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N. J. Court of Errors and Appeals.

HENRY A. V. POST,
Appellant,
v.
ANDREW KIRKPATRICK, RECEIVER, &C.,
Respondent.
AND
GEORGE BLAKE,
Appellant,
v.
SAME.

On Appeal from an Interlocutory Order of the Court of Chancery.

BRIEF OF J. E. HOWELL,

ON BEHALF OF ANDREW KIRKPATRICK, RECEIVER.

On February twenty-seventh, eighteen hundred and ninety-five, Andrew Kirkpatrick, receiver of the Domestic Sewing Machine Company, an insolvent New Jersey corporation, filed a bill of complaint in the Court of Chancery, against seven persons who were directors of the Domestic Sewing Machine Company, alleging that they, as directors of that company, had paid out large sums of money to the stockholders in the form of dividends, when in fact there had been no profits, and praying that these directors might jointly and severally account for and pay over to the receiver the amount of money so wrongfully paid out by them.

The bill was filed under the provisions of Section 7, of the Corporation Act, (Rev. p. 178,) which provides that in case the directors of any company shall make dividends except from the surplus or

net profits arising from the business of the corporation, or in case they divide, withdraw or in any way pay to the stockholders any part of the capital stock, or reduce the capital stock without the consent of the legislature, said directors shall be jointly and severally liable to the creditors of the company in case of insolvency, for the full amount of the payments so made by their authority.

Three of the directors, who were made parties defendant to this bill, including Mr. Post and Mr. Blake, the appellants in this case, reside out of the State of New Jersey ; Mr. Post being a resident of New York, and Mr. Blake a resident of North Carolina.

These defendants were returned by the Sheriff of Essex as non-residents, and thereupon, on March 23, 1895, the usual order for publication was made against them, requiring them to appear, plead, answer or demur to the bill of complaint on or before May 24, 1895, and in pursuance of this order, the usual notice of the order was published and mailed to these two appellants.

Just before the expiration of the time to answer, these appellants obtained leave of the Court of Chancery to enter a special appearance for the purpose of contesting the right of the Court to make the order for publication against them. Such special appearance was entered, and thereupon the appellant moved to set aside the order for publication as illegally and improvidently entered. This motion was heard on the appellant's petition and the receiver's answer thereto. After the argument an order was entered denying the application. From this order the appellant's appeal is taken.

I.

THE NON-RESIDENT DEFENDANTS ARE PROPER AND NECESSARY PARTIES TO THE SUIT.

Gaffney v. *Colvill*, 6 Hill. 567.

This was a common law action, brought by a shareholder against a director of a bank to recover against him for the payment of dividends, when in fact none had been earned. The statute is in the same words as those contained in the 7th section of our corporation act. The opinion is by BRONSON. He held that the action was not properly brought against one director; it must be against the whole board, for the reason that the thing complained of could be done only by the board of directors. Our act controls the action of "*the directors* of any "bank, monied or manufacturing corporation." It is *the directors* who may not make dividends, &c., and in case of violation of the provisions of the law, it is *the directors* who are liable jointly and severally.

It will be noted that the act does not provide that *each* director, &c., shall be liable; it is *the directors*.

Franklin Fire Ins. Co. v. *Jenkins*, 3 Wend. 130.

The liability is joint *and* several, not joint *or* several. If more than one is sued, all must be brought in. Each defendant has a right to defend severally, and is entitled to such joint defence as he can make with the others. Besides, it may appear that the action of the Board, in declaring the unearned dividends, was induced by the representations of certain members of the Board, in which case there might be equities between them to adjust.

If it should be held that there was contribution among them, as is sometimes held in negligence cases, then it would be necessary to make the whole Board parties.

Ashurst v. *Mason*, L. R., 20 Eq., 225, 236.

Again—the penalty of our statute, which this suit seeks to enforce, will not be enforced against these appellants in the States in which they are domiciled.

Derrickson v. *Smith*, 3 Dutch. 166;

Thompson's Liability of Officers, (p. 455, Sec. 19.)

It is therefore the duty of the receiver to attempt to call them to account in this jurisdiction—the only forum in which he could hope to succeed.

II.

THE APPELLANTS HAVE SUBMITTED THEMSELVES TO THIS JURISDICTION.

The appellants are shareholders in and directors of the Domestic Sewing Machine Company—a corporation organized under the laws of New Jersey. They hold their interests in the company by virtue of the laws of New Jersey, and their shares are apportioned and distributed in accordance with our statutory provisions. They hold their offices of directors, and all their official acts were and are guided and given effect to, under and by virtue of the same authority.

These are the facts, and from them I deduce the proposition that, so far as these appellants are concerned, they must be held—either to have a domicile in New Jersey for all purposes of corporate action and corporate liability—*or* they must be held to have submitted themselves to our jurisdiction, both as to the substantive corporation law and the rules of procedure in our courts, in so far as relates to their rights, duties, obligations and liabilities as members of the corporation.

This seems to be the English rule.

Copin v. *Adamson*, L. R., 9 Exch 345; 1 Exch. Div. 17.

Bank of Australia v. *Harding*, 9 C. B. (M. G. & S.) 661.

Bank of Australia v. *Nias*, 16 A. & E. (N. S.) 717.

See also the last paragraph of the opinion of FIELD, *J.*, in *Pennoyer* v. *Neff*, 95 U. S., at p. 735, where he cites *Copin* v. *Adamson*.

See the collation of cases on this subject in—

Gibbs v. *Queen Ins. Co.*, 63 N. Y. 114.

The general corporation law is the company's charter.

Ellerman v. *Junction Ry. Co.*, 4 Dick. 217.

Every provision of it is binding on these appellants. The act of the legislature providing remedies against the directors, is just as much a part of the corporation act as if it had been included under its title. The corporation act, which is the charter of the company, is only a part of the general body of our law, and the seventh section, under which this suit is brought, must have read into it, and made a part of it, all the provisions of the law of the State, and all the rules of practice and procedure, which go to make the remedy provided by the act an effective remedy.

Besides this, the appellants have voluntarily come into court and have expressly submitted themselves to its jurisdiction.

They are creditors of the Domestic Sewing Machine Company, and have proved their claims before the receiver, who is proceeding against them in this suit. By so doing they have made themselves parties to the original administration suit, and they therefore are bound by any decree which may be made therein. They were probably parties thereto, under our law, without such action,

but the proof of claims by them is an express appearance in the cause, which gives the Court undoubted jurisdiction to make decrees for or against them in that suit.

Now, the present suit against the directors is merely ancillary to the main case. It is part and parcel of the general administration of the assets and estate of the insolvent corporation ; its purpose and effect is the purpose and effect of the original suit.

White v. *Ewing*, U S. Sup. Court, June, 1895, to be reported in 159 U. S., where the Supreme Court held, on the authority of previous cases, that a suit by a receiver to collect the assets of a corporation is ancillary to the main suit, and that the Federal Court would take jurisdiction without regard to the citizenship of the parties, the main suit having been instituted in the Federal Circuit Court. I make the following quotation from the opinion :

> " The Circuit Court obtained jurisdiction over the Cardiff Coal and Iron Company by the filing of the original creditor's bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver, and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defence of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties, or of the amount in controversy. *Freeman* v. *Howe*, 24 How. 450. 460 ; *Krippendorf* v. *Hyde*, 110 U. S. 276 ; *Dewy* v. *West Fairmount Gas Coal Co.*, 123 id., 29 ; *In re* Tyler, 149 id. 164, 181 ; *Root* v. *Woolworth*, 150 id. 401, 413 ; *Rouse* v. *Letcher*, 156 id. 47, 49. Indeed, it was conceded that, where an insolvent corporation is placed in the hands of a receiver of the Circuit Court, such appointment draws to the jurisdiction of that court the control of its assets, so far as persons having claims to participate in the distribution of such assets are

concerned, and that parties must go into that court in order to assert their rights, prove their demands, and receive whatever may be due them, or their share or interest in the estate. But it is insisted that there is a distinction between cases where parties are brought before the court for the purpose of the payment to them of claims they may hold against the estate, and cases where it is sought to recover of them claims which the receiver insists they owe the estate; that the receiver stands in the shoes of the company, and has no higher rights than the corporation, and having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed. This position is entirely correct, so far as the right of the receiver to recover upon the merits is concerned; but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits. The receiver does not take his authority as an ordinary indorsee of the paper, and subject to the disability to sue in the Federal Court, which attaches to such indorsee, but he takes title by operation of law and as an instrument of the court which appointed him."

If this is to be regarded as a statement of the law, then the result seems to be that all suits to which the receiver is a party, and which relate to the collection of the assets or to the rights and duties of the parties in interest among themselves, are parts of one general scheme of administration.

In *National Condensed Milk Co.* v. *Brandenburgh*, 11 Vroom, 111, it was held that if a foreign corporation makes a contract in this State it thereby submits itself to the jurisdiction of our laws, so as to be liable to suit here when summoned in accordance with our laws.

A fortiori, a foreign director of a New Jersey corporation, who takes his office and exercises its functions under our laws, should be held to be liable to answer for any violation of those laws when brought into court under the rules of procedure which were in force at the time the violation complained of was committed.

III.

The Practice.

It is not proper practice to vacate the order for publication on motion. It can be done only by an appeal.

Gifford v. *Thorn*, 3 Halst. Ch. 90 ;
Pennoyer v. *Neff*, 95 U. S. 714,

or by showing that the affidavit, which is the foundation of the order, was false.

The order for publication is not violative of the fourteenth amendment to the Federal Constitution. It was made on an affidavit of the facts required by one statute, and is in the form prescribed by the statute and rules of practice.

IV.

The Scope and Effect of the Decree.

If a final decree should be made in this cause against the appellants, it will be a valid decree in so far as it affects or reaches property belonging to them in this State, even though they are held not to have assented to the jurisdiction, or to be personally bound by the decree.

Mutual Life Ins. Co. v. *Pinner*, 16 Stew. 52.
Swan Land Co. v. *Frank*, 148 U. S. 614.
G. & B. Sewing Machine Co. v. *Radcliffe*, 137 U. S. 297.

It certainly will be a good decree so far as it may affect property which is under the control of the Court of Chancery in the main suit. This would include the claims filed by them with the receiver and their interest as shareholders in the company.

Pennoyer v. *Neff*, 95 U. S. 714, is authority for holding that a personal decree can not be obtained which would be valid in external jurisdiction with-

out service of process, but Mr. Justice Gray, in the later case of—

Hart v. *Sansom*, 110 U. S. 151, at p. 153,

says, in speaking of the substituted service by publication, "The courts of the State might, perhaps, "feel bound to give effect to the service made as "directed by its statutes. But no court deriving "its authority from another government will recog- "nize a merely constructive service as bringing the "person within the jurisdiction of the court."

And in—

Freeman v. *Alderson*, 119 U. S. 185,

Mr. Justice Field extends the jurisdiction of the court to property that has been brought "under the control of the court." The control which the Court of Chancery has over the claims and interests of the appellants in the main suit is sufficient to give jurisdiction in this case to the extent of reaching any property of the appellants which is so controlled.

If this is not so, then there is no way by which the claims of the receiver against the appellants can be collected. There can be no attachment at law, there is no express common law lien, and unless the property in the hands of the receiver and under the control of the Court, can be held to answer the claim of the receiver, the legislature has given us a futile remedy.

If the courts of our own State may not bring parties in by publication, and subject them to the performance of judgments and decrees, within this jurisdiction, then there is a large class of legislation in this and other States which must be held to be unconstitutional; for example:

Proceedings in Chancery against non-residents, P. L., 1893, p. 199. Rev. p. 106, Secs. 18, 19, 20, 21.

Notice to non-resident officers of corporations,
Rev. p. 108, sec. 22.
Notice to unknown parties in foreclosure suits,
P. L., 1892, p. 192.
Notice to defendants on bills to quiet title,
P. L., 1891, p. 96.
Notice in proceedings for the sale of lands of persons presumed to be dead,
P. L., 1889, p. 28.
Notice in suits when it is unknown whether parties defendant are living or dead,
P. L., 1893, p. 256.
Notices in partition suits, Rev. p. 1375.
Fieri facias Rev. p. 879, Sec. 202.
Proceedings against non-residents in local actions,
P. L., 1878, p. 141.
Citations in Orphans' Courts,
Rev. p. 786, Secs. 155, 156.
Lien claim summons,
Rev. p. 672, Sec. 18.
Actions against foreign corporations,
Rev. p. 193, Secs. 90 and 91.
Amending pleadings in common law actions by adding non-resident defendants,
Practice act, Sec. 39.
Notice to non-resident executor, Rev. 780.
Notices to non-resident heirs and devisees, Rev. 477.
Notices against non-residents and foreign corporations who own or control property in New Jersey, where the cause of action arose in this State and the plaintiff resides here,
P. L, 1895, p. 380.

These are merely examples of a class. The number could probably be largely increased.

In none of the cases above provided for does the Court have any control of, or any lien or other hold upon property. This list omits the attach.

ment act, the act giving liens on vessels and other acts of like character.

The inhibition of the Federal Constitution referred to in *Pennoyer* v. *Neff*, 95 U. S. 714, is against the enforcement of laws by any State which deprive the defendant of his property.

The order for publication deprives the appellants of nothing, and if the points which I have made are deemed by the Court to be sound, then the long line of cases in the Federal Supreme Court, led by *Pennoyer* v. *Neff*, have no application to the case in hand.

I may say, however, that all the Federal cases in which this question is discussed, arose out of attempts to enforce void judgments or decrees, and in no case, so far as I have discovered, was any attempt made to set aside the decree, or any proceeding on which it was founded, by any direct attack in the court in which the judgment or decree was pronounced.

The Supreme Court has already seen the far-reaching result of the broad rule laid down in *Pennoyer* v. *Neff*, and they have limited its operation to cases in which the void judgment or decree is attempted to be used to deprive a defendant of his property.

York v. *Texas*, 137 U. S. 15.
Kaufman v. *Waters*, 138 U. S. 285.

I submit that the order appealed from should be affirmed.

J. E. HOWELL,
Of Counsel with Receiver.

New Jersey Court of Errors and Appeals.

Between—
HENRY A. V. POST,
Appellant,

AND

ANDREW KIRKPATRICK, Receiver, &c.,
Appellee.

On Appeal from Order in Chancery.

Between—
GEORGE BLAKE,
Appellant,

AND

ANDREW KIRKPATRICK, Receiver, &c.,
Appellee.

On Appeal from Order in Chancery.

BRIEF OF J. C. O'CONOR ON BEHALF OF THE APPELLANTS.

Statement of Facts.

The Receiver of the Domestic Sewing Machine Company, the appellee, filed a bill against Post, the appellant, impleaded with others, charging that Post, as a director of the company, had declared a

dividend in excess of the earnings, and prayed judgment against him personally for the amount of such excess so paid. The bill does not allege that any of the acts complained of were done within the State of New Jersey.

The defendant Post was never served with a subpœna within the State of New Jersey, and upon the appellee's application, it being made to appear by affidavit that the said Post, resided out of the State of New Jersey, an order was made that process should be served upon him by publication. By this order the defendant was directed to appear on or before the 24th of May, 1895. On the 22d of May, 1895, the defendant Post appeared for the sole purpose of applying to set aside the order of publication made against him, and at the same time upon his petition stating that he was a resident of the County of Suffolk in the State of New York, and that no subpœna had ever been served upon him, an order was granted directing the appellee to show cause why the said order of publication should not be set aside as illegally and *improvidently* entered. To this petition of the appellant, the appellee filed an answer. The matters therein set forth the appellant claims to be immaterial, and cannot be used in support of the order as its validity is to be determined from the papers upon which the Court acted and not from papers subsequently presented.

The case of the appellant Blake, is substantially the same as that of Post.

The argument was had before Vice-Chancellor Emery, who discharged the rule to show cause. The defendant Post thereupon appealed to this Court.

Argument.

The object of this suit is to recover a sum of money only. No other relief than a money decree is asked for. It is an action *in personam* and in no sense an action *in rem*. The suit is not brought to define any rights of property, but to recover a sum

of money which the plaintiff claims is due to him from the defendant Post by reason of the wrong-doing of the defendant. The statute is highly penal and the Court will not enforce it unless the plaintiff is in his strict right.

There is no allegation in the bill that shows the Court of New Jersey has jurisdiction over the subject matter. The bill shows that the New Jersey corporation was but a name as far as New Jersey was concerned; that all the business in New Jersey was done by the Domestic Manufacturing Company and that all the business of the Domestic Sewing Machine Company was done outside the State.

See page 5, lines 30–40, page 3, lines 20 to 30.

The bill does not show that any of the dividends were declared or paid in the State of New Jersey.

Nor is the appellant Post a necessary party hereto. The statute permits suits of this character to proceed severally as well as jointly.

The appellant now urges that the order of publication made against him should be vacated. First, because the bill of complaint is not sufficient for the Court to assume jurisdiction over the subject matter; and secondly, because being an action *in personam* it would be improvident to make an order which would lead to nothing and which the Court could not enforce.

It is manifest that the Court of Chancery has no jurisdiction over the appellant Post, nor has the Court any power to assume jurisdiction by permitting a solely personal decree to be entered against him.

It is a universal principal recognized by all Courts that before a Court can render a personal decree against a defendant process must be served upon the defendant while within the jurisdiction of the Court. This is the only safe rule, and any departure therefrom will not be permitted when the matter is brought to the serious attention of the Court.

This rule of the common law was, and we believe is, the law of New Jersey. This sound doctrine was laid down by the Chancellor in Gifford *vs.* Thorne, 3 Hal. Ch., 90–96. The Chancellor says: "So far as "relates to the obtaining a decree against him per- "sonally, ordering him to pay the money he had "received, no such decree can be made unless the "Court acquire jurisdiction over his person; and "this order would not give such jurisdiction." And, again, in the same case he says: "The Court "would not make a decree it had no power to en- "force" (p. 97).

There was no attempt to depart from this rule until the case of the Mutual Life Insurance Company *vs.* Pinner.

The opinion of the late Vice-Chancellor Van Vleet clashes directly with the doctrine of the late Chancellor Halsted just referred to and holds that where the defendant is notified by publication a decree against him "is in all respects just as valid "and effectual for all local purposes as a decree "made against a defendant who has been brought "into Court by personal service."

The late Vice-Chancellor fell into error because he made no distinction as to the law-making power over a resident and a non-resident. It is true the statutes of New Jersey can provide how residents of the State may be brought before its Courts, and it may provide the form by which non-residents may be invited to appear before its tribunals, but the Legislature cannot enforce a statute bringing non-residents before its Courts, nor can the Legislature pass any statute conferring jurisdiction over non-residents. Statutes cannot confer jurisdiction over persons not subject to legislative power. "The laws of the State having no operation outside "of its territory, except so far as may be allowed "by comity, its tribunals cannot send their citation "beyond its limits and require parties from other "domiciles to respond to proceedings against them; "a publication of citation within the State cannot

"create any greater obligation upon them to "appear."

Freeman *vs.* Alderson, 119 U. S., 185.

We see, therefore, that the decision of Vice-Chancellor Van Vleet was occasioned by his mistake as to the legislative power.

Following his decision to its legitimate conclusion an execution could issue against the property of the non-resident defendant and his property be taken from him, although he were never personally served in the action. But this doctrine has been pronounced unconstitutional and a judgment so obtained invalid by the Supreme Court of the United States in the well-known case of Pennoyer *vs.* Neff, 95 U. S., 714, and under this case the judgment so granted by the State Courts would be powerless to take the property of the non-resident defendant not personally served with process.

The question, therefore, now presented is: Will the New Jersey Court permit a decree to be made against a non-resident defendant, which decree can have no local or extra territorial effect? Will it enter up a decree which cannot be enforced either at home or abroad?

The question has been passed upon by the Courts of Massachusetts and New York and has, as will be shown hereafter, been in both States decided in the negative.

The rule in Massachusetts is the rule of common sense. It is: "A court of equity can only deal "with persons who can be compelled by process to "perform its decrees; and with property which is "either situated within the limits to which its jur-"isdiction extends, or which can be reached through "the action of parties who are amenable to its authority" (Moody *vs.* Gay, 15 Gray, 457–458). This is the same rule laid down in New Jersey by Chancellor Halsted in the case of Gifford *vs.* Thorne above referred to. It is the same rule which the Supreme Court of the United States says is sonnd and fully

protected by the fourteenth amendment, and is the rule upon which we rely.

It would seem to be childish to enter up a judgment which would avail nothing, and under which the property of the appellant could not be taken nor his actions controlled. Courts do not sit for pleasure or enter up judgments for amusement.

This common sense rule in Massachusetts has been followed to its logical sequences by its courts and a judgment *in personam* against a non-resident is declared invalid where the defendant is not served within the commonwealth and does not appear in the action.

Elliott *vs.* McCormick, 144 Mass., 10.
Needham *vs.* Thayer, 147 Mass., 536.
Stone *vs.* Wainright, 147 Mass., 201.
Rand *vs.* Hanson, 154 Mass., 87.

The learned Vice-Chancellor delivering the opinion below while he referred to the first two of these cases, and also remarked that the rule laid down by the United States Supreme Court had not been referred to by Vice-Chancellor Van Vleet, yet allows himself to fall into error by failing to distinguish between the right of the legislature to prescribe how its own citizens may be served with process, and the utter inability of that legislature to make a valid service outside of the State upon a non-resident that will warrant a personal judgment against such non-resident. Nay, more, he fails to notice that upon the application for a decree it is the duty of the Chancellor in the first instance to ask if the non-resident has been served with process within the State, or if he has appeared in the suit, action or proceeding, and if he has not been so served, and has not appeared the Chancellor should decline to make a personal judgment against him.

The exact question never could arise in New York because the Courts of that State never did attempt to enter up a personal judgment against a non-resident where he had not been served within the State

by process. And in that State while publication is in certain cases permitted, it will not permit a judgment to be entered unless the plaintiff shall produce the following papers; First, proof by affidavit, that a warrant of attachment, granted in the action, has been levied upon the property of the defendant. Second, a description of the property so attached, verified by affidavit, with a statement of the value thereof, according to the inventory.

Section 1217, Code of Civil Procedure.

But the Courts of that State have held that no order for publication can be granted unless from the bill of complaint itself, duly verified, a cause of action appears of which the Court can take cognizance without personal service of process within its jurisdiction upon the defendant; and the Court of Appeals vacated an order for the publication of a summons upon a non-resident trustee, under the will of a resident of the State, holding the legal title to real property there, upon the ground that the action was a merely personal one and jurisdiction could not be obtained by publication.

Paget *vs.* Stevens, 143 N. Y., 172.

And so also in an action for fraud where it was charged that the defendant had left the State with intent to defraud the plaintiff, the Court vacated the order for publication and said "The Court "can give no relief and the impropriety of issuing "an order which, if it leads to judgment, 'would "operate on nothing in the State and be regarded "by nobody out of it' becomes apparent. It offends "every principle by which the jurisdiction of a "Court can be vindicated and should not be allowed "to stand."

Bryan *vs.* University Pub. Co., 112 N. Y. 382.

Capitol State Bank *vs.* Parent, 134 N. Y. 527.

In the case at bar the bill alleges the personal wrong-doing of the appellant Post and charges that he, with others, have wrongfully paid out assets of the corporation and seeks to recover the money back. This is strictly a personal action and asks for a judgment only against the appellant. It is founded on a tort and there is no allegation that the wrongful act was committed in this State. Nor does the fact that the wrongful act was committed by the defendant while a director of the New Jersey corporation make any difference.

The New Jersey corporation law does not provide that directors of corporations shall be amenable to any law or process in force in New Jersey. On the contrary, it contemplates that all the business may be done without the State and contents itself with providing that the corporation only shall keep an office in this State, and so takes care that the corporation itself can always be reached by process. The law also contemplates that the directors may never be within the jurisdiction, and provides that only one director must be a resident of the State. It has even extended the law in this regard, as formerly the statute required a majority of the directors to reside within the State; and if it had been intended to have the directors amenable to any process, the law would have so stated, or else provided that all the directors must be residents of the State. It is obvious that a money decree cannot be entered against a defendant director for wrong done by him, either within or without the State, unless personally served by process; and this is particularly so when, as in the case at bar, the bill contains no averment that the wrong complained of was done within the State of New Jersey.

If the Legislature had contemplated having the directors at all times amenable to process, it might, by its laws, have required as a condition precedent to the granting a charter to the corporation, or to transact business within the State, that every direc-

tor should appoint an agent upon whom, or designate a domicile at which, service might be made within the State; and providing he fail to so do, the directors might be proceeded against by publication. But in default of any such provisions there is no special authority or contract authorizing the courts to proceed. An indictment might be found against one for a crime perpetrated within the State, but the person charged could not be tried or convicted unless personally brought within the jurisdiction. How, then, can the Court proceed against the defendant for a personal injury and enter up judgment against him upon a personal demand without first bringing him within the jurisdiction?

The case of York *vs.* Texas, 137 U. S., 15, and Kaufmann *vs.* Wootters, 138 U. S., 285, referred to by the learned Vice-Chancellor in his opinion refusing to vacate the order of publication would seem, upon examination, to rather suggest the propriety of his vacating the order. In this action it appeared that the statutes of Texas provided that there could be no special appearance to question the jurisdiction of the Court, but that such special appearance should be deemed a general appearance. "In Texas "by its statute, if he asks the Court to determine "any question, even that of service, he submits "himself wholly to its jurisdiction." And the Court held that this denial of a right to be heard before judgment simply as to sufficiency of service did not operate to deprive the defendant of liberty or property or any of his constitutional rights and therefore was not within the fourteenth amendment but the Court, while admitting the Texas Legislature had the power to declare a special appearance for any purpose should be considered a general appearance for all purposes, questions the propriety of the statute and at the same time asserts if the defendant had failed to appear in the suit, any judgment entered against him would have been invalid. Listen to its words: "It certainly is more con- "venient that a defendant be permitted to

"object to the service, and raise the ques-
"tion of jurisdiction, in the first instance,
"in the Court in which suit is pending. But mere
"convenience is not substance of right. If the
"defendant had taken no notice of this suit, and
"judgment had been formally entered upon such
"insufficient service, and under process thereon his
"property, real or personal, had been seized or
"threatened with seizure, he could, by original
"action, have enjoined the process and protected
"the possession of his property. If the judgment
"had been pleaded as defensive to any action
"brought by him, he would have been free to deny
"its validity. There is nothing in the opinion of
"the Supreme Court, or in any of the statutes of
"the State, of which we have been advised, gain-
"saying this right."

Nor do the cases, Minton *vs.* Vail, 5 Vroom, 418, and the Consolidated Electric Storage Co. *vs.* The Atlantic Trust Co., 5 Dick, Ch. 93, suggest any right or relief to the defendant served by publication. These cases are merely declaratory of the common practice, that where it is evident from the judgment entered that no cause of action was alleged, or the cause alleged, was not within the jurisdiction, the Courts of New Jersey would grant relief.

And the statute of New Jersey attempts to conclude the defendant served by publication from any relief.

Section 19 of the Revision expressly provides that a person served by publication shall be bound by the decree in such cases as if he were served with process within the State, thus attempting to give the statute of New Jersey an extra territorial effect.

But, on the other hand, no case can be stated showing relief to be granted by reason of service by publication alone; on the contrary, where a personal judgment has been granted upon publication, the Court has refused relief.

Mutual Life In. Co. *vs.* Pinner, 16 Stewart, 52, cited *ante.*

And a perfectly proper manner to raise the question, as suggested by the Supreme Court of the United States, as to the right of the Court to proceed, is, by motion, to vacate an order for publication.

Von Hesse *vs.* McKay, 55 Hun, 365, at p. 373.

The case of Penoyer *vs.* Neff is the leading authority for the doctrine that publication of the summons on a non-resident will not support a personal judgment against him, and this case was decided in 1887, and has ever since been continually followed down to the present time, and as time rolls on this decision seems to gain in force. Without following seriatim the decisions from that time to this, we beg to refer as examples to three of late date.

Wilson *vs.* Seligman, 1891, 144 U. S., 44.

Scott *vs.* McNeil, 1893, 154 U. S., 46.

Goldy *vs.* Morning News, 1894, 156 U. S., 521.

In 1891, the Supreme Court says: "The general "principles applicable to this subject were clearly "and exhaustively discussed by this Court, speak- "ing by Mr. Justice Field, in Pennoyer *v.* Neff, "95 U. S., 714, from which it will be sufficient to "quote a few sentences: 'Every State possesses "exclusive jurisdiction and sovereignty over per- "sons and property within its territory,' and 'No "State can exercise direct jurisdiction and au- "thority over persons or property without its ter- "ritory, p. 722.' 'It is in virtue of the State's "jurisdiction over the property of the non-resident "situated within its limits, that its tribunals can in- "quire into that non-resident's obligations to its own "citizens, and the inquiry can then be carried only "to the extent necessary to control the disposition "of the property, p. 723.' 'Where the entire "object of the action is to determine the personal

" rights and obligations of the defendants; that is, " where the suit is merely *in personam*, construc- " tive service in this form upon a non-resident is " ineffectual for any purpose. Process from the " tribunals of one State cannot run into another " State and summon parties there domiciled to " leave its territory and respond to proceedings " against them. Publication of process or notice " within the State where the tribunal sits cannot " create any greater obligation upon the non- " resident to appear. Process sent to him out of " the State and process published within it are " equally unavailing in proceedings to establish " his personal liability, p. 727.' 'A judgment " which can be treated in any State of this Union " as contrary to the first principles of justice " and as an absolute nullity, because ren- " dered without any jurisdiction of the tribunal " over the party, is not entitled to any respect in the " State where rendered, p. 732.' 'To give such " proceedings any validity, there must be a tribunal " competent by its constitution, that is, by the law " of its creation, to pass upon the subject matter of " the suit; and if that involves merely a determi- " nation of the personal liability of the defendant, " he must be brought within its jurisdiction by " service of process within the State, or his vol- " untary appearance."

In 1893 the same tribunal says: " The words, " 'due process of law,' when applied to judicial " proceedings, as was said by Mr. Justice Field, " speaking for this Court, ' mean a course of legal " proceedings according to those rules and princi- " ples which have been established in our systems " of jurisprudence for the protection and enforce- " ment of private rights. To give such proceedings " any validity, there must be a tribunal competent " by its constitution—that is, by the law of its " creation—to pass upon the subject-matter of the " suit; and, if that involves merely a determination " of the personal liability of the defendant, he must " be brought within its jurisdiction by service of

"process within the State, or his voluntary appear-
"ance."

"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 in 1894 it also says: "It is an elementary
"principle of jurisprudence that a Court of justice
"cannot acquire jurisdiction, over the person of
"one who has no residence within its terri-
"torial jurisdiction, except by actual service
"of notice within the jurisdiction upon him or upon
"some one authorized to accept service in his be-
"half, or by his waiver, by general appearance or
"otherwise, of the want of due service. Whatever
"effect a constructive service may be allowed in
"the courts of the same government, it cannot be
"recognized as valid by the courts of any other
"government."

This court is then now called upon to decide: First, Will it follow the sensible rule laid down by Chancellor Halsted and decline to entertain a suit against a defendant not having been personally brought within the jurisdiction, or Secondly, Will it permit a judgment to be entered which will be a mere idle ceremony and under the supreme law of the land ineffectual to operate either on person or property, except perhaps to tarnish credit or good name.

It is respectfully submitted the order of publication should be vacated if not illegally, certainly as improvidently granted.

J. C. O'Conor.

Livingston Middleditch Co., 149 to 153 Leonard St. Telephone Franklin 186.

New Jersey Court of Errors and Appeals.

Between—

HENRY A. V. POST and GEORGE BLAKE,
Appellants,

AND

ANDREW KIRKPATRICK, Receiver, &c.,
Appellee.

On appeals from Orders in Chancery.

Brief of R. V. Lindabury for Appellants.

These appeals are from orders in Chancery denying appellants' petition, for the vacation of an order of publication made against them as absent defendants in a suit instituted by the Receiver of the Domestic Sewing Machine Company of New Jersey. The appellants are non-residents, and the action is purely personal, the object being to recover from the appellants and others, certain dividends alleged to have been illegally declared by them as directors of said company out of its capital instead of out of its earnings.

The only questions for review are whether or not the Court of Chancery had power to make the order of publication complained of, and if it did not, whether or not such order should have been set aside on appellants' application at this time. I submit :

FIRST.

That such order was not authorized by our Chancery Act.

As is well known, no court, independent of statutory provision, can acquire jurisdiction over non-resident defendants in personal actions, except by service of process within its territorial jurisdiction or by voluntary appearance.

> *Noble* v. *Union River Logging R. R.*, 147 U. S., 165, 173.
> *Mexican Central Railway Co.* v. *Pinkney*, 149 U. S., 194, 209.

In his work on *Modern Equity Practice*, at section 186, *Mr. Beach* states the rule thus: "Substituted service by publication or in any other authorized form may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the Court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State or of some interest therein by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a

non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability."

Has this rule been altered by our Chancery act?

The 18th section of this act (Rev., p. 106) provides "that in case of a bill filed against any defendant against whom a subpœna or other process to appear shall issue, and such defendant shall not cause his appearance to be entered in such suit, as according to the practice of said Court the same ought to be entered, in case such process has been duly served, and it shall be made to appear, by affidavit or otherwise, to the satisfaction of the Chancellor that such defendant is out of the State or cannot, upon due inquiry, be found therein, or that he conceals himself within this State, every such defendant shall be deemed and taken to be an absent defendant, and thereupon the Chancellor may, by order, direct such absent defendant to appear, plead, answer or demur to the complainant's bill at a certain day therein to be named; * * * and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, * * * the Chancellor may order and direct that the complainant's bill be taken as confessed against such absent defendant so failing to plead, answer or demur, or the Chancellor may, at his discretion, order the complainant to produce documents, depositions, exhibits or other evidence to substantiate and prove the allegations in the bill, or the Chancellor may examine the complainant on oath or affirmation touching or concerning the allegations in the bill, and thereupon such decree shall be made in either case as the Chancellor shall think equit-

able and just, and that the provisions of this section shall apply to petitions and bills for divorce."

The nineteenth section provides "that any defendant upon whom such notice is served as herein directed, shall be bound by the decree in such cause as if he were served with process within this State" * * *.

These two sections, with slight alterations immaterial to the questions in this case, were re-enacted by the Legislature in 1893 (Pamphlet Laws, 1893, p. 199).

Where in these sections is to be found authority for making an order of publication in a proceeding *in personam?* The order of publication here provided for is to be followed by a decree *pro confesso*, which itself is to be followed by a final decree of such character as the defendant's confession or the complainant's proofs may warrant, and this decree is to bind the defendant "as if he were served with process within the State." It is plain, therefore, that an order of publication is only authorized in those cases where the Court can proceed to interlocutory and final decree. Now while this can be done in a proceeding *in rem* for the reasons stated by Mr. Beach as above, nothing is better settled than that it cannot be done, and cannot be authorized to be done in an action *in personam*.

22 *Am. & Eng. Enc. of Law*, p. 140.
Cooley on Cons. Lim., p. 186.
Pennoyer v. *Neff*, 95 U. S., 714.
Freeman v. *Alderson*, 119 U. S., 185.

And this was the situation when the Chancery act was revised by the Legislature in 1874, for the Fourteenth Amendment had then become a part of the Constitution of the United States; and when the 18th and 19th sections of the Chancery act were re-enacted in 1893, the true meaning of the Fourteenth Amendment in this respect had been authoritatively made know to all men by the decisions in *Pennoyer* v. *Neff* and *Freeman* v. *Alderson*.

I submit, in view of these considerations, that what the Legislature intended to authorize was an order of

publication in proceedings *in rem*, ~~not one~~ but one which they had a right to authorize in proceedings *in personam*, which they had no power to authorize. And this construction is strengthened, I think, by the clause at the end of Section 18 extending its provisions to actions for divorce. This would seem to be superfluous if the clause at the beginning of the section embraces all manner of actions.

SECOND.

But if the statute was intended to authorize such an order, the Court was still without power to make it, because in that view the statute was contrary to the Federal Constitution.

That no Legislature can authorize a court to pronounce judgment against a non-resident in a personal action who is not served with process within its territorial jurisdiction, and who does not voluntary appear, was expressly decided in *Pennoyer* v. *Neff* and *Freeman* v. *Alderson* (*supra*). In the former case it was declared that a judgment of that charactar recovered in the State of Oregon, under a statute expressly authorizing it, was "without any validity." In the latter case the same was declared with respect to a judgment recovered in the State of Texas.

In *Eliot* v. *McCormick*, 144 Mass., 10, Morton, C. J., said: "The Fourteenth Amendment to the Constitution of the United States provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.' The Supreme Court of the United States has held in recent decisions that, under this provision, it is not competent

for a State court to render a judgment *in personam* against a person who is not a resident of the State, who does not appear in the suit, and who is not served personally with process within the State. It is held that, where property of a non-resident defendant is found within the State, the State court may attach it on the writ, and may proceed to a judgment so far as to apply the property to the debt; but if there is no appearance of the defendant, and no personal service on him, a judgment rendered against him personally is void, and has no effect beyond the property attached, and no suit can be maintained on such judgment, either in the same or in any other court."

In *Needham* v. *Thayer*, 147 Mass., 536, the Court said, "The question of the validity of a judgment rendered by a court of this State against a defendant, who was not a resident of the State, and who was not served personally with process within the State, was considered in *Eliot* v. *McCormick*, 144 Mass., 10, 10 N. E. Rep., 705. In that case this Court, following the decisions in the Supreme Court of the United States, held that such judgment contravened the fourteenth article of the amendments of the Constitution of the United States, and was invalid, and would be reversed upon a writ of error. The case at bar presents the question whether, in a suit in this State upon such a judgment, the defendant may show, by plea and proof, that it is invalid. The recent cases in the Supreme Court of the United States go upon the ground that a judgment *in personam* against a person who is not a resident of the State, who has not been personally served with process, and who has not appeared, is wholly void, and that no suit can be maintained on it, either in the same or in any other Court, *95 U. S., 714-732;* 119 U. S., 185. The Court has no jurisdiction, and its judgment has no force either in the State in which it was rendered or in any other State. This being so, the judgment cannot be enforced by a suit upon it; and the non-resident cannot be deprived of the right to show by plea

and proof, if such suit is brought, that the judgment is void, without an abridgement of his privileges and immunities, to protect which was the object of the fourteenth article of amendment. To compel him to resort to our courts by a writ of error, in which he must file a bond if he would obtain a stay of execution, is to impose a burden upon him, and thus to abridge his privileges and immunities. It has been held in many cases that a domestic judgment cannot be impeached by plea and proof in a suit brought upon it, because the proper remedy is a writ of error, *105 Mass., 26*, and cases cited. But while a State may make laws binding its own citizens, requiring them to resort to a writ of error, it cannot so bind citizens of other States. The case of *McCormick* v. *Fiske*, 138 Mass., 379, seems opposed to our views. But in that case the question of the effect of the Fourteenth Amendment was not raised or suggested to the Court, and therefore is not considered."

It follows as, of course, that if a Court cannot obtain jurisdiction by publication to make a decree against a non-resident, any such publication and any order directing it are null and void, as is also any statute which purports to authorize them, or either of them.

Under our statute the order of publication, the publication itself, the decree *pro confesso* and the final decree are all inseparable parts of one system, and must stand or fall together. Who can say that the Legislature would have authorized an order of publication requiring the defendant to appear at a day named without giving authority to the Court and without having the power to give it to make its order respected?

In 22 Am. & Eng. of Law, page 140, it is said: "It may be considered settled that any statute which provides for a method of service so as to authorize a judgment *in personam* against a party not actually summoned nor appearing, is violative of that provision of the Constitution that no State shall deprive any person of life, liberty or property without due process of law, and will not, therefore, be upheld."

THIRD.

The validity of such an order and of a statute authorizing it can properly be challenged on a motion to set the order aside.

This was expressly held by Chancellor Halsted in a similar case in *Gifford* v. *Thorn*, 3 Hal. Ch., 90, 97. He said: "If the case be such that the Court cannot give relief for want of jurisdiction over either the person or the subject-matter, the jurisdiction may be objected to in any stage of the proceedings; indeed, the Court would take judicial notice of it and refuse any decree; it would not make a decree which it had no power to enforce."

On a similar motion, in *Bryan* v. *University Pub. Co. of N. Y.*, 112 N. Y., 382, 388, the Court of Appeals said: "The Court can give no relief, and the impropriety of issuing an order which, if it leads to a judgment, 'would operate on nothing in the State and be regarded by nobody out of it,' becomes apparent. It offends every principle by which the jurisdiction of a Court can be vindicated, and should not be allowed to stand."

In *Von Hesse* v. *Mackaye*, 8 N. Y. Supp., 894, the syllabus is as follows: "An objection by a non-resident to the jurisdiction of the Court may be raised by a motion to vacate the order of publication."

In *Bentlif* v. *London, &c., Corp.*, 44 Fed. Rep., 667 (Circuit Court, S. D., New York), a motion was made to set aside the service made upon a foreign corporation under the New York Statute. The motion was resisted, and the Court, in sustaining it, said: "If the plaintiff could not have obtained a judgment in the State Court which would have any validity whatever when called in question here because of want of jurisdiction, what reason is there for deny-

ing to the defendant the right to challenge the jurisdiction at the threshold of the controversy."

In *Brooks* v. *Dunn*, in the Circuit Court of West Tennessee, 51 Fed. Rep., 138 (1892), a similar motion was made, and the Court in sustaining it said: "No objection is made to the form in which defendants present this question for adjudication, and indeed such objection could not successfully be made, as it seems to be now well settled by all the later cases that at law it is quite immaterial whether this defence be made by motion to set aside the return of the officer, or to quash the return, or to dismiss the suit for want of jurisdiction of the Court over the parties, or by special plea or answer, or by plea in abatement.

FOURTH.

Nor, I submit, are any of the reasons given in the able opinion of the learned Vice-Chancellor sufficient to sustain the order in question.

(*a.*) He says first: "The joinder of non-resident directors, charged to be jointly liable with the resident directors, and the exhaustion of all statutory power of bringing the non residents into court by service or publication is I think necessary as to the foundation of any decree for joint liability against the resident directors, even if no final decree can be made against the non-residents under the decree *pro confesso* expressly authorized by the statute."

This, I submit, is beside the point. It may be admitted that the non-resident directors were properly named as defendants in the bill of complaint, and that the complainant was bound "to exhaust all the statutory power" of bringing them into court. And the question will still remain, had not the complainant

done this when his subpœna *ad respondendum* was returned into Court unserved.

(*b.*) Next, the Vice-Chancellor cites the opinion of Vice-Chancellor Van Fleet in *Mutual Life Ins. Co.* v. *Pinner*, 16 Stew., 52, and declares that he is bound by it, and that if the question were *res nova*, and the present bill were filed against non-residents alone, his view would correspond with that of the late Vice-Chancellor.

In reply to this I need only point to the fact that the case of *Mutual Life Ins. Co.* v. *Pinner*, is in direct and irreconcilable conflict with *Pennoyer* v. *Neff*, and *Freeman* v. *Alderson*. It is doubtless to be accounted for upon the theory that the attention of Vice-Chancellor Van Fleet was not called to those cases.

(*c.*) Next, the Vice Chancellor says that neither the statute nor the order of publication are invalid by reason of the 14th amendment.

I have already shown that this is a mistaken view. In support of this part of his opinion the Vice-Chancellor relies almost entirely upon what I conceive to be a misunderstood passage in the opinion of Mr. Justice Brewer in *York* v. *Texas*, 137 U. S., 15, 19. The opening words of that opinion show the Vice Chancellor's error. They are as follows: "It was conceded by the District and Supreme Courts" (of Texas) "that the service upon the defendant in St. Louis was a nullity and gave the District Court no jurisdiction." To understand the significance of these words it is only necessary to turn to the state of case on page 16, where it is said: "The defendant being a non-resident, a citizen of St. Louis, Missouri, a notice in accordance with the provisions of the statute was served upon him personally in that city. No question is made but that the service was in strict conformity with the letter of the statute."

(*d.*) Next, the Vice-Chancellor says that the 14th amendment reaches only to the protection of prop-

erty, and can be properly invoked only when the record shows that the taking of property is a direct issue on the record.

He calls attention to the fact that such taking was directly involved in *Pennoyer* v. *Neff*, and then proceeds to discuss the case of *York* v. *Texas*, *supra*, upon which he chiefly relies in support of this doctrine.

As to Pennoyer v. *Neff*. While it is true that the taking of property was directly involved in this case, it is also true that the Court declared not only the writ under which it was taken, but also the judgment on which the writ was issued to be invalid, thus showing that the 14th amendment operated not merely upon final process but upon the whole proceeding and from the beginning.

As to York v. *Texas*. The learned Vice-Chancellor seems to be in fundamental error as to what was decided in this case. He says (Case, p. 38, l. 3): The Supreme Court itself has by its own decisions in *York* v. *Texas* and *Kaufman* v. *Waters* "declared the operation of the amendment to be confined to cases where property is taken or attempted to be taken by process issued under judgment."

As already pointed out, the Court in *York* v. *Texas* assumed the exact contrary of this, approving the view made necessary by all its former adjudications, that the Fourteenth Amendment operated to annul original as well as final process and to render nugatory the whole proceeding upon which final process was based. *Kaufman* v. *Waters* need not be discussed, as it was a mere affirmance of *York* v. *Texas*.

The Vice-Chancellor further refers to the decision in *York* v. *Texas* (Case, p. 38, l. 26) as holding that the entry of the judgment under review in that case "did not deprive the defendant of property in the absence of proof that the statutes or decisions of the Texas courts would prevent his attacking the validity of this judgment for want of jurisdiction."

What the Court held on this point, as I understand

the opinion, was the opposite of this. It assumed that the judgment did deprive the defendant of property, and that the Texas statutes and decisions would prevent his attacking the validity of this judgment for want of jurisdiction, but held that he was nevertheless bound by the judgment because he had appeared in the action, and effectually submitted himself to the jurisdistion of the Court.

The case was this: The defendant, upon whom notice was served in St. Louis, as heretofore stated, appeared and filed a plea to the jurisdiction of the Court. Under a peculiar statute in Texas this was held by the State Courts to be a voluntary appearance, which gave the District Court jurisdiction over him for all the purposes of the suit. He appealed to the Supreme Court of the United States, and there insisted that the Texas statute contravened the 14th amendment of the Constitution. The question on the appeal is thus stated by Mr. Justice Brewer (after setting out the Texas statute): "It must be conceded that such statutes contravene the established rule elsewhere—a rule which also obtained in Texas at an earlier day, to wit, that an appearance which, as expressed, is solely to challenge the jurisdiction, is not a general appearance in the cause, and does not waive the illegality of the service or submit the party to the jurisdiction of the Court.

"The difference between the present rule in Texas and elsewhere, is simply this: Elsewhere the defendant may obtain the judgment of the Court upon the sufficiency of the service, without submitting himself to its jurisdiction. In Texas, by statute, if he asks the Court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere, he gets an opinion of the Court before deciding on his own action. In Texas, he takes all the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient, they are valid. And the question is, whether under the Constitution of the

United States the defendant has an inviolable right to have this question of the sufficiency of the service decided in the first instance and alone."

The question was answered in the negative, and the case has no value in the present discussion except to support the claim of the appellants as to the unconstitutionality of the New Jersey Statute if it must be construed as the Vice-Chancellor construes it; and their further claim of a right to challenge such a Statute everywhere outside of Texas on a motion to set aside an unconstitutional order of publication made thereunder.

We do not rely, as the Vice-Chancellor seems to have supposed, on the 14th amendment as the basis of our right to move at this time against the order of publication in question. All we rely upon that for is to establish the invalidity of such order. That being established, our New Jersey system of practice entitles us, as I have shown, to move to set it aside at this or any other stage of the proceeding.

FIFTH.

Nor is there anything in the doubt expressed by the Vice-Chancellor as to whether a non-resident by becoming a director in a New Jersey company, and thereby becoming subject to the duties and liabilities imposed upon him by law, impliedly consents, so far as relates to the enforcement of those duties and obligations, to the provisions of New Jersey laws authorizing service on non-residents by publication.

Of the many answers to any such suggestion one is all sufficient. It is that the Court can no more obtain

jurisdiction by publication to adjudge that a non-resident "became a director" of a New Jersey company than it can to adjudge that he defaulted in the performance of his duties as such director.

Wilson v. *Seligman*, 144 U. S., 41 (1892).
Wilson v. *St. Louis, &c., Ry. Co.*, 18 S. W. Rep., 286 (Sup. Ct., Missouri, 1891).

SIXTH.

Nor is there anything of substance in the new matter set up in the answers of the appellee to the appellants' petitions in the Court below.

1st.—Because the order of publication can only be supported by the facts before the Court when it was made and upon which it was based.

2d.—Because the mere presentation of claims as creditors to the receiver did not make the appellants parties to the original action; or if it did, this suit is not a proceeding in that action by petition or otherwise, but an independent suit in which jurisdiction of the defendants must be acquired as it has been attempted to be by original process.

See

Wilson v. *St. Louis, &c., Ry. Co.*, 18 S. W. Rep., 286, 294.

I submit that the orders appealed from should be set aside.

Dated November 18, 1895.

R. V. LINDABURY.

INDEX.

Bill of Complaint.

In Chancery of New Jersey.

To the Honorable Alexander T. McGill, Chancellor of New Jersey :

1.—In Chancery complaining shows unto your Honor your orator, Andrew Kirkpatrick, of the City of Newark, County of Essex, in his capacity of Receiver of the Domestic Sewing Machine Company, that the Domestic Sewing Machine Company was organized under the general corporation laws of the State of New Jersey, under and by the name of the United Domestic Sewing Machine Company, on the first day of April, eighteen hundred and ninety-one, with an authorized capital stock of two million dollars, divided into twenty thousand shares, of the par value of one hundred dollars each, and that it was stated in the certificate of organization that the said corporation would begin business with one thousand dollars capital, which was subscribed for by David Blake, George Blake, John D. Harrison, Caleb B. Knevals and Henry A. V. Post, each of whom subscribed for two shares of the said capital stock ; that the said certificate of incorporation was duly recorded in the office of the Clerk of the County of Essex, and on the sixth day of April, eighteen hundred and ninety-one, was filed in the office of the Secretary of State; that on the third day of April, eighteen hundred and ninety-one, after said certificate had been executed and signed by the incorporators respectively, the said incorporators held a meeting in the City of Newark, and there organized themselves into a corporation, adopted by-laws, elected a Board of Directors, consisting of Caleb B. Knevals, David Blake, George Blake, John D. Harrison and Henry A. V. Post, and elected the following officers : For President, John D. Har-

rison; Vice President, David Blake; Secretary, George Blake; Treasurer, Caleb B. Knevals; and that subsequently and on the twelfth day of May, eighteen hundred and ninety-one, John Dane, Jr., and Elias G. Heller were elected Directors of said corporation; and that all the above named persons continued to be Directors of said corporation and to act as such until the failure of the said corporation, except Elias G. Heller, who resigned his directorship on the eighteenth day of May, eighteen hundred and ninety-two.

2.—That on the twenty-second day of April, eighteen hundred and ninety-one, the Board of Directors of said corporation, with the consent of the stockholders, created out of its authorized capital stock of two millions of dollars, preferred stock aggregating five hundred thousand dollars divided into five thousand shares of the par value of one hundred dollars each, and that thereafter the authorized capital of the said company was one million five hundred thousand dollars of common or general stock, and five hundred thousand dollars of preferred stock, and that subsequently, but on what day your orator is now unable to state, the name of the said corporation was changed from the United Domestic Sewing Machine Company to the Domestic Sewing Machine Company by a certificate executed for that purpose, which certificate your orator is informed was duly filed as required by law.

3.—That long prior to the organization of the said company, and in the year eighteen hundred and seventy-one, or thereabouts, the Domestic Sewing Machine Company was incorporated under the laws of the State of Ohio, with a capital, as your orator is informed and believes, of one million dollars (which capital was on the eighteenth day of May, eighteen hundred and ninety-one, increased to one million five hundred thousand dollars), having its principal office in Ohio, in the City of Cleveland, in that State, which corporation is hereinafter called the "Ohio corporation;" that soon after the organization of the said

Ohio corporation it became the owner of a large manufacturing plant for the manufacture of sewing machines, located in the City of Newark, in this State, and began the business of manufacturing and selling sewing machines in accordance with the original object of its incorporation; that in the year eighteen hundred and eighty-one the officers and directors of said Ohio corporation, deeming it more convenient for the purpose of their business to do so, organized a corporation under the laws of the State of New Jersey, by the name of the "Domestic Manufacturing Company," with a capital stock of two hundred thousand dollars, divided into two thousand shares of the par value of one hundred dollars each, all of which, excepting twenty shares, was issued to the said Ohio corporation, and in consideration thereof the said Ohio corporation transferred to the said manufacturing company all its manufacturing plant and manufacturing assets, tools, machinery, fixtures and materials located in the City of Newark, and which was valued on the books of the said Ohio corporation, at that time, at upwards of eight hundred thousand dollars; and your orator shows that thereby the said Ohio corporation divested itself of its title to all its manufacturing plant, and thereafter owned only its books of accounts and assets in the various offices of the company throughout the United States, and also the nineteen hundred and eighty shares of the capital stock of the manufacturing company which had been issued to it upon the transfer of the said manufacturing plant, and that the said Ohio corporation continued to own the same, and continued to transact the business of selling sewing machines until the organization of the United Domestic Sewing Machine Company hereinbefore mentioned (and hereinafter called the "New Jersey corporation"), in the year eighteen hundred and ninety-one.

4.—That from the year eighteen hundred and eighty-one to the year eighteen hundred and ninety-one all

the Domestic sewing machines which were manufactured, were manufactured by the Domestic Manufacturing Company; that during that period all the Domestic sewing machines which were sold, were sold by the said Ohio corporation; that the said Ohio corporation established agencies, carried on the business of distributing, transporting and selling sewing machines, superintended the agencies, collected the proceeds of the sales, purchased all the materials used by the said Manufacturing Company, and furnished the money with which the Manufacturing Company paid its pay-roll, and other expenses incident to the manufacture of said machines; that while the said two corporations were separate legal entities, they were engaged in one business, each being supplemental to the other, and that the business conducted by them was carried on for the benefit of the stockholders of the said Ohio corporation.

5.—That on the twenty-second day of April, eighteen hundred and ninety-one, the said Ohio corporation transferred to the said Domestic Sewing Machine Company (the New Jersey corporation) all the property and assets of the said Ohio corporation which it then owned, or to which it was in any way entitled, and in consideration thereof the said New Jersey corporation issued to the said Ohio corporation fifteen thousand shares of the capital stock of the said New Jersey corporation, and that thereafter the said New Jersey corporation had title to, and possession of, all the said tangible property, and actual assets which had formerly belonged to the said Ohio corporation, and the said Ohio corporation held only the fifteen thousand shares of stock of the New Jersey corporation, and had no other property of any character. But your orator shows that the said Ohio corporation maintained its existence, and that its capital stock was held by the individual shareholders who held the same prior to the time when it divested itself of its assets, as above set out.

6.—That on the twentieth day of May, eighteen hundred and ninety-one, the Board of Directors of the said Domestic Sewing Machine Company (the New Jersey corporation), resolved that the officers of the company be empowered to issue the preferred stock of the company, which had theretofore been created, as is hereinbefore set out, at par and accrued interest, as the same might be convenient, and that from time to time the officers of the said corporation did make sale of and issue shares of the said preferred stock, so that at the time of the appointment of your orator as receiver of the said corporation, in the year eighteen hundred and ninety-three, there were outstanding fourteen hundred and one shares of the preferred stock of the said corporation, representing a paid up cash capital of one hundred and forty thousand and one hundred dollars, entitled to dividends from the net profits of the company at the rate of seven per centum per annum, payable quarterly on the first days of May, August, November and February of each year, said dividends to be cumulative; and the holders thereof were also, after the payment of twelve per centum per annum divided on the common stock, entitled to share in the surplus profits *pro rata* with the common stock; that the said preferred stock was redeemable by the company at any time after January first, eighteen hundred and ninety-seven, upon sixty days' notice, upon the payment in cash of one hundred and ten dollars per share with accrued dividends.

7.—That after the said transfer of assets to the New Jersey corporation, that corporation continued to transact the business which had formerly been carried on by the said Ohio corporation, namely, the sale of sewing machines, the collection of the proceeds thereof, the management of the agencies and the furnishing of cash to the Manufacturing Company, substantially in the same manner that the same business had been previously carried on by the Ohio corporation, and that the officers and

directors of the said corporation, from time to time, as appears by the books of account of the said corporation now in the custody of your orator as its receiver, made up statements of the business which had been so conducted under their supervision for the purpose of ascertaining whether the said corporation was making any profits or not.

8.—That at the end of the first quarter of a year after the organization of the said company, to wit, on the thirtieth day of June, eighteen hundred and ninety-one, such statement of profits was made up from the books of the said company, and that it appeared at that time according to the entries in said books that there was a surplus of profits over and above the debts and all liabilities of said corporation of seventy-four thousand and forty-four dollars and thirty-five cents ($74,044.35), and like statements were made up each quarter of a year thereafter until the thirtieth day of September, eighteen hundred and ninety-two, and that the amount of profits so appearing at the end of each quarter, is as follows :

June 30, 1891	$74,044 35
September 30, 1891	33,399 23
December 31, 1891	19,806 85
March 31, 1892	39,400 96
June 30, 1892	3,585 50
September 30, 1892	17,319 18

Making a total of profits up to that date $186,556.07. That on the quarter day following the last statement lastly above mentioned, namely, on December thirty-first, eighteen hundred and ninety-two, another quarterly statement was made up of the said company's business from said books of account, and that by such statement it appeared that the company had during the quarter lost the sum of eleven thousand two hundred and thirty-two dollars and sixty-nine cents ($11,232.69). And your orator shows that the several statements and estimates made by officers of

the said company from its books, from and after the thirty-first day of December, eighteen hundred and ninety-two, showed that the said company had lost money, and that its only profits from its organization, as appeared by its books of accounts, were the sums hereinabove mentioned.

9.—That the directors of the said Domestic Sewing Machine Company (the New Jersey corporation) determined to divide the profits which its books of account showed that it had made, among its shareholders, and for this purpose directed the opening of its book of account of a new account, which was called "Domestic Sewing Machine Company Dividend Account," and that from time to time, as hereinafter more fully stated, the directors of the said corporation authorized and directed the transfer of certain portions of the so-called surplus profits from the profit and loss, or surplus account to the said Domestic Sewing Machine Company dividend account, in order that the same might be subsequently paid out to the stockholders of the said company in the form of dividends. That on the thirty-first day of October, eighteen hundred and ninety-one, a meeting of the directors of the said corporation was held at the office of the company, at which meeting there were present the following directors: John Dane, Jr., Elias G. Heller, Henry A. V. Post, Caleb B. Knevals, David Blake and John D. Harrison; that at the said meeting, as appears by the minute book of the said corporation in your orator's possession, a resolution was passed, without dissent, by which it was voted to transfer $75,000 from the surplus account of the said corporation to the said "Domestic Sewing Machine Company Dividend Account," and that in pursuance of the said resolution the proper entries were made in the books of account of the said company, by which there was deducted from the said surplus account the sum of $75,000, and entered in the said new account the sum of $75,000, and that immediately

thereafter the said sum of $75,000 was distributed and paid out by the said company to its several shareholders in proportion to the number of shares held by them respectively in the said company on their stock. That in like manner a meeting of the Board of Directors of the said company was held at the company's office on the 16th day of February, 1892, at which meeting the following directors were present: John D. Harrison, John Dane, Jr., David Blake, George Blake, Caleb B. Knevals and Elias G. Heller, and that at the said meeting, as appears by the said minute book of the said corporation, a resolution was passed, without dissent, by which it was voted to transfer another sum of $75,000 from the said surplus account to the said "Domestic Sewing Machine Company Dividend Account," and that in pursuance of the said resolution, the proper entries were made in the books of account of the said company, by which there was deducted from the said surplus account the sum of $75,000, and entered to the credit of the said dividend account a like sum of $75,000. That immediately thereafter the said sum of $75,000 was distributed by the said corporation among its share holders as a dividend, each receiving such proportion thereof as his share holdings of general stock entitled him to. That in like manner, on the 23d day of March, 1892, a meeting of the Board of Directors of said company was held at the office of said company, at which meeting the following directors were present: John D. Harrison, Caleb B. Knevals, John Dane, Jr., David Blake and George Blake, and that at such meeting a resolution was passed, without dissent, by which it was resolved, that a sufficient amount be transferred from the accrued profits to pay a dividend at the rate of 2½% on the total common stock of the said company. And your orator shows that in pursuance of the said resolution the sum of $37,500 was thereupon transferred from the said surplus account to the said "Domestic Sewing Machine Company Dividend Account," by proper entries on the books of the said corpora-

tion, and that on or about the first day of April, 1892, the said sum of $37,500 was paid out by the said corporation in the form of dividends to its several share holders in proportion to the number of shares of general stock held by each in the said corporation. In like manner, on the 18th day of May, 1892, a meeting of the Board of Directors of said company was held at the company's office, at which were present the following directors: David Blake, Henry A. V. Post, Caleb B. Knevals, John Dane, Jr., and George Blake. That at said meeting, as appears by the said minute book, a resolution was passed, without dissent, by which it was resolved that a sufficient amount of money be transferred from the accrued profits of the said company to the said dividend account to pay a dividend at the rate of 2½ per cent. on the common stock of said company, and that in pursuance of such resolution the further sum of $37,500 by proper entries made in the books of account of the said company was deducted from the said surplus account, and entered to the credit of the said dividend account, and that on the first day of July thereafter, the said sum of $37,500 was paid out by the said company to its stockholders as a dividend upon the general stock held by them in proportion to the number of shares held by them respectively. That in like manner a meeting of the Board of Directors of said company was held at the office of the company on the 29th day of September, 1892, at which meeting there were present the following directors: Henry A. V. Post, Caleb B. Knevals, David Blake and George Blake, that the said meeting as appears by the minute book of the said corporation, in your orator's possession, a resolution was passed without dissent, by which it was voted that a dividend of 2 per cent. out of the profits of the quarter ending September 30, 1892, be declared on the common stock of the company. That in pursuance of the said resolution the sum of $30,000 was transferred by proper entries on the books of account from the said surplus ac-

count to the said dividend account, and was immediately thereafter paid out to the several shareholders of the said company as a dividend on the common stock of the said corporation. And your orator shows that by virtue of the said resolutions of the said Board of Directors, and of their action in pursuance thereof and subsequent thereto respectively, the said corporation paid out to the holders of the common or general stock of the said corporation as dividends and surplus from the business of the said company the sum of $255,000, and that, in addition thereto, the said corporation during the period above mentioned declared dividends upon the preferred stock of the said company, aggregating the sum of $13,154.07, which was likewise paid to the said holders of shares of the preferred stock of the said corporation, in proportion to the number of shares held by them, and that the members of the Board of Directors above named, jointly and severally, voted at meetings of the said Board to declare the said dividends to the general and preferred stockholders, and your orator shows that it does not appear by the minute book of the said corporation in his possession, that any of the said directors at any of the said meetings voted against any of the said resolutions to declare dividends on either the general or preferred stock, and he charges the truth to be that none of the said directors did ever vote at any of the said meetings against any of the said resoulutions, but that they all voted in favor thereof at any meeting at which they were respectively present; that it does not appear by the said minutes that any of the said directors who were absent from any of the said meetings, ever caused their dissent to the passage of any of said resolutions to be entered on the minutes of the said corporation; or that any of them ever caused any copy of such dissent to be published in some public newspaper as required by law, nor in fact did any of them do so; and he further charges that by reason of the premises, each and all of the said directors must be held to have

voted in favor of the said resolutions to declare the said dividends, as hereinabove set out.

10.—That it appears by the books of account of the said company, as hereinabove stated, that on the thirtieth day of June, eighteen hundred and ninety-one, there was a surplus of profits in the business of the said company amounting to seventy-four thousand and forty-four dollars and thirty-five cents, and that on the 30th day of September, 1891, there was a like surplus profit of $33,399.23, making a total for the said two quarters of $107,443.58; that out of this sum there was paid to the general stockholders of said New Jersey corporation on the first day of October, 1891, the sum of $75,000, and likewise a dividend to the preferred stockholders of the said New Jersey corporation, aggregrating $53.91; that there was then, on the 1st day of October, 1891, a balance of profit, as appeared by the books of the said company, of $32,389.67; that on the 31st day of December, 1891, as appearsby the said books of account, there was an addition to the surplus or profits of the said company of the sum of $19,806.85, making on that date a surplus of profits of $52,196.52. That in the month of January, as is hereinbefore set out, a dividend of $75,000 was paid to the general stockholders of record of the said N. J. corporation, and a dividend of $722.91, to the preferred shareholders of said N. J. corporation; and that this dividend exceeded the profits of the said company, shown on its books of account at that time, by the sum of $23,526.39. And your orator shows that all the dividends paid by the said N. J. corporation to its general stockholders, and to the holders of its preferred stock, were thereafter paid out of the capital of the said company, and not out of the profits; and that, as appears by the books of account of the said company, from the organization of the said company down to the 3rd day of May, 1893, the Directors of the said company paid out in dividends, in excess of its profits, as the same were shown

by its books, the sum of $92,826.69. And your orator appends to this his bill of complaint, a statement of such profits and dividends (marked "Schedule A"), which he prays may be taken as part of this his bill of complaint.

11.—That while it appears by the said books of account of the said N. J. corporation that there was an over payment of dividends amounting to $92,826.69, yet, as a matter of fact, as your orator is informed and believes, the over payment of dividends above the actual profits applicable to dividends was very much larger than the sum last above named. That your orator is informed and believes it to be true, and charges the truth to be, that the method of ascertaining the amount of profits made by the said corporation was improper and illegal. That, among other things, the said corporation had the title to a leasehold interest originally for the term of twenty years, in the building known as the Domestic Building, situate on the southwest corner of Broadway and 14th street, in the City of New York, which leasehold interest expired on the 1st day of November, 1891. That at the time of the organization of the said corporation, the said leasehold interest was acquired by assignment from the said Ohio corporation, and that at that time the same was considered by it of no value whatever, and was not entered upon the books of the said Ohio corporation, or upon the books of the said N. J. corporation as an asset. That as a matter of fact the said leasehold interest was never a valuable asset of the said corporation, but, on the contrary thereof, was a great drawback and encumbrance upon it by reason of the fact that the company was obliged to expend on said building for rent and maintenance the sum of $25,000 a year or thereabouts more than it received therefrom; that in the month of May or June, 1891, arrangements were made between the said company and the owners of the said building, for a renewal of the said lease for an additional term of twenty years, and that thereupon,

without any change in the said building, or in the situation of the said property, or in the expenses for rent and maintenance, by the action of the Board of Directors of the said company, the leasehold was valued at $125,000, and that the same was entered upon the books of the company as that value, and that thereafter and until the 1st day of October, 1892, the said leasehold was carried as an asset at $125,000. That on the 1st day of October, 1892, when the question of paying dividends was pending, the valuation of the said leasehold interest was by resolution of the said Board increased to $150,000, and that it was carried as an asset at $150,000 from that time down to the date of the failure of the said company, as hereinafter stated; and your orator shows that the said leasehold interest was never a valuable asset of the said company; that it had no cash value whatever, and that there never was a time from the date of the organization of the said company, to the date of its failure, when the same could have been sold for anything. That in like manner the said corporation owned certain patents and claimed to own certain exclusive rights, the value of which your orator is unable to state. That at the time of the organization of the said company, on the 1st day of April, 1891, the same were not carried as a valuable asset on its books of account, and do not appear in the statement of its assets and liabilities, or on its balance sheet made up at that time. That on or about the 30th day of June, 1891, the said patents and exclusive rights were entered upon the books of the said company at a valuation of $164,157.66, although, as your orator shows, there had been no additions to, or changes in the same from the time the said company was organized, and that they were carried on the books of account of the said company at that amount until the first day of January, 1892, when the valuation of the same was, by resolution of said Board, raised from the last named sum to the sum of $250,000, at which amount the same were carried on the books of the said company as an asset until the failure of the

said company in 1893. And your orator shows that while the said patents and exclusive rights probably have some value, a large part of the amount at which they were originally carried on the books of the said company, and the whole of the increase therefrom up to $250,000 was false and fictitious, and that the values of the said Domestic Building and of the said patents and exclusive rights were increased, as hereinbefore stated, for the sole purpose of making it to appear by the books of the said company that large profits had been made by the said company in the prosecution of its business, as hereinafter mentioned; that the said company failed to charge up against its net earnings or profits large items of expenses of conducting the said business and carrying on the company's affairs; that during the quarter ending June 30th, 1891, the said corporation expended the sum of $1,825 for improvements on the said Domestic Building, which was in reality an expense of the said company, but which was charged on the books of the company to the account of "Patents and Exclusive Rights," and thereafter carried on said books of the company as an asset of the company; that in like manner, during the same quarter, the said company lost by fire, at its wood-work factory, the sum of $3,158.50, which loss was credited to the woodwork department of the said corporation, and charged to the account of Patents and Exclusive Rights, and so carried as an asset of the corporation; that during the quarter ending Dec. 31st, 1891, the following items were charged to the account of Patents and Exclusive Rights, namely: Cost of experimenting at Newark, $2,000; work done on loopers at factory, $3,350; allowance made on sales of loopers, $2,596.50; allowances made on sales of button-hole attachments, $828; expenses in obtaining re-possession of machines sold and on lease account, $229; difference between debits and credits, which should have gone to surplus, $48.60—making a total sum of $9,052.18, which items were expenses of the said business and were carried on the

books of the said company as assets; that during the quarter ending March 31st, 1892, the Domestic Mfg. Co. Stock Account is charged and Profit and Loss Account credited arbitrarily with $25,000, so that the profits of the said company were apparently augmented by that sum, whereas, as a matter of fact, no such profits were made. That it appears by the said books that the profits have been unduly and unlawfully augmented at the end of each quarter between June 30th, 1891 and June 30th, 1892, by including in the credit to Merchandise Account for the previous quarter shipments made during the ensuing quarter, and that the amount of such augmentations during the said five quarters aggregate the sum of $28,654.08; that among the other items of assets carried on the books of the said company are the following: Sewing machines loaned out and on trial, and given away $781.13; expenses of experimenting on new machines and new parts of machines $1,304.99; loss on the conduct of the fashion department, $876.07; amount expended during the last quarter of 1892, or the first quarter of 1893, for expenses for the exhibit of the said company at the World's Fair, at Chicago, $1,866.80; expenses of David Blake, Vice-President of the company, in making sale of the preferred stock of the company, $16,000; and that in addition thereto the said company retained among its assets (shown by its books) certain accounts against certain of its customers aggregating upwards of $300,000, which were known to the said Board of Directors to be uncollectible, and exceeding by $100,000 the amount of such uncollectible accounts carried to its suspense account. And your orator shows that each and all of the apparent increases of values of the assets of the said corporation as above set out, and each and all the entries in its books of account above mentioned, were made by the said Board of Directors, and under their direction and supervision, and with their full knowledge, and were made for the purpose of augmenting the apparent profits of the business done by

the said corporation, to the end that it might appear by the books of the said company that sufficient profits had been made to justify the declaration of the said dividends, but your orator shows that in fact the same were false and fictitious and were known by the members of the said Board to be so, and that the same could not lawfully be made the basis of dividends, or justify the said Board in making any division of the assets of said company among its shareholders.

12.—That on the 31st day of May, 1893, David Blake, then the V.-Prest. of the said N. J. corporation, filed his complaint in this Honorable Court, alleging, among other things, that the said corporation had become insolvent, and had ceased to transact its ordinary business for want of funds with which to carry on the same, and praying that the business of tha said company should be wound up, and a receiver appointed for that purpose, and that such proceedings were had in the said suit, that on the 2nd day of June, 1893, your orator was appointed receiver of the said corporation, with the powers given to receivers of insolvent corporations by the statute in such case made and provided; that your orator qualified as such receiver, and from thence has been, and is now, in possession of all the assets of the said corporation. And your orator shows that the said corporation is hopelessly insolvent, and that it will not be possible by any means known to your orator to realize from its assets a sufficient sum to pay its debts or any considerable portion thereof.

13.—That by the laws of the State of N. J., it is not lawful for the directors of any manufacturing corporation of this State to declare any dividends except from surplus or net profits arising from the business of such corporation, nor to divide, withdraw, or in any way pay to the stockholders of said corporation, or any of them, any part of the capital stock of said corporation, or to reduce the said capital stock except in the manner provided by law, or with the

consent of the Legislature ; and that in case any of the Directors of the said corporation shall violate any of the provisions of the law in that behalf, such Directors under whose administration the same may happen, shall in their individual and private capacities jointly and severally be liable at any time within the period of six years after the payment of such dividend to the said corporation, and to the creditors thereof in the event of its insolvency, to the full amount of the dividend paid, or capital stock so divided, withdrawn, paid out, or reduced, with legal interest. And your orator charges that the persons hereinbefore named as the directors of the said corporation did, during the time that they were so severally directors thereof, declare dividends in excess of the profits made by the said corporation in its business, and did pay out of the capital of the said company the large amounts of money hereinbefore set out as dividends, and that the said persons, so named as directors are jointly and severally liable to your orator, as receiver of the said corporation, for the amount so paid out and withdrawn from the capital of the said corporation by them, and that the amount of money so paid out and withdrawn by them should be ascertained by the decree of this Honorable Court, upon an accounting had of the various matters hereinbefore stated, and that said persons should be directed by such decree to refund to your orator the amount so withdrawn and paid out by them of the capital of the said company, or so much thereof as shall be necessary to pay the creditors of the said corporation in full.

Wherefore, inasmuch as your orator is without remedy by the strict rules of common law, and can only have relief in this honorable Court, he prays :

1.—That the said David Blake, George Blake, John D. Harrison, Caleb B. Knevals, Henry A. V. Post, John Dane, Jr., and Elias G. Heller may without oath, full, direct and perfect answer make to all and singular the premises and each fact above stated, and that

as fully and particularly as if the same were here again repeated, and they thereunto particularly interrogated.

2.—That an accounting may be had of the assets and liabilities of the Domestic Sewing Machine Company, organized under the laws of the State of New Jersey, on the 1st day of April, 1891, the date of its organization, and also on each day on which dividends were declared by the directors of the said corporation, as hereinbefore set out.

3.—That it may be ascertained whether the dividends which were declared and paid by the said corporation were paid out of the surplus or profits of the said corporation, or whether the same were paid out of the capital thereof, and that if paid out of the capital thereof the amount or amounts of such payment or payments may be ascertained, and that the said directors, who are the defendants to this suit, may be held personally, jointly and severally responsible and liable therefor, and may be directed by the decree of this Court to pay your orator the amount of their joint and several liabilities so ascertained.

4.—That your orator may have such other and further relief as the nature of his case requires, and shall be agreeable to equity.

May it please your Honor, the premises considered, to grant unto your orator the State's writ of subpœna, to be directed to the said David Blake, George Blake, John D. Harrison, Caleb B. Knevals, Henry A. V. Post, John Dane, Jr., and Elias G. Heller, commanding them on a certain day to appear before this Court to answer the premises, and each fact above stated, and to abide such decree as shall be made against them.

COULT & HOWELL,
Solrs.

J. E. Howell,
Of Counsel.

Schedule "A."

Net earnings and dividends (April 1, '91 to May 3, 1893).

Net Earnings.

1891.			
June 30	Profits as per Profit & Loss A-C	$74,044 35	
Sept. 30	" " " " " " "	33,399 23	
Dec. 31	" " " " " 45,227 53		
	Deduct assets included 25,420 68	19,806 85	
1892.			
Mch. 31	Profits as per Profit & Loss A-C	39,400 96	
June 30	" " " " " " "	2,589 50	
Sept. 30	" " " " " " "	17,319 18	
		186,560 07	
Dec. 31	Loss " " " " " "	11,232 69	
	Net earnings Apl. 1–91 to May 3–93, as per face of Ledger....		175,327 38
	Dividends in excess of earnings...		92,826 69
			$268,154 07

Dividends.

1891.			
Oct. 31	Dividend paid on Common Stock	75,000 00	
Nov. 6	" " " Pref'd "	53 91	
1892.			
Jan. 26	" " " Common "	75,000 00	
Feb. 3	" " " Pref'd "	722 91	
Apl. 1	" " " Common "	37,500 00	
May 2	" " " Pref'd "	1,988 03	
July 1	" " " Common "	37,500 00	
Aug. 1	" " " Pref'd "	2,695 36	
Oct. 1	" " " Common "	30,000 00	
Nov. 1	" " " Pref'd "	2,624 34	
1893.			
Feb. 6	" " " Pref'd "	2,693 20	
May 3	" " " Pref'd "	2,466 32	
	Total dividends declared from Apl. 1–'91 to May 3–'93		$268,154 07

Order of Publication.

The complainant having filed his bill in the above cause and process of subpœna having been issued and returned according to law; and it being made to appear by affidavit that the defendants George Blake, Caleb B. Knevals and Henry A. V. Post reside out of the State of New Jersey, and that process could not be served upon them:

It is, on this twenty-third day of March, one thousand eight hundred and ninety-five, on motion of Coult & Howell, solicitors of the complainant, ordered, that the said absent defendants do appear, plead, demur, or answer to the complainant's bill on or before the twenty-fourth day of May next, or that, in default thereof, such decree be made against them as the Chancellor shall think equitable and just.

And it is further ordered, that the notice of this order prescribed by law and the rules of this court, shall, within ten days hereafter, be served personally on the said absent defendants by a delivery of a copy thereof to them or be published within the said ten days in The Newark Daily Advertiser, a newspaper printed at Newark in this State, for four weeks successively, at least once in each week, and in case of such publication, that a copy thereof be also mailed, within the said time, to the said absent defendants, directed to their post office address, if the same can be ascertained in the manner prescribed by law and the rules of this court.

ALEX. T. McGILL, C.

A true copy,

ALLAN McDERMOTT, Clerk.

Petition of Henry A. V. Post for Relief.

To the Honorable ALEXANDER T. MC GILL, Chancellor of the State of New Jersey :

Your petitioner, Henry A. V. Post, one of the defendants in the above entitled cause, respectfully shows:

1st. That the bill of complaint in said cause is filed against him and others as directors of the Domestic Sewing Machine Company, a corporation of the State of New Jersey, for the sole purpose of obtaining a decree making said defendants liable to the complainant as receiver of said corporation for moneys alleged to have been improperly and illegally paid out by said company under the order of said directors as dividends upon the general and preferred stock of said company.

2d. That your petitioner is a resident of Babylon, in the County of Suffolk and State of New York, and has been a resident of the State of New York, for more than one year last past.

3d. That your petitioner has not been served with a subpœna to answer in said cause, but that in lieu of said service an order was made against him in said cause as an absent defendant, on the twenty-third day of March last, requiring him to appear, plead, answer or demur to the said bill of complaint, on or before the twenty-fourth day of May instant, or the said bill would be taken as confessed against him, notice of which order, received by your petitioner through the United States mails, is annexed to the affidavit of your petitioner hereto attached.

Your petitioner therefore prays :

FIRST.—That he may be permitted to enter a special appearance in the above entitled cause for the sole purpose of applying to set aside the said order of publication.

SECOND.—That the said order of publication may be set aside as illegally and improvidently entered.

THIRD.—That all further proceedings in said action against him be stayed until the determination of this matter.

Dated May 21st, 1895.

R. V. LINDABURY,
Solicitor for Petitioner.

IN CHANCERY OF NEW JERSEY.

Between—
ANDREW KIRKPATRICK, Receiver, &c.,
Complainant,
AND
HENRY A. V. POST and others,
Defendants.

On Bill, &c.

STATE OF NEW YORK,
City and County of New York, } ss. :

HENRY A. V. POST, being duly sworn, deposeth and saith :

I am the Henry A. V. Post, named as a defendant herein and in the printed slip hereto annexed. I reside at Babylon, in the County of Suffolk, in the State of New York, and am engaged in business as a banker and railway commission merchant, at No. 45 Wall Street, in the City of New York. I have, through the mail received a printed slip, a duplicate of which is hereto annexed. Such slip was addressed to me at my said office, No. 45 Wall street, in the City of New York. No subpœna has been served upon me in this suit nor has any paper or notice of any kind in this

suit other than the printed slip above specified been served upon me or received by me.

H. A. V. POST.

Subscribed and sworn to before me a Notary Public for the State of New York, this 20th day of May, 1895. In witness whereof I have hereunto set my hand and affixed my official seal the year and day above written.

J. C. O'CONOR,
Notary Public,
N. Y. Co.

[SEAL.]

IN CHANCERY OF NEW JERSEY.

To George Blake, Caleb B. Knevals and Henry A. V. Post:

By virtue of an order of the Court of Chancery of New Jersey, made on the date of the date hereof, in a case wherein Andrew Kirkpatrick, receiver of the Domestic Sewing Machine Company, is complainant, and you and others are defendants, you are required to appear, plead, answer or demur to the bill of the said complainant on or before the twenty-fourth day of May next, or the said bill will be taken as confessed against you.

The said bill is filed for the purpose of obtaining a decree of the said Court making you and others directors of The Domestic Sewing Machine Company, liable to the receiver for moneys alleged in said bill to have been improperly and illegally paid out by said company as dividends upon the general and preferred stock of the said company, and you are made defendants to said bill because it is therein alleged that you were directors of the said company at the time the said moneys were so paid out.

Dated March 23, 1895.

COULT & HOWELL,
Solicitors of Complainant
765 Broad street,
Newark, N. J.

m27-4wWe

Order to Show Cause.

Upon reading and filing the petition of Henry A. V. Post, one of the defendants in the above entitled cause, together with the affidavit of said Henry A. V. Post thereto annexed,

It is, on this twenty-second day of May, A. D. eighteen hundred and ninety-five, ordered:

1st.—That the said Henry A. V. Post have leave to enter a special appearance in said cause for the purpose of applying to set aside the order of publication made therein against him as an absent defendant on the twenty-third day of March, eighteen hundred and ninety-five.

2d.—That the complainant show cause before this Court, at Chancery Chambers in the City of Jersey City on Monday, the third day of June next, at ten o'clock in the forenoon, why the said order of publication should not be set aside as illegally and improvidently entered, and a copy of the petition and of this order (which may be uncertified) shall be served on the solicitors of the complainant.

3d.—That all further proceedings in said action against the said defendant Henry A. V. Post be stayed until the determination of this matter.

ALEX. McGILL.

A true copy,

ALLAN McDERMOTT,
Clerk.

Respectfully ordered,

JOHN R. EMERY,
Vice Chancellor.

Special Appearance.

A special appearance is hereby entered on behalf of the defendant Henry A. V. Post in the above-entitled cause, for the sole purpose of applying to set aside the order of publication made therein against the said defendant as an absent defendant.

Dated May 22d, 1895.

R. V. Lindabury,
Solicitor for the Defendant,
Henry A. V. Post.

Answer to Petition of Henry A. V. Post for Relief.

The answer of Andrew Kirkpatrick, Receiver of the Domestic Sewing Machine Company, to the petition of Henry A. V. Post, one of the defendants:

1.—This respondent for answer to the first paragraph of the said petition admits the filing of the bill of complaint in this cause, as therein stated, but prays leave to refer to the original bill for the object and purpose thereof, and he admits that the said Henry A. V. Post is now a resident of the State of New York; that he was not actually served with a subpœna to answer in this cause and that an order for publication was made against him herein, as is stated in the said petition, and he prays leave to refer thereto whenever it may be necessary to do so for the particulars thereof.

2.—And this respondent, further answering, says, that on the second day of June, eighteen hundred and ninety-three, he was appointed Receiver of the Domestic Sewing Machine Company, a New Jersey corporation, by the order and decree of this Court, for the purpose of winding up the business and affairs of the said corporation as an insolvent corporation. That he accepted the said appointment and has been since the date of his appointment engaged in the busi-

ness of winding up the affairs of the said corporation and carrying on its business under the orders and direction of this Court; that on the 9th day of June, eighteen hundred and ninety-three, this Court made an order requiring all creditors of the Domestic Sewing Machine Company to present their claims against the said company to this respondent, as its Receiver, within a period of four months from that date, and that in pursuance of the notice which this respondent gave to the creditors of the said company of the said order, the Garfield National Bank of the City of New York filed its claim against the said company, claiming that on the fifth day of October, eighteen hundred and ninety-three, the said Domestic Sewing Machine Company was indebted to it in the sum of twenty-nine thousand two hundred and ninety-seven dollars upon certain promissory notes attached to the said claim and made part thereof; that so far as this respondent knows the said claim has never been withdrawn, and this respondent prays leave to refer thereto, the said claim being in his possession, for the particulars thereof, whenever it shall be necessary so to do.

2.—And this respondent, further answering, says, that all the notes so set out in the claim of the Garfield National Bank were notes which were discounted by the said Bank for the said Sewing Machine Company and that the said Henry A. V. Post, the petitioner, herein, was the endorser thereon, and that he has been informed and believes it to be true, that the said Henry A. V. Post endorsed the said notes for the accommodation of the said Sewing Machine Company. That after the appointment of this respondent as Receiver of the said corporation, as this respondent has been informed and believes, and charges the truth to be, the said Garfield National Bank took legal proceedings of some character, unknown to this respondent, against the said Henry A. V. Post, to compel him to pay the amount due upon the several notes which he had so endorsed, and this respondent further says,

on information and belief, that the said Henry A. V. Post paid to the Garfield National Bank the amount of its said claim against the said company, and that thereupon he took from the Garfield National Bank an assignment to him of the said claim which the said Bank had against the said Sewing Machine Company, and that the said Henry A. V. Post by virtue of the premises now claims that the said Sewing Machine Company is indebted to him in the amount proved before this respondent by the said Garfield National Bank.

4.—And this respondent, further answering, says, that the Domestic Publishing Company is a corporation of the State of New Jersey, having an issued capital stock of one hundred and eighty-one thousand dollars, divided into eighteen hundred and ten shares of the par value of one hundred dollars each, and that the whole of the said stock at the time of the appointment of this respondent as receiver of the said Sewing Machine Company belonged to the said Sewing Machine Company. That at the time that the said Henry A. V. Post endorsed the notes held by the Garfield National Bank, the same were endorsed by Caleb B. Knevals and David Blake, who were directors of the said Sewing Machine Company, and that at that time, or subsequently, the said Domestic Sewing Machine Company assigned to the said Post, Blake and Knevals, or to one of them, or to some one as trustee for them, one thousand shares of the capital stock of the said Domestic Publishing Company, as collateral security for the several amounts which the said Sewing Machine Company owed to them, or for which they were in some way obligated on behalf of the said company, and this respondent says that the said stock of the Publishing Company is still held for the benefit of the said Henry A. V. Post, the said David Blake and the said Caleb B. Knevals, and that they claim to hold the same as collateral security as aforesaid, and refuse to deliver

the same to this respondent until the payment of their respective claims. That in like manner the Second National Bank of Cooperstown, New York, within the time allowed by the said order, made proof to this respondent that the said company was indebted to the said bank in the sum of five thousand three hundred and thirty-six dollars on two promissory notes which were endorsed by the said David Blake, Caleb B. Knevals and Henry A. V. Post, and that in like manner, as this respondent is informed and believes, and charges the truth to be, the said Henry A. V. Post took up and paid off the said promissory notes and took an assignment of the said claim, which he now holds. That subsequently, and on the thirty-first day of May, eighteen hundred and ninety-three, the said Sewing Machine Company transferred to the said David Blake, Caleb B. Knevals and Henry A. V. Post promissory notes owned by the said Sewing Machine Company, aggregating the sum of forty thousand eight hundred and thirty-seven dollars and seventy-six cents, as collateral security for the amounts which they had obligated themselves for on the promissory notes held by the said Second National Bank of Cooperstown and the said Garfield National Bank, and that this respondent has in his hands the sum of one thousand dollars, which was received by him from one of the said notes made by B. J. McKinney, which is held by him to await some adjudication as to whether this respondent or the said endorsers are entitled thereto.

5.—And this respondent, further answering, says, that the said Henry A. V. Post is a shareholder in the Domestic Sewing Machine Company, and that in the year eighteen hundred and ninety-one he was elected a director of the said Company, as is stated in the bill of complaint in this cause, and that he has remained a director of the said Company from that time until the present. That the charter of the Domestic Sewing Machine Company has not been declared forfeited by this

Honorable Court and that the said Henry A. V. Post at this time is a shareholder in and a director of the said corporation; and this respondent, further answering, says: That he is informed and believes it to be true, that the said defendant, Henry A. V. Post, is possessed of property, real or personal, located within the State of New Jersey.

6.—And this respondent further answering says: that this cause is one of a series of causes depending in this and other courts to which this respondent, as receiver of the Domestic Sewing Machine Company, is a party; that all the said litigation, including this cause, is ancillary to the original cause in which he was appointed receiver for the purpose of winding up the business and affairs of the said insolvent corporation; that so far as the claim filed by the said Garfield National Bank, and assigned to the said Henry A. V. Post, as above stated, is concerned, this Court has under its control, property claimed by the said Henry A. V. Post, which is being administered upon by this Court by its orders and decrees made from time to time in the cause in which this respondent was appointed receiver as aforesaid.

7.—And this respondent, further answering, says: That the said Henry A. V. Post, in becoming a shareholder and director of the said corporation, and in making a claim against the said corporation as a creditor thereof, has thereby submitted himself to the jurisdiction of this Honorable Court, and that he is bound by all orders and decrees which may be made by this Court in relation to the business and affairs of the said Sewing Machine Company and in relation to any interest he may have therein as a creditor and shareholder, and in relation to any liability which he may be under to this respondent, as receiver of the said corporation, and this respondent prays to be hence dismissed with his costs.

COULT & HOWELL,
Solrs. for Deft.

Essex County, ss.:

ANDREW KIRKPATRICK, being duly sworn, says that he is receiver of the Domestic Sewing Machine Company; that the matters and things set out in the foregoing petition are true to the best of his knowledge, information and belief.

ANDREW KIRKPATRICK.

Sworn and subscribed to before me this 29th day of May, 1895.

CHAS. A. DICKSON,
Master in Chancery of N. J.

Opinion.

On motion to set aside order of publication against Henry A. V. Post and George Blake, absent defendants, as illegally and improvidently entered.

Mr. Lindabury for motion.

Mr. J. E. Howell *contra*.

EMERY, V. C.:

The bill in this case is filed by the Receiver of an insolvent corporation, against seven of the directors of the corporation, to establish, by decree of this court, their joint and several liability, under section seven of the corporation act, for the making and payment of dividends out of the capital of the company, and not from its surplus or net profits, and for an account of the assets and liabilities of the company, as far as necessary to determine whether these payments of dividends were so made. By the terms of this section, the directors under whose administration such payment of dividends from surplus or net profits or division of the capital among the stockholders shall happen, are liable jointly and severally to the corporation, and to the creditors thereof, in case of its dissolution or insolvency, to the full amount of the dividend made or capital stock divided. Rev. 178, Sec. 7. By the bill, process of

subpœna is prayed against seven of the directors as defendants, including George Blake and Henry A. V. Post. Subpœna against all of the defendants was issued, four of them were served by the sheriff of Essex, and three, George Blake, Henry A. V. Post and Caleb B. Knevals, were returned as non-residents, the affidavit of non-residence showing that Blake resided in North Carolina, and Post and Knevals in New York. On this affidavit an order of publication was made on March 23, 1895, against the three non-residents "that the said absent defendants do appear, plead, demur or answer to the complainant's bill on or before the twenty-fourth day of May next, or that, in default thereof, such decree be made against them as the Chancellor shall think equitable and just," and it was further directed that notice of the order as prescribed by law and the rules, be within ten days served personally on the absent defendants or be published or mailed to them as directed in the order.

The defendant George Blake, on May 22, 1895, two days before the expiration of the time fixed for his appearance by the order, and too near to that date to permit of giving the five days notice of motion to discharge the order, required by rule 141, filed a petition, setting out the filing of the bill and its general object, his residence in North Carolina, and that he had not been served with a subpœna to answer in the cause, but that in lieu thereof, the above order of publication had been made, of which he had received notice by mail. The petition prayed leave to enter a special appearance in the suit for the sole purpose of applying to set aside the order of publication, that the order might be set aside as illegally and improvidently entered, and that all further proceedings in the action against him be stayed until the determination of the matter of his application. On filing the petition, an order was made directing (1) that he had leave to enter a special appearance for the purpose of applying to set aside the order of publication, (2) that the complainant show cause why the order should not be set aside as

illegally and improvidently entered, and (3) that all further proceedings in said action against him be stayed until the determination. A similar petition was filed and similar order made, on the same day and under the same circumstances, as to the defendant Post, and on May 22, 1895, special appearances were entered on behalf of Post and Blake, for the sole purpose of applying to set aside the orders of publication made against them respectively as absent defendants.

The Receiver has filed an answer to the petition of Blake, setting out, in addition to the facts stated in the bill, that Blake filed with the complainant as Receiver, his claim as a creditor of the company in the insolvency proceedings; that he still is a shareholder and director of the company and is possessed of a large amount of real and personal property in this State, and claiming, that in becoming a shareholder and director of the corporation, and filing his claim as creditor, he has submitted himself to the jurisdiction of this Court for the purpose of all decrees made in the original suit in insolvency, or suits ancillary thereto brought by the Receiver for the purpose of winding up its affairs. Substantially similar allegations and claims are made in an answer by the Receiver to the petition of the defendant Post, his claim against the corporation being, however, one which he holds as assignee of a creditor who has proved.

On the petition and answers, the counsel for petitioners move to set aside the orders: *First*, because they are not authorized by the law of the State. This claim is based on the contention that the statutes of the State cannot be construed to authorize orders of publication in suits where the bill is founded on a purely personal demand, upon which this Court has no jurisdiction to make a decree in the suit unless the defendant is served within the jurisdiction or voluntarily appears. *Second*, because the Fourteenth Amendment to the Federal Constitution provides that no State shall deprive any person of property without due process of law, and the order violates this pro-

vision of the Federal Constitution as construed by the United States Supreme Court, and is therefore illegal. This assertion of an alleged right under the Federal Constitution was not made in the petition or on the record, but is raised at the hearing.

The motion to set aside the order of publication must be denied, upon the following grounds:

First.—The order for publication was issued under the express authority of the statute, Rev. 106, par. 18, amended March 10, 1893, Chap. 114, P. L. 199, sec. 1. This statute, so far as relates to the character of the suit in which publication might be made against an absent defendant, was the same as the Chancery act of February 29, 1820, Rev. L. 702, par. 2, and confers the power "In case of a bill filed against any defendant or defendants, &c."—without any limitation as to the character of the bill. This was an enlargement of the power conferred by the original Chancery act of 1799, Pet. Laws, 430, par. 16, which extended only to cases where "any person shall file a bill against a defendant or defendants residing within the State in which it shall be proper or necessary to join other defendant or defendants residing out of this State, whether in the United States or any other Country" &c.—The present bill, it will be perceived, comes within the scope of the act of 1799. For the Receiver was entitled, under the seventh section, to insist upon a joint liability of the directors implicated, and for this purpose a joinder of all such directors in the bill was proper. The joinder of non-resident directors charged to be jointly liable with the resident directors, and the exhaustion of all the statutory power of bringing the non-residents into Court by service or publication, is, I think, necessary, as the foundation of any decree for joint liability against the resident directors, even if no final decree can be made against the non-residents under the decree pro confesso expressly authorized by the statute. In *Madox* v. *Johnson*, 3 *Atk.*, 406, Lord Hardwicke says: "The general rule of the Court is, where a debt is joint and several, the plaintiff must

bring each of the debtors before the Court, because they are entitled to the assistance of each other for taking the account."

1 *Dan. Ch. Prac.* 3*rd Am. Ed.*, 264.
Gifford v. *Thorn*, 3 *Halst. Ch.*, 90, 94 (*Halsted Ch.*, 1848).

That the terms of the present statute extend to cases where the bill prays a decree *in personam* against a non-resident on a personal demand, as to which the Court of Equity has power to adjudicate against a resident, is settled in this Court by the decision of Vice-Chancellor Van Fleet in the *Mutual Life Insurance Company* v. *Pinner*, *16 Stew.*, 52 (1887). In this case a non-resident defendant applied to set aside a decree for deficiency which had been rendered against him in a foreclosure suit on notice given to him under this statute. The Vice-Chancellor denied this upon the ground (pp. 57, 58) that every independent government had the right to declare by what means parties to suits should be brought before its tribunals, that the method of notice to resident or non-resident was a "subject over which the law-making power of each government had supreme control," and therefore a decree against a non-resident, pronounced under the notice prescribed by statute, was in all respects as valid and effectual for all local purposes, as a decree made against a defendant brought into court by personal service of process. Chancellor Halstead in *Hoyt* v. *Thorn*, 3 *Halst. Ch.*, 9, 15, said that the statute of 1820 could only apply to "cases in which the Court has jurisdiction of the subject matter of the suit", and set aside an order of publication against a sole defendant living in New York. This was a bill filed to set aside an assignment of an interest in a decedent's estate, made in this State, and to recover the money received by the defendant under the assignment. This case appears to have been argued as if on application to proceed to decree in the cause (see argument of counsel, p. 13, and opinion, p.

14), and thus to get in advance the opinion of the Court as to what it had the right to decree, if the defendant did not appear. But, if treated as a construction of the statute, adding by construction words limiting the express terms of the act, it must yield to the later decision of Vice Chancellor Van Fleet and the cases cited by him on which he relied.

If the question of construction were *res nova*, and the present bill was filed against non-residents alone, my own view would coincide with that of the late Vice-Chancellor. The rule limiting by construction the words of a statute sometimes applies in cases where the construction of the statute is not clear, but cannot be adopted where the language of the statute is clear, and where the statute, as enacted, is within the authority of the legislature. That the clear language of the act should be followed was the rule of construction applied in the Court of Appeals in chancery on a similar question in *Drummond v. Drummond*, E. L. R., 2 *Ch. App.*, 32 (1866). The Court of Appeal here held that the rule of Court authorizing the Court to order service of a copy of a bill on a defendant "in any suit" out of the jurisdiction, and which rule had, by statute, the effect of an act of Parliament, could not be restricted to suits relating to land, stock or shares in England, as provided by previous acts of Parliament. Lord Westbury's decision in *Cookney* v. *Anderson*, 1 De G. J. & S., 66 *Eng. Ch.*, 365, limiting the operation of the rule to the cases mentioned in the previous statutes was overruled. Lindley, J., says, in *re Anglo African Steamship Company*, 32 *Ch. Div.*, 348, 351, that the question of service out of the jurisdiction depends on the statutes or rules having the force of a statute.

It is to be noted also that since the decision of Ch. Halsted, the Legislature has, by several acts, expressed its intention and policy of making non-residents and foreign corporations parties by publication to suits founded on personal demands recoverable in common law courts.

Act of March 3, 1853, Rev. 477, par. 5, allows pub-

lication against non-residents, heirs and devisees of a testator or intestate in a suit by a creditor on contract, and on default of appearance, the entry of a judgment for the debt and damages without proof of lands descended. See Par. 3 and 6. Rev., p. 193, sec. 88, &c., provides for publication against foreign corporations not served with summons.

Act 1878, P. L. 141, Suppl. Rev. 813, par. 30, provides for publication against non-resident defendants where the cause of action arose in this State, and is one denominated local. This would reach to all local actions founded on a personal demand or cause of action.

Act 1895, March 20, Chap. 201, provides for publication against non-residents or foreign corporations, etc., who own or control property in this State, where the cause of action arose in this State and the plaintiff resides in this State.

The legislative intention evidenced by these later acts negatives the idea that in any of the acts upon this subject it was intended to leave to the courts the power to limit their express language by constructive additions, confining their operation to the cases where the court might make final decree or judgment. It was not intended, I think, that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree.

Second.—Neither the statute nor the order of publication are invalid by reason of the fourteenth amendment of the Constitution of the United States, providing that "no State shall deprive any person of life, liberty or property without due process of law."

This provision, by its language, reaches only to the protection of property, and can be properly invoked only where the record shows that the taking of property

is a direct issue on the record. Such taking was directly involved in *Pennoyer* v. *Neff*, 95 U. S., 714 (1877), the leading case upon the application of the amendment to judicial proceedings in the State courts. Here a judgment was obtained in Oregon upon a personal money demand against a non-resident, and the judgment was rendered upon publication of notice to the non-resident pursuant to the Oregon statutes. The defendant in the action did not appear, judgment by default was entered and an execution issued thereon, and the purchaser at the Sheriff's sale under the execution entered into possession of the lands sold. The defendant in the Oregon suit brought ejectment for the lands in the Circuit Court of the United States against the purchaser, who set up the title under the Oregon judgment and execution. The Supreme Court (Field, J., p. 733) held that the property was taken without due process of law upon the ground, that in a suit involving merely a determination of personal liability, the defendant must be brought within the jurisdiction of the court by service of process, within the State, or by his voluntary appearance. The judgment here was attacked as being rendered without due process of law, and so in all the other cases in the Supreme Court following this case, and relied on by counsel, final judgments had been rendered, and either by force of the judgment itself or of the proceedings under it, *property had been* taken and the question whether it was taken without due process of law was directly involved in the right set up either by the plaintiff or defendant.

The courts of the State cannot, in the absence of an authoritative decision of the Supreme Court of the United States, construe this provision of the fourteenth amendment as bringing within its scope the forms of procedure in State Courts prior to the rendition of judgment, and which are adopted by the State for the purpose of acquiring or attempting to acquire, jurisdiction over non-residents. To construe it to apply to these forms of procedure, which may or may not

result in a final judgment against a non-resident, and the taking of his property, would, it seems to me, be an unwarranted extension of its provisions. The Supreme Court itself has, by its own decisions in *York* v. *Texas*, 137 U. S., 15 (1890), and *Kauffman* v. *Watters*, 138 U. S., 285 (1891), declared the operation of the amendment to be confined to cases where property is taken or attempted to be taken, by process issued under judgment, and that the benefit of its protection cannot be claimed against statutes of a State, which merely regulate procedure in cases prior to the final judgment. In the first case service in a suit brought in a Texas district court was made in St. Louis on a non-resident defendant. This defendant so served filed a special plea to the jurisdiction. Texas statutes provided that on such limited appearance, if the judgment was against the defendant, the appearance should be considered voluntary for all purposes. The District Court of the State decided against the defendant on the plea to the jurisdiction, and the defendant, relying solely on this plea, the District Court gave final judgment against defendant. On appeal to the Supreme Court of the State this judgment was affirmed, and on writ of error from the U. S. Supreme Court to the State Supreme Court the judgment was also affirmed, the U. S. Supreme Court holding that the entry of this judgment did not deprive the defendant of property, in the absence of proof that the statutes or decisions of the Texas Courts would prevent his attacking the validity of this judgment for want of jurisdiction. Mr. Justice Brewer, delivering the opinion of the Court, says on the point now in question, p. 20, "But the mere entry of a judgment for money which is void for want of proper service, touches neither person nor property. It is only when process is issued thereon, or the judgment is sought to be enforced, that liberty or property is in present danger. If at that time of immediate attack, protection is afforded, the substantial guarantee of the amendment is preserved, and there is no just cause of complaint. The State has

full power over remedies and procedure in its own Courts, and can make any order it pleases in respect thereto, provided, that substance of right is secured without unreasonable burden to the parties and litigants."

If the non-resident defendant in the present case should fail to appear, and final decree should be eventually entered against him, then, or perhaps not until the attempt to enforce the decree by process against his property, the question of his right to protection under the fourteenth amendment may properly arise, but I cannot hold that it has risen by virtue of making the order of publication for the purpose of acquiring jurisdiction of the non-resident defendant and allowing him to come in to defend if he wishes. *Eliot* v. *McCormick*, 144 *Mass.*, 10, and *Needham* v. *Thayer*, 147 *Mass.*, 536, hold that judgments which are invalid, within the rule laid down by the United States Supreme Court in *Pennoyer* v. *Neff*, can no longer be held valid in the State courts since the Fourteenth Amendment. The question of the application of the amendment and of the decision in *Pennoyer* v. *Neff* was not raised or considered by Vice Chancellor Van Fleet in *Mutual Insurance Company* v. *Pinner*, *supra*, nor have I referred to any decision in this State which rules upon the question. But the general rule, that a judgment or decree, void for want of jurisdiction appearing on the record, may be set aside on direct application or ignored in collateral proceedings, is recognized in this State, both at law and in equity.

Munday v. *Vail*, 5 *Vroom*, 218.
The Consolidated Electric Storage Co. v. *The Atlantic Trust Co.*, 5 *Dick. Ch.*, 93.

In view of the character of the bill in this cause, as filed against residents and non-residents claimed to be jointly and severally liable, and of the character of the decree which is prescribed by the statute to be entered when notice is given, as directed by the order, it seems clear that the order cannot be held to deprive the non-

residents of any property in violation of the Fourteenth Amendment.

Under the view I take of the case, it is not necessary to decide the question whether the non-resident defendant, by becoming a director in the N. J. Company, and thereby having become subject to the duties and liabilities of a director, especially imposed upon him by the act of incorporation of the company, has impliedly consented, so far as relates to the enforement of these duties and obligations, to the provisions of the New Jersey laws authorizing service on non-residents by publication. I therefore express no opinion on this point.

The application to set aside the order of publication must be denied and the rule to show cause discharged with costs.

Order Discharging Rule to Show Cause.

The order of this Court bearing date on the twenty-second day of May, eighteen hundred and ninety-five, requiring the complainant to show cause why the order for publication made herein against the defendant, Henry A. V. Post, should not be set aside as illegally and improvidently entered, having been duly served as directed in and by the said order, and the said complainant having filed his answer to the petition of the said Henry A. V. Post, and the said matter having come on to be heard in the presence of R. V. Lindabury, of counsel with the petitioner, Henry A. V. Post, and of J. E. Howell, of counsel with the complainant, and the Court being of opinion that the prayer of the said petition should not be granted;

It is thereupon on this seventeenth day of June, eighteen hundred and ninety-five, ordered and decreed that the said order to show cause be and the same hereby is discharged with costs, and that the stay of

proceedings therein contained be and the same hereby is vacated.

Respectfully advised,
ALEX. T. McGILL.
C.

JOHN R. EMERY,
Vice Chancellor.

A true Copy,
ALLAN McDERMOTT,
Clerk.

Appeal.

The defendant Henry A. V. Post, under the special appearance heretofore entered in this cause, hereby appeals from an order made therein, on the seventeenth day of June, eighteen hundred and ninety-five, ordering and decreeing that a certain order to show cause made in said cause on the twenty-second day of May, eighteen hundred and ninety-five, on the petition of said Henry A. V. Post be discharged with costs, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all cases.

Dated June 17th, 1895.

R. V. LINDABURY,
Sol'r for, and of Counsel with defendant HENRY A. V. POST.

I conceive there is good cause for appeal in the above stated cause.

R. V. LINDABURY,
Of counsel with defendant HENRY A. V. POST.

Petition of Appeal.

To the Honorable the Court of Error and Appeals in the last resort in all cases:

The humble petition of Henry A. V. Post, the appellant in the above-entitled cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Alexander T. McGill, Chancellor of New Jersey, bearing date the 17th day of June, eighteen hundred and ninety-five, in a cause wherein Andrew Kirkpatrick was complainant and your petitioner and others were defendants, in this respect, to wit: that the said order adjudges and decrees that a certain order to show cause, made in said cause on the twenty-second day of May, eighteen hundred and ninety-five, on the petition of your petitioner, requiring the complainant to show cause why a certain order of publication theretofore taken in said cause against your petitioner should not be set aside, be discharged with costs.

And your petitioner humbly appeals from the said order and from every part thereof upon the ground that the same is erroneous, for that the said order to show cause should have been made absolute, with costs in favor of your petitioner and against the said complainant; and, also, for that the said order of publication is contrary to law and the practice of said Court of Chancery; and also for that the said order of publication is contrary to the Fourteenth Amendment of the Constitution of the United States.

Your petitioner therefore prays that the said order of the Chancellor dated the seventeenth day of June, eighteen hundred and ninety-five, and the said order of publication may be in all things reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

R. V. LINDABURY,
Sol'r. for and of Counsel
with Appellant.

Answer to Petition of Appeal.

The answer of the above-named respondent to the petition of appeal of the above-named appellant:

This respondent not acknowledging all or any of the matters, which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that an order was, on the seventeenth day of June last past, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said order is agreeable to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

COULT & HOWELL,
Solrs. and of Counsel with Respondent.

Petition of George Blake for Relief

IN CHANCERY OF NEW JERSEY.

Between—
ANDREW KIRKPATRICK, Receiver, &c., Complainant,
AND
GEORGE BLAKE and others, Defendants.

On Bill, &c., Petition.

To the Honorable ALEXANDER T. MCGILL, Chancellor, of the State of New Jersey:

Your petitioner, GEORGE BLAKE, one of the defendants in the above entitled cause, respectfully shows:

1st.—That the bill of complaint in said cause is filed against him and others as Directors of the Domestic Sewing Machine Company, a corporation of the State of New Jersey, for the sole purpose of obtaining a decree making said defendants liable to the complainant as receiver of said corporation for moneys alleged to have been improperly and illegally paid out by said company under the order of said Directors as dividends upon the general and preferred stock of said company.

2nd.—That your petitioner is a resident of Greensboro in the State of North Carolina, and has been a resident of the State of North Carolina for more than one year last past.

3rd.—That your petitioner has not been served with a subpœna to answer in said cause, but that in lieu of said service an order was made against him in said cause as an absent defendant on the twenty-third day of March last, requiring him to appear, plead, answer or demur to the said bill of complaint on or before the twenty-fourth day of May instant, or the said bill would be taken as confessed against him, notice of which order, received by your petitioner through the United States mail, is annexed to the affidavit of David Blake hereto attached.

Your petitioner therefore prays:

1st.—That he may be permitted to enter a special appearance in the above-entitled cause for the sole purpose of applying to set aside the said order of publication.

2nd.—That the said order of publication may be set aside as illegally and improvidently entered.

3rd.—That all further proceedings in said action against him be stayed until the termination of the matter.

Dated, May 21st, 1895.

R. V. LINDABURY,
Solicitor for petitioner.

IN CHANCERY OF NEW JERSEY.

Between—
ANDREW KIRKPATRICK, Receiver, &c.,
Complainant,
AND
GEORGE BLAKE and others,
Defendants.

On Bill, &c., Affidavit.

Union County, ss.:

DAVID BLAKE, of full age, being duly sworn, on his oath, saith: I am one of the defendants in the above-entitled cause. George Blake, another of said defendants, is my brother. He resides at Greensboro', in the State of North Carolina, and has resided there for a year or more. He is a florist, and has not been in the State of New Jersey within the last six months, so far as I know or have heard, or believe. On the 23rd day of March, 1895, there was published in the Newark Daily Advertiser, a newspaper published in the City of Newark, in the County of Essex, a notice of which a copy cut from said paper is hereto attached; said notice is in the suit entitled above, and the George Blake therein-named is my said brother. I received a letter from my brother a short time ago, stating that he had received by mail a printed copy of said notice, which he enclosed to me, and asked me to look after the matter for him.

DAVID BLAKE.

Sworn and subscribed before me this 20th day of May, A. D. 1895.

A. J. BRUNSON,
Master in Chancery of New Jersey.

In Chancery of New Jersey—

To George Blake, Caleb B. Knevals and Henry A. V. Post:

By virtue of an order of the Court of Chancery of New Jersey, made on the day of the date hereof, in a case wherein Andrew Kirkpatrick, receiver of the Domestic Sewing Machine Company, is complainant, and you and others are defendants, you are required to appear, plead, answer or demur to the bill of the said complainant on or before the twenty-fourth day of May next, or the said bill will be taken as confessed against you.

The said bill is filed for the purpose of obtaining a decree of the said Court, making you and others directors of the Domestic Sewing Machine Company, liable to the receiver for moneys alleged in said bill to have been improperly and illegally paid out by said Company as dividends upon the general and preferred stock of the said Company, and you are made defendants to said bill because it is therein alleged that you were directors of the said Company at the time the said moneys were so paid out.

Dated March 23, 1895.

Coult & Howell,
Solicitors of Complainant,
765 Broad street,
Newark, N. J.

m. 27-4.w. We.

Answer to Petition of George Blake for Relief.

The answer of Andrew Kirkpatrick, Receiver, etc., complainant in this cause, to the petition of George Blake, defendant :

1.—This respondent for answer to the first paragraph of the said petition admits the filing of the bill of complaint in this cause, as therein stated, but prays leave to refer thereto for the object and purpose thereof, and he admits that the said George Blake is now a resident of the State of North Carolina, that he was not served with a subpœna to answer in this cause, and that an order for publication was made against him herein, as is stated in the said petition, and he

prays leave to refer thereto whenever it may be necessary so to do.

2. And this respondent, further answering, says, that on the second day of June, eighteen hundred and ninety-three, he was appointed Receiver of the Domestic Sewing Machine Company, a New Jersey corporation, by the order and decree of this Honorable Court, for the purpose of winding up the business and affairs of the said corporation as an insolvent corporation; that he accepted the said appointment, and has been, since the date of his appointment, engaged in the business of winding up the affairs of the said corporation and in carrying on the business of the corporation under the orders and direction of this Court; that on the ninth day of June, eighteen hundred and ninety-three, this Court made an order, requiring all creditors of the Domestic Sewing Machine Company to present their claims against the said company to this respondent, as its Receiver, within a period of four months from that date, and that in pursuance to the notice which this respondent gave to the creditors of the said company of the said order, the petitioner, George Blake, within the said period of four months, and while he was yet a resident ot the State of New Jersey, filed his claim against the said company, claiming that on the sixth day of October, eighteen hundred and ninety-three, the said Domestic Sewing Machine Company was indebted to him in the sum of seven thousand eight hundred and twenty-nine dollars and forty-seven cents, besides interest, upon certain promissory notes set out in his said claim, and that so far as this respondent knows the said claim has never been withdrawn; and this respondent prays leave to refer to the said claim in his possession for the particulars thereof, whenever it shall be necessary so to do.

3.—And this respondent, further answering, says, that the said George Blake is a shareholder in the Domestic Sewing Machine Com-

pany, and that in the year eighteen hundred and ninety-one he was elected a director of the said company, as stated in the bill of complaint in this cause, and that he has remained a director of the said company from that time until the present; that the charter of the Domestic Sewing Machine Company has not been declared forfeited by this Honorable Court, and that the said George Blake at this time is a shareholder and director of the said corporation, and this respondent, further answering, says that he is informed, and believes it to be true, that the said defendant, George Blake, is possessed of a large amount of real and personal property located within the State of New Jersey.

4.—And this defendant, further answering, says, that this cause is one of a series of causes depending in this and other courts, in which this respondent, as Receiver of the Domestic Sewing Macnine Company, is a party; that all the litigation, including this cause, is ancillary to the original cause in which he was appointed Receiver for the purpose of winding up the business and affairs of the said insolvent corporation; that so far as the claim filed by the said George Blake, as above stated, is concerned, this Court has under its control property claimed by the said George Blake, which is being administered upon by tnis Court by its orders and decrees made from time to time.

5.—And this respondent, further answering, says. that the said George Blake in becoming a shareholder and director of the said corporation and in filing a claim against the said corporation as a creditor has thereby submitted himself to the jurisdiction of this Honorable Court, and that he is bound by all orders and decrees which may be made by this Court in relation to the business and affairs of the said Sewing Machine Company, and in relation to any interest he may have therein as a creditor or shareholder and in relation to any liability which he may be under to this respondent, as Receiver of the said corporation, and

this respondent prays to be hence dismissed with his costs.

COULT & HOWELL,
Solicitors for Defts.

Essex County, ss.:

Andrew Kirkpatrick, being duly sworn, says that he is Receiver of the Domestic Sewing Machine Company, that the matters and things set out in the foregoing answer are true to the best of his knowledge, information and belief.

ANDREW KIRKPATRICK.

Sworn and subscribed to before me this 28th day of May, 1895.

Chas A. Dickson,
Master in Chancery of N. J.

In the George Blake case there was a rule to show cause, a special appearance, and order discharging the rule to show cause, an appeal, a petition of appeal and an answer to such petition, all in the same form as in the Post case.