by law. The defendant, upon the merger of the Central Mercantile Bank into the Bank of United States, exchanged these shares for stock of the latter corporation. Upon the consummation of the merger the Central Mercantile Bank ceased to exist and the defendant became

the holder of securities of an entirely different corporation. This, to my view, was the equivalent of a new investment and beyond his power as executor.

Abe Kessler, Yetta Kessler -- These defendants sold their stock prior to December 9, 1930, and in the afternoon of that day delivered the certificate to a vice-president of the bank at its branch office located at Thirteenth avenue and Forty-seventh street, in the Borough of Brooklyn, requesting that the stock be transferred upon the stock ledger to the purchaser.

The uncontested evidence shows that the Bank of United States maintained some fifty branches throughout the City of New York and a stock transfer office at No. 70 Wall Street, in the Borough of Manhattan, and that under its established and regular business practice certificates of stock delivered at its branch offices for transfer, other than the stock transfer office, were sent to the stock transfer office by messengers at approximately 11 o'clock A.M. on each business day. Under this procedure the certificates delivered by these defendants would have been transmitted by the Brooklyn branch of the stock transfer office at about 11 o'clock A. M. on the morning of December 10, 1930. The established practice of the stock transfer office in effecting a transfer of certificates of stock presented for transfer was as follows: Upon the day of receipt the certificate of stock presented for transfer and the indorsement thereon are examined as to form and validity. If regular in all respects the transfer office on the day of receipt prepares a new form of certificate in the name of the transferee, and at the close of business on that day the new certificate so drawn is signed by an authorized officer of the bank. On the following business day the old certificate in the name of transferor, together with the new certificate made out in the name of the transferee, is delivered to the Chase National Bank, the registrar of the stock of the Bank of United States, where the certificates are examined as to genuineness and regularity. The new certificate is authenticated by the signature of the registrar and on the same day returned to the stock transfer office of the Bank of United States as proper in form for issuance and transfer, together with the old certificate, and the name of the transferor is canceled upon the stock ledger and the name of the holder of the new certificate entered thereon. All certificates of stock of the Bank of United States bear upon their face the following notice:"This certificate is not valid until registered by the registrar." Registered:The Chase National Bank of the City of New York, Registrar, By---------, Assistant Cashier. The certificate of stock delivered by these defendants to the branch of the bank were never transmitted to its stock transfer office. Had the said certificates been delivered by the branch bank to the stock transfer office on the morning of December 10, 1930, the new certificates, under the procedure already outlined, would not have been authenticated by the registrar and returned by it to the Bank of United States for transfer upon its stock ledger into the name of the defendants' transferee until the 11th day of December, 1930. The superintendent of banks took possession of the Bank of United States before the opening of business at 9 A.M., on December 11, 1930. Defendants contend that the non-transfer of the stock was caused by the negligence of the bank in failing to deliver the certificates to the stock transfer office. But if the employees of the branch bank had transmitted the certificates in accordance with the reasonable and established practice already described no transfer upon the stock ledger could have been effected, since the certificate would not have been redelivered by the registrar for that purpose prior to the time the bank had passed into the hands of the superintendent. Unfortunately for the defendants the bank closed and its transfer office ceased to operate before the transfers requested by them could be effected in the ordinary course of business, and they necessarily remained stockholders of record at the time of the closing of the bank. They therefore remain liable (Cook v. Carpenter, 212 Pa. St., 177). The question remains whether a mere presentation of stock for transfer to a branch office of a bank prior to its closing relieves the defendants from liability and is the practical equivalent of an actual transfer upon the books

of the bank. Section 120 provides in part:

> "No person who has in good faith, and without any intent to evade his liability as a stockholder, caused his stock to be transferred on the books of the bank when such bank is solvent to any resident of this state of full age previous to any default in the payment of any debt or liability of the bank, shall be subject to any personal liability for any contracts, debts or engagements of the bank."

Under this section mere presentation for transfer is not sufficient, but it is necessary to cause the transfer to be made on the stock ledger prior to the closing of the bank in order to escape liability. As the certificates were not presented at such a time that the transfer could be effected in the reasonable and ordinary course of business, it cannot be said that defendants have in legal effect caused their stock to be transferred upon the books of the bank within the holding of Whitney v. Butler (118 U.S.655); Matteson v. Dent (176 U.S.,521), and Richards v. Robin (178 App. Div.,535) cited by the defendants. In those cases the presentation for transfer was made long prior to the closing and the failure to cause the transfer to be made was due to the wrongful or negligent omission of the officers of the bank. In Earle v. Carson (188 U.S., 42, at p.53) the rule of Whitney v. Butler was formulated in the following language:

> "The court * * * proceeded to hold that the stockholder was not liable, because he had done everything in his power to secure the transfer, and hence his name remained on the register by the neglect of the officers of the bank."

Similar considerations dispose of the like defense pleaded by the defendant Catherine Samuels.

Al Schwartz -- This defendant was a depositor in the Bank of United States, and shortly prior to its closing the bank held in safekeeping for his account fifty shares of stock of the Bank of United States. The defendant signed an order directing the bank to sell his stock through the customary channels and also blank powers of attorney authorizing the bank to transfer title to the purchaser. The sale was effected through a brokerage house to which the certificates were delivered indorsed in blank. The stock was never transferred upon the stock ledger out of the name of the defendant Schwartz. There was no demand or request accompanying the instructions to sell, that the shares be transferred out of his name upon the stock ledger or that they be sold or delivered in other than the customary method of effecting sales of securities. Under the Personal Property Law (sec.162) delivery of a certificate indorsed in blank is proper and, moreover, this is the general and customary method. The direction to sell and deliver under the blank stock transfer power was the equivalent of express instructions to sell in the usual and customary way on the open market through such agencies as the bank might select. There was therefore no presentation of the stock for transfer upon the stock ledger nor any duty on the bank to cause the shares to be transferred thereon. This was essential to relieve the defendant from liability (Van Tuyl v. Robin, 80 Misc. 360; Commissioner v. Cosmopolitan Trust Co., 253 Mass., 205; Richmond v. Irwin, 121 U.S.,27; American Trust Co. v. Jenkins, 193 N.C.,761). The rule that mere notice to the bank that its stockholder of record is not the actual holder of the stock is no defense to the enforcement of the assessment reflects the same general principal (Broderick v. Pomerantz, 148 Misc.,188).

This also requires dismissal of the similar defenses asserted by the defendants Sam Schuster and Rose Silberstein.

J. Irwin Shapiro -- This defendant appears as a stockholder of record of twenty-five shares. On December 9, 1930, he sold this stock to one Birnbaum. Upon delivery of the stock he indorsed the certificates to Birnbaum and caused

his signature to be witnessed by a notary public, and at noon on December 9, 1930, Birnbaum presented the certificates for transfer to the stock transfer office, which refused to accept the certificate for transfer on the ground that the indorsement of Shapiro was not guaranteed by a bank or member of the New York Stock Exchange in accordance with the general custom and practice governing the operations of transfer offices established upon the trial. As I view it these guarantee requirements are reasonable and necessary for the protection of the corporation, and the mere attestation of the signature by a notary public is neither an actual nor substantial compliance with these essential requirements. The defendant therefore remains liable on the assessment.

In Telegraph Co. v. Davenport (97 U.S.369) the defendant transferred plaintiff's stock upon a forged indorsement. In sustaining judgment for the plaintiff the court said (pp.371,372):

> "The officers of the company are the custodians of its stockbooks, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner.***"

Nathan Hoch, Papazian Bros.--Shortly prior to the closing of the bank the defendant Nathan Hoch signed a written order instrucing the Public National Bank to purchase for his account fifteen shares of stock of the Bank of United States. Defendant testified that in making the purchase he was acting for one Reis, and so advised the Public National Bank and requested it to transfer the stock into the name of the latter. While I am disinclined to accept this version of the transaction, apart from the question of credibility defendant is nevertheless liable, since the error, if any occurred, was that of his own agent, for which he must bear the consequence.

The defense of Papazian Bros. is substantially similar and is disposed of accordingly.

John P. Brogan, Mary A. Brogan--On November 28, 1930, the defendants, the owners of certain Collateral Bankers bonds and Dairymen's League certificates, entered into an agreement with Warren R. Wallace & Co., Inc., a corporation doing business in the City of Syracuse, to exchange these securities for the Bank of United States units. On December 2, 1930, Wallace & Co., Inc., advised defendants that 84 shares of the Bank of United States stock were in the course of transfer into their names and on December 8, 1930, the certificates were actually transferred upon the stock ledger. Physical delivery of the certificates was made shortly after the closing of the bank and were immediately returned to Wallace & Co., Inc., upon the ground that the purchase had been induced by fraudulent representations. Thereafter an action was instituted against Wallace & Co., Inc. In the ensuing litigation against Wallace & Co., Inc., defendants testified that it was represented to them that the Bank of United States stock was stock of a governmental institution. The jury returned a verdict in favor of the

Brogans for the value of the securities which were delivered in exchange for the Bank of United States stock, and this verdict was upheld upon appeal (Brogan v. Wallace, Inc., 235 App. Div.,388). The facts recited relating to this litigation were introduced into evidence as a defense to this action. Plaintiff established that between December 2 and December 10, 1930, millions of dollars were deposited daily in the bank. It has been repeatedly held that fraud in inducing the purchase of stock, even if perpetrated by the bank itself, is no defense to the assessment (Scott v. Deweese, 181 U.S.,202; Commissioner v. Cosmopolitan Trust Co., 253 Miss., 205; Broderick v. Adamson, 148 Misc.,353). In such a case equities in favor of the stockholder against his vendor cannot affect or impair the right of depositors who entrust their money to the bank in partial reliance upon the assessment liability of its stockholders (Thompson v American State Bank of Detroit, 256 Mich., 245; Blackert v. Lankford, 74 Okl.,61; Stufflebeam v. De Lashmutt, 101 Fed.,367). The remedy of defendants, if any, is by way of indemnity against their vendor.

Arthur J. Rieser. --The defendant purchased and paid for 210 shares and directed his broker to transfer such shares to his son, also named Arthur J. Rieser. The stock was so recorded. Upon the question of fact presented I hold that the stockholder of record and the actual owner of these 210 shares at the time of the closing of the bank was the son, Arthur J. Rieser. The son, however, at the time of the purchase of the stock and until December of 1931, a year after the closing of the bank, was an infant under twenty-one years of age. The defendant is therefore liable, since he purchased these shares with his own funds and caused them to be transferred to an infant (Banking Law, sec. 120; Early v. Richardson, 280 U.S.,496; Broderick v. Aaron, Sternlieb, April 10, 1934, N.Y. Law Journal, App. Div., First Dept.). The 100 additional shares acquired in November of 1930 were purchased and paid for by the son, Arthur J. Rieser. As to these shares the defendant is entitled to judgment dismissing the complaint.

No costs will be awarded to either plaintiff or defendants.

Trial appearances for the Superintendent of Banks -
Carl J. Austrian, Arthur Ofner, Harold N. Cohen,
Edward Garfield and Maurice Cohen.

Mr. Edward Weitz assisted in the preparation for trial,
Mr. Isidore H. Cohen in the preparation of trial memoranda,
Mr. Joseph Singer in the preparation of pleadings, and
Mr. Louis Newman in the trial of the cross-claims and
impleaders.