

## THE CONCLUSIVENESS OF JUDGMENTS AGAINST CORPORATIONS ON THEIR MEMBERS IN ASSESSMENT PROCEEDINGS

In many of the early attempts to assess foreign stockholders by receiver's suits, courts were reluctant to proceed against them. The petitions of creditors were more favorably regarded; yet even they, not infrequently, failed to compel stockholders to perform their just obligations. At a later period the courts realized that both receivers and creditors must be treated with greater consideration; meanwhile the old doctrine concerning the conclusiveness of a judgment against a corporation on its members, which is the basis of proceedings against them for assessments, is on the judicial anvil assuming a more pliable form. From this labor has appeared from time to time a new limitation or modification; the existing rule may therefore be thus expressed: a judgment against a corporation rendered without mistake,<sup>1</sup> by a court of competent jurisdiction,<sup>2</sup> untainted by fraud,<sup>3</sup> on a contract *intra vires*,<sup>4</sup> is conclusive with respect to the amount of the corporation's indebtedness and the propriety of the procedure.

The occasions are few in which a mistake has been committed by a court in rendering judgment serious enough to serve as a justifiable ground for stockholders to resist paying their assessments. No one will question the justness of this limitation, and therefore whenever a mistake has been shown, courts have not failed to give to stockholders the full benefit arising from the discovery.

The occasions are more numerous in which judgments against corporations have proved an insufficient basis against their members from lack of jurisdiction. Of course this difficulty is fundamental, and whenever the defect is shown, the worthlessness of

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<sup>1</sup> *Merchants' Bank v. Chandler*, 19 Wis., 434; *Wilson v. Kiesel*, 9 Utah, 397, and 164 U. S., 248, dismissing appeal.

<sup>2</sup> *Fogg v. Ellis*, 61 Neb., 829; *Schertz v. First Nat. Bank of Chester*, 47 Ill. App., 124; *Ball v. Reese*, 58 Kan., 614; *Steffins v. Gurney*, 61 Kan., 292; *American National Bank v. Supplee*, 115 Fed., 657; *Hancock Nat. Bank v. Farnum*, 176 U. S., 640.

<sup>3</sup> *Martin v. Wilson*, 58 C. C. A., 181, 184.

<sup>4</sup> *Ward v. Joslin*, 186 U. S., 142; *Warrington v. Ball*, 33 C. C. A., 609.

the judgment appears. This class of cases, therefore, has not been difficult for courts to adjudicate.<sup>5</sup>

Again, if fraud or collusion enter into a judgment, it would be contrary to elementary principles to predicate any subsequent action thereon. The cases of this character are numerous, and many of them have been already mentioned.<sup>6</sup>

The reasons are not less cogent for declaring that a judgment against a corporation which rests on an *ultra vires* contract ought not to serve as a basis of assessment on a member. This limitation has the sanction of the highest federal tribunal.<sup>7</sup>

A judgment cannot operate against a member unless he is one. Therefore, when he is sued for an assessment, he may always show that he is not a member; either that he never was, or that he has parted with his stock through voluntary action, or by operation of law.<sup>8</sup> Says Chief Justice Knowlton in *Howarth v. Lombard*:<sup>9</sup>

"Of course the defendant may show if he can that he is not a stockholder of the bank, or not a stockholder for so large an amount as alleged, or may make any other defense that is personal to himself. But we are of opinion that, as a member of the corporation, he is bound by the decision of the court of the State where the corporation was organized, made in administering its affairs in insolvency and determining the amount of its assets and liabilities and the amount of the assessment which should be made upon the stockholders."

The logical deduction from this rule is, a member can also prove that he does not own as much stock as may be asserted or alleged.<sup>10</sup>

<sup>5</sup> *McBryan v. Universal Elevator Co.*, 130 Mich., 111, 116; *Ward v. Joslin*, 44 C. C. A., 456.

<sup>6</sup> *McBryan v. Universal Elevator Co.*, 130 Mich., 111, 116; *Bohn v. Brown*, 33 Mich., 257; *Slee v. Bloom*, 20 Johns., 669; *Bissett v. Ky. River Nav. Co.*, 15 Fed., 353.

<sup>7</sup> *Ward v. Joslin*, 186 U. S., 142; *Marion Trust Co. v. Blisk*, 170 Ind., 686; *American Nat. Bank v. Supplee*, 115 Fed., 657. Contra, *Baines v. Babcock*, 95 Cal., 581.

<sup>8</sup> *King v. Cochran*, 76 Vt., 141; *Howarth v. Lombard*, 175 Mass., 570; *Straw and Ellsworth Mfg. Co. v. Kilbourne Boot and Shoe Co.*, 80 Minn., 125; *Giving v. Red River Lumber Co.*, 105 Miss., 336; *Brown v. Traill*, 89 Fed., 641; *Hanson v. Davison*, 73 Minn., 454.

<sup>9</sup> 175 Mass., 570; *Town of Hinckley v. Kettle River R. Co.*, 80 Minn., 32.

<sup>10</sup> *King v. Cochran*, 76 Vt., 141; *Howarth v. Lombard*, 175 Mass., 570; *Straw and Ellsworth Mfg. Co. v. Kilbourne Boot and Shoe Co.*, 80 Minn., 125; *Saylor v. Commercial Bkg. Co.*, 38 Or., 204.

As he is permitted to prove that the debt upon which judgment was obtained was fraudulent, so can he prove that it has been paid or discharged;<sup>11</sup> he is relieved from paying by the statute of limitations.<sup>12</sup>

We have now reached one of the two great battle grounds of judicial controversy. To what extent is the amount of a judgment against a corporation conclusive on its members? Three opinions are maintained. The Nebraska view is: "An assessment made by the court on the stockholders of an insolvent corporation is a conclusive judicial determination only to the extent that it ascertains the amount of the corporate assets and liabilities and declares the necessity for making the assessment ordered."<sup>13</sup> By this view a stockholder is not personally bound in any manner by the judgment. To sustain this view are cited several cases from which, however, with one or two exceptions, it is difficult to extract such a rule. It is true that this view has the sanction of the Supreme Court of Missouri, for in *Wilson v. St. Louis & San Francisco R. R. Co.*, the court declared that a stockholder is not, in any sense, a party to the judgment, rendered against a corporation to which he may belong.<sup>14</sup> The same view has been entertained by Justice Canty of Minnesota in a dissenting opinion.<sup>15</sup>

Another case is *Pennoyer v. Neff*, which was an action to recover a tract of land.<sup>16</sup> The plaintiff asserted title by a patent of the United States, while the defendant's title rested on a sheriff's deed given in execution of a judgment recovered against the plaintiff. The effect of a judgment against a corporation in no way entered into the case.

Another case was the *Great Western Telegraph Co. v. Purdy*,<sup>17</sup> which was a bill in equity by some members of the company to compel the issue of shares to them, and to set aside as fraudulent a contract by which the company had agreed to transfer all its shares to others. A decree was entered setting aside the con-

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<sup>11</sup> *Martin v. Wilson*, 58 C. C. A., 181, 184; *Barron v. Paine*, 83 Me., 312.

<sup>12</sup> *Great Western Tel. Co. v. Purdy*, 162 U. S., 329; *Schertz v. First Nat. Bank of Chester*, 47 Ill. App., 124.

<sup>13</sup> *Commonwealth Mutual Fire Ins. Co. v. Hayden*, 61 Neb., 454, 457; *Lund v. Ballard*, 80 Neb., 385.

<sup>14</sup> 108 Mo., 588; *Ball v. Breese*, 58 Kan., 614.

<sup>15</sup> *Langworthy v. Garding*, 74 Minn., 325, 332; *Steffins v. Gurney*, 61 Kan., 292.

<sup>16</sup> 95 U. S., 714, 723; *Clark v. Ogilvie*, 63 S. W. (Ky.), 429.

<sup>17</sup> 162 U. S., 329; *Wood v. Wood*, 78 Ky., 625, and cases cited

tract and ordering shares to be issued to the petitioners, and the election of a new board of directors. Afterwards a supplemental bill was filed by other stockholders, alleging fraud and mismanagement by the new directors, insolvency of the company, and praying for the appointment of a receiver. The court without notice to the petitioners in the original bill, appointed a receiver, and made an order for an assessment on all the stockholders. "The order was not," so the court declared, "and did not purport to be, a judgment against any one. It did not undertake to determine the question whether any particular stockholder was or was not liable to any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defense he may have in an action upon the contract. In this action, therefore, brought by the receiver, in the name of the company, as authorized by the order of assessment to recover the sum supposed to be due from the defendant, he has the right to plead a release, or payment, or the statute of limitations, or any other defense, going to show that he is not liable upon his contract of subscription." This case may sustain the Nebraska view to some extent, but only a partial answer is given to the question, for nothing more was needed to determine the case. Could the stockholder show that his liability, if once existing, had ceased by operation of the statute of limitations? And the court answered in the affirmative. The court did not attempt to show that defenses are denied to a stockholder by the rendition of a judgment against his company; nor are we justified in assuming that its silence should be construed as an acquiescence in the view ascribed to it by the Nebraska tribunal, especially in the clear light of three other decisions cited by the Nebraska court, which will now be noticed.

The first of these is *Howarth v. Angle*,<sup>18</sup> which was an action by the receiver of a bank in the State of Washington against a stockholder living in New York. "It was not necessary," said Justice Vann, "that all the stockholders should be before the Washington court when the order was made appointing the plaintiff receiver and giving him authority to sue, any more than when a decree in bankruptcy is made, which binds all who are not parties the same as those who are. The judgment may be regarded as a proceeding *in rem* binding all the world so far as

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<sup>18</sup> 162 N. Y., 179; *Merchants' Bank v. Chandler*, 19 Wis., 434.

title to the assets of the corporation is concerned, and according to the decisions of the highest courts of the State where it is made, the so-called statutory liability of stockholders is part of the assets."

The second case is *Howarth v. Lombard*,<sup>19</sup> a Massachusetts adjudication, in which Chief Justice Knowlton said:

"The court of Washington, acting under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholder relates to the payments of amounts, so to be ascertained. The ascertainment is like a common case of a judgment against a corporation which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation. That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided."

The third case is *Ball v. Breesc*.<sup>20</sup> The stockholders of a bank against which a judgment had been rendered on a certificate of deposit sought to show that it had been issued without authority, and therefore was not a valid indebtedness of the corporation. The trial court ruled that the stockholders could make any defense which the bank itself could have made, and admitted testimony to prove the defendant's contention. But the ruling was not sustained by the court of review. That court asked the questions, "What effect is to be given to the judgment against the corporation in a proceeding to enforce the statutory liability? Is it to be deemed conclusive upon the stockholders? or can they go behind it and compel creditors to re-litigate the questions determined between the corporation and himself?" And the court thus answered: "The rule appears to be well settled, and the courts seem well nigh unanimous in holding that the judgment is conclusive upon the stockholders as to the liability of the corporation, except for collusion or fraud, and, of course, a judgment is of no force where there is a lack of jurisdiction.

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<sup>19</sup> 175 Mass., 570.

<sup>20</sup> 58 Kan., 614.

The ruling proceeds upon the theory that the corporation represents its stockholders within the limits of its corporate powers. Through its officers and agents it can make contracts binding upon its members, and as it has to bring and defend suits in regard to any interest of the corporation, its action in that respect, if there is good faith, necessarily binds the stockholders as to any matter in litigation."

If the Nebraska view were generally entertained the difficulty in collecting assets from the stockholders would be greatly increased, a result that would have a disastrous effect on the credit of corporations. The double liability has broadened their foundation among creditors whereby their members have profited; and when overtaken by disaster it is not creditable to the law to find for them ways for escaping their just obligations.

The second view is that the judgment against the corporation for the amount is only *prima facie* evidence of the truth in a suit against a stockholder for his assessment. This rule has the support of several jurisdictions.<sup>21</sup> It was early adopted by the courts of New York,<sup>22</sup> but instead of assuming a permanent place in the jurisprudence of the State, it was questioned and modified. The Court of Errors, reversing Chancellor Kent, held that the stockholders were concluded by the judgment against the corporation,<sup>23</sup> and this ruling was sustained on another occasion.<sup>24</sup> Then followed a change, the court holding that the judgment was not even *prima facie* evidence of the validity of the debt.<sup>25</sup> Later there was a return to the former view.<sup>26</sup> At last, the question

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<sup>21</sup> *Wheatley v. Glover*, 125 Ga., 710; *McBryan v. Universal Elevator Co.*, 130 Mich., 11; *Schoffler v. Missouri Home Ins. Co.*, 46 Mo., 228. In the *Wheatley* case a creditor of a bank obtained a judgment against it for services rendered after the bank was placed in the hands of a receiver. This judgment, though *prima facie* conclusive on the question of the indebtedness of the corporation, did not deprive a court of equity sitting in another State of the right to determine whether the claimant's right of action was such as to bind the stockholders in a proceeding to enforce a stockholder's subscription and statutory liability. *Covell v. Fowler*, 144 Fed., 535. In *McBryan v. Universal Elevator Co.*, 130 Mich., 111, 117, the court says: "When a stockholder can show, even *aliunde* the record, that the judgment is wholly void, he may do so as a defense to his liability as a stockholder."

<sup>22</sup> *Slee v. Bloom*, 5 Johns, Ch. 366.

<sup>23</sup> 19 Johns., 456, 473; and 20 Johns., 669.

<sup>24</sup> *Moss v. Oakley*, 2 Hill, 265, 267.

<sup>25</sup> *Moss v. Oakley*, 5 Hill, 131.

<sup>26</sup> *Moss v. McCullough*, 7 Barb., 279.

came before the present Court of Appeals. Three of the judges held that the judgment was *prima facie* evidence of the amount; four refused to attach to it even that much weight.<sup>27</sup> And this view has received its sanction in later cases. In *Howarth v. Angle*,<sup>28</sup> a recent determination of the court, it was declared that in such a suit against a stockholder he may "controvert all the essential facts, such as insolvency, the amount of the deficiency, and the like, whether they are established by the judgment appointing the receiver or not."

The third view is that the judgment is conclusive of the amount within the limitations mentioned in the first statement of the rule.<sup>29</sup> But as these cover most of the cases in which the amount

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<sup>27</sup> *Belmont v. Coleman*, 21 N. Y., 96. In *McMahon v. Macy*, 51 N. Y., 155, the court held that a judgment against the company was a *prima facie* evidence of its existence, but a stockholder in an action against him was not thereby prevented from showing that the company was not properly organized, besides other defences. For a review of New York cases see opinion of Gray, Com., in above case, also *Miller v. White*, 57 Barb., 504, and *Belmont v. Coleman*, 1 Bos., 188. In *Hastings v. Drew*, 76 N. Y., 9, the court still wavered over the effect to be given to such a judgment.

<sup>28</sup> 162 N. Y., 179.

<sup>29</sup> *Nichols v. Stevens*, 123 Mo., 96; *Schofield v. Excelsior Oil Co.*, 27 Ohio C. C., 347; *Castleman v. Templeman*, 87 Md., 546; *Straw and Ellsworth Mfg. Co. v. Kilbourne Boot and Shoe Co.*, 80 Minn., 125; *Swing v. Red River Lumber Co.*, 105 Mo., 336; *Hendrickson v. Bradley*, 29 C. C. A., 303; *Verner v. Simpson*, 68 S. C., 459, 460, and cases cited. In Kansas its conclusiveness is declared by statute. *Dexter v. Edmunds*, 89 Fed., 467. "The great weight of authority supports the doctrine that the judgment, in an action by a creditor against a corporation, in the absence of fraud and collusion, pronounced by a court having jurisdiction, is conclusive of the amount and validity of the claim as against stockholders who are made defendants in a suit to reach corporate assets wrongfully withdrawn and in the hands of stockholders." *Montgomery v. Whitehead*, 40 Col., 320, 322, citing *Singer v. Hutchinson*, 183 Ill., 606; *Bissitt v. Ky. River Navigation Co.*, 15 Fed., 353. In *Hale v. Hardon*, 95 Fed., 747, 757, Judge Aldrich says: "It has been repeatedly held, and the great weight of authority is, that a judgment against a corporation in favor of a creditor, without notice to a stockholder, conclusively establishes the fact of indebtedness, while, in a comparatively few jurisdictions it is treated as *prima facie* evidence only" Citing, *Flash v. Conn.*, 109 U. S., 371, 380; *Hanson v. Davison*, 73 Minn., 454; *Holland v. Duluth Iron Co.*, 65 Minn., 324; *Grund v. Tucker*, 5 Kan., 614; *Thayer v. Printing Co.*, 108 Mass., 523, 528; *Came v. Brigham*, 39 Me., 35; *Milliken v. Whitehouse*, 49 Me., 527, 529; *Bullock v. Kilgour*, 39 Ohio St., 543; *Bank v. Warren*, 52 Mich., 557, 561; *Henderson v. Turngren*, 35 Pac. 495 (Utah); *Bissitt v. Ky. River*

has been the chief matter in controversy, this view yields nearly the same results as the other, that the judgment against the corporation is essentially nothing more than a *prima facie* judgment against its stockholders. Still, the results have not always been similar from applying these two supplementary or subsidiary rules to the principal one. Thus it has been held that a judgment against a bank, adjudging it liable for assessment as a stockholder in another bank, is conclusive upon its stockholders with respect to such liability, and a stockholder who is sued upon such judgment in another jurisdiction to enforce his statutory liability cannot set up the want of bank power to subscribe to the stock of another corporation.<sup>30</sup>

Again in a determination of this character by the New Jersey Court of Errors the court remarked:

"The proper tribunal to ascertain the amount necessary for these purposes is a court of equity, since courts of law have no procedure adapted to the marshalling of assets and liabilities requisite in such a calculation. The ascertainment may be made on a petition filed by the receiver against the stockholders in the suit wherein the corporation was adjudged to be insolvent, for it seems to be settled that a stockholder is so far an integral part of the corporation that, in view of the law, he is to that extent privy to those proceedings; and when in such a suit an assessment on the stock has been ordered by the court to meet corporate liabilities, and an action is brought against a stockholder to collect his quota, he cannot then question the propriety of the assessment."<sup>31</sup>

In Ohio the findings and judgment in a mortgage that had been assumed by a corporation and foreclosed was held to be conclusive against the stockholders of the corporation with respect to the assumption of the debt, and they were thereby precluded from interposing any defense that might have been set up by the corporation in the foreclosure proceeding.<sup>32</sup>

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*Nav. Co.*, 15 Fed., 351, 361; *Wilson v. Coal Company*, 43 Pa., 424; *Dunworth v. Coolbaugh*, 5 Iowa, 300; *Bank of Australasia v. Nias*, 16 Q. B., 717; *Borland v. Haven*, 37 Fed., 394; *Powell v. Railway Co.*, 38 Fed., 187; *Tabor v. Bank*, 10 C. C. A., 429; *McVacker v. Jones*, 70 Fed., 754; *Mortgage Co. v. Woodworth*, 79 Fed., 951; *Guerney v. Moore*, 131 Mo., 650; *Heggie v. Association*, 107 N. C., 581; *Warrington v. Ball*, 33 C. C. A., 609; *Bradley v. Eyre*, 11 Mees. and Wels., 432.

<sup>30</sup> *Martin v. Wilson*, 58 C. C. A., 181.

<sup>31</sup> *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq., 627, 629, citing *Hawkins v. Glenn*, 105 U. S., 319; *Hood v. McNaughton*, 25 Vroom, 425.

<sup>32</sup> *Gaw v. Glassboro Novelty Co.*, 20 Ohio C. C., 416.



Likewise in an action to enforce the liability of stockholders after judgment had been rendered against a corporation for its indebtedness, a stockholder was not allowed to show informality in the execution by the corporation of its notes representing the debt.<sup>33</sup> *Howarth v. Lombard* is one of the headlands on this subject in which Chief Justice Knowlton has remarked:

"We are of opinion that, as a member of the corporation, he is bound by the decision of the court of the State where the corporation was organized, made in administering its affairs in insolvency, and determining the amount of its assets and liabilities and the amount of the assessment which should be made upon the stockholders."<sup>34</sup>

The rule applied by the United States Supreme Court is not so clearly defined, except in administering the national banking law. The court has exercised liberal authority in reviewing judgments on which assessment proceedings have been based; perhaps the New York view, as declared in *Howarth v. Angle*, may be seen reflected in the federal cases. In one of them a national bank went into voluntary liquidation in September, 1873. Before that time it had become liable to a state bank as guarantor on notes made by a third person, which were discounted by the state bank. In August, 1874, the maker of them was released from further liability by the acting president of the national bank, who, however, attempted to continue the bank's liability thereon. In May, 1880, a judgment was obtained by the state bank against the national bank and its stockholders to enforce their statutory liability. It was held that the judgment against the bank was not binding on the stockholders in the sense that it could not be re-examined; that the bank's guaranty on the notes was released by the release of the maker, and that the rights of the stockholders could not be affected by the acts of their president after the bank had gone into liquidation.<sup>35</sup> In other than national bank cases the view of the Supreme Court reflects more clearly the law of the State in which the cause of action has arisen.

Again, is there any distinction between the conclusiveness of a judgment against a corporation in which the directors were served with the process, or a receiver? Judge Aldrich, speaking for the Circuit Court of Appeals, has thus answered the question:

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<sup>33</sup> *Steffins v. Gurney*, 61 Kan., 292.

<sup>34</sup> 175 Mass., 570.

<sup>35</sup> *Schrader v. Manufacturers Nat. Bank*, 133 U. S., 67.

"We fail to discover any reasonable distinction between the rule of conclusiveness in respect to a judgment for indebtedness against a judgment or decree against an insolvent corporation represented by a general receiver, who is the quasi-judicial receiver of the corporation and its interests."<sup>36</sup>

How far is the decree of a corporation's insolvency or the amount of its indebtedness, determined in such a procedure, binding on its members in subsequent assessment proceedings? Generally, such a judgment or decree has been regarded the same as a judgment against it by a creditor for a debt which is not paid, and serving as the basis for his proceedings against them. In other words such action is a substitute for that of creditors in obtaining a judgment. Its conclusiveness is measured by the same principles.<sup>37</sup> When, therefore, a judgment for the amount due from a corporation is only *prima facie* evidence of the fact, an insolvency decree is regarded in the same manner.<sup>38</sup>

The other battle ground relates to the notice that must be given to stockholders to render the judgment against the corporation binding on them.<sup>39</sup> The more general rule is that notice to the corporation is notice to the members. "A stockholder of the company," says the Circuit Court of Appeals, "is equally bound and concluded, for the reason that he is an integral part of the corporation, as, in contemplation of law, he was before the court in all the proceedings touching the body of which he was a mem-

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<sup>36</sup> *Hale v. Hardon*, 95 Fed., 747, 757; *Great Western Tel. Co. v. Purdy*, 162 U. S., 329, 336.

<sup>37</sup> *Converse v. Ayer*, 197 Mass., 443, 455.

<sup>38</sup> *Booth v. Dear*, 96 Wis., 516; *State v. Union Stock Yards State Bank*, 103 Iowa, 549; *Howarth v. Angle*, 162 N. Y., 179.

<sup>39</sup> *Converse v. Ayer*, 197 Mass., 443, 455, citing *Howarth v. Lombard*, 175 Mass., 570; *Glenn v. Williams*, 60 Md., 93; *Hawkins v. Glenn*, 131 U. S., 319; *Hancock Nat. Bank v. Farnum*, 176 U. S., 640; *Bernheimer v. Converse*, 206 U. S., 516; *Hanson v. Davison*, 73 Minn., 454, 462; *Merchants' Nat. Bank v. Minnesota Thresher Mfg. Co.*, 90 Minn., 144; *Caloway v. Glenn*, 105 Ky., 648; *Castleman v. Templeman*, 87 Md., 546; *Langworthy v. Garding*, 74 Minn. 325; *Marson v. Deither*, 49 Minn., 423; *Straw and Ellsworth Mfg. Co. v. Kilbourne Boot and Shoe Co.*, 80 Minn., 125; *Parker v. Stoughton Mill Co.*, 91 Wis. 174; *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich., 170; *Warner v. Delbridge*, 110 Mich., 590; *Irvine v. Putnam*, 167 Fed., 174; *Goss v. Carter*, 156 Fed., 746; *Great Western Tel. Co. v. Purdy*, 162 U. S., 329; *Hale v. Hardon*, 37 C. C. A., 240; *Childs v. Cleaves*, 95 Me., 498. Note 34 L. R. A., 694.

ber."<sup>40</sup> Thus in an action by a creditor against a corporation in which a judgment is rendered declaring the corporation insolvent and a receiver is appointed, a shareholder is a party defendant by representation and consequently cannot dispute the validity of the receiver's appointment, in an action against him to collect an unpaid subscription.<sup>41</sup>

But some jurisdictions still insist that actual notice must be served on the members in order to bind them by a judgment rendered against their corporation.<sup>42</sup>

The conclusiveness of the judgment against the corporation affects the stockholders in the same manner whether his liability is for an unpaid subscription for his stock, or for an additional sum, usually not greater than the par value of the stock. Says the New York Court of Appeals:

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<sup>40</sup> *Hendrickson v. Bradley*, 85 Fed. 508, 516; *Sanger v. Upton*, 91 U. S., 56; *Wilson v. Seymour*, 22 C. C. A., 447. Said Jackson, J., in *Stutz v. Handley*, 41 Fed. 537: "The judgment cannot be re-litigated in this case, for the reason that the defendants, as shareholders, being represented by the corporation in that suit, have already had their day in court on this question."

<sup>41</sup> *Fish v. Smith*, 73 Conn., 377; *Howard v. Glenn*, 85 Ga., 238.

<sup>42</sup> Stockholders are not bound by a judgment against a corporation in an action to which they are not in fact parties in respect to rights arising out of contracts other than subscriptions for stock, for example, a contract which is the basis of a mechanic's lien on the property of the corporation. *Andrews v. National Foundry and Pipe Works*, 22 C. C. A., 210. In a proceeding against a stockholder at the instance of a creditor, to enforce the individual liability under the contract, a judgment against the corporation establishes *prima facie* the amount and validity of the debt. When the stockholder was not a party to the suit against the corporation, and had no opportunity to defend in that suit he may, by way of defense in a suit against him, set up not only any fact which would absolve him from liability under the charter but also any fact which would establish that the corporation was not liable upon the debt which was the basis of the judgment. *Wheatley v. Glover*, 125 Ga., 710. In *Converse v. Aetna Nat. Bank*, 69 Conn., 163, the court, after declaring that the Minnesota law providing for the appointment of receivers with authority, to proceed against non-resident stockholders was unconstitutional, held that the objection incurred by the defendant stockholder was that of a surety, and was not due to the corporation, but only to its creditors or to their representatives; that as the assessment order by the Minnesota court did not deal with obligations due to the insolvent corporation or with the disposition of its property, the defendant was not a party to the action in that State on the theory that it was represented by the insolvent corporation, and therefore the order did not conclude the amount of his contractual obligation.

"There is no substantial difference between the liability for an unpaid balance on a stock subscription, and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which the stock may be owned. The express promise runs to the corporation, and may be enforced by it, while the implied promise runs to the creditors, and may, according to the common law of the State wherein it was made, be enforced for the benefit of creditors, or by a receiver of the corporation."<sup>43</sup>

Formerly a distinction was drawn in the mode of procedure against him for the two liabilities, the courts declaring that a receiver, assignee or creditor could proceed against him for the unpaid subscription, because it was a liability due to the corporation, while creditors alone could sue for the double liability because it was an asset intended solely for their benefit.<sup>44</sup> As a receiver or assignee had no title thereto, he had no right to sue for the recovery of this asset. To overthrow this distinction, which was not based on a sound theory, has required many a legal battle; and where the courts have failed, the legislatures have completed the work. In *Cushing v. Perot*,<sup>45</sup> it was held that a single foreign creditor of an insolvent company in Kansas could not maintain an action in Pennsylvania to enforce the statutory liability of a stockholder residing in that State after a receiver had been appointed by the Kansas court having jurisdiction over the corporation; but that the right to sue for that purpose was in the receiver. The court, speaking through Chief Justice Mitchell, said:

"A receiver represents not only the corporation, but all its creditors, and as to the latter it is his duty to receive all the assets available for their payment. For this purpose he succeeds to all their rights and has all the power to enforce such

<sup>43</sup> *Howarth v. Angle*, 162 N. Y., 179; *Hanson v. Davison*, 73 Minn., 462; *Straw and Ellsworth Mfg. Co. v. Kilbourne Boot and Shoe Co.*, 80 Minn., 125; *Holland v. Duluth Iron Co.*, 65 Minn., 480; *Childs v. Cleaves*, 95 Me., 498, 507; *King v. Cochran*, 72 Vt., 107; *Barton Nat. Bank v. Atkins*, 72 Vt. 33.

<sup>44</sup> *In re People's Live Stock Ins. Co.*, 56 Minn., 181; *Olson v. Bank*, 57 Minn., 552; *King v. Cochran*, 72 Vt., 107; *Murtey v. Allen*, 71 Vt. 377; *Newell v. Fisher*, 24 Miss., 392; *Garver v. Wallace*, 44 Pa., 294; *Maine Trust and Banking Co. v. Southern Loan and Trust Co.*, 92 Me., 442, 452; *Bristol v. Sanford*, 12 Blatch., 341; *Jacobson v. Allen*, 20 Blatch., 341; *Brown v. Traill*, 89 Fed. 641; *Relfe v. Rundle*, 103 U. S., 222; *Glen v. Marbury*, 145 U. S., 499; *Hale v. Harden*, 37 C. C. A., 240.

<sup>45</sup> 175 Pa., 66.

rights that the creditors had before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all and common to all, and hence the receiver who represents all alike is the proper party to assert the common right and pursue the common remedy for the common benefit."

More recently the highest tribunal has pronounced the same opinion in considering the question of making personal service on stockholders in order to bind them in a judgment against the corporation. Justice Day said:

"Nor can we see any substantial difference in this respect between a liability to be ascertained for the benefit of creditors upon a stock subscription and the liability for the same purpose which is entailed by becoming a member of a corporation through the purchase of stock whereby a contract is implied in favor of creditors. The object of the enforcement of both liabilities is for the benefit of creditors, and while it is true that one promise is directly to the corporation but is for the benefit of its creditors, either liability may be enforced through a receiver acting for the benefit of creditors under orders of a court in winding up the corporation in case of its insolvency."<sup>46</sup>

In some States the distinction has been overthrown by statute; in others the courts, seeing the unsubstantial nature of the distinction and the manifest gain to justice by overthrowing it, have not hesitated to act even if in so doing they were obliged to overrule contrary decisions made only a short time before. As Justice Day remarked: "The object of the enforcement of both liabilities is for the benefit of creditors," and there never was any sound reason for shutting the doors of justice against a receiver who wished to compel a stockholder to pay his double liability and permit him to sue for an unpaid subscription:

Lastly, a judgment against a corporation in some jurisdictions does not prevent a stockholder from setting off against the assessment a claim he had against the corporation.<sup>47</sup> This doc-

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<sup>46</sup> *Bernheimer v. Converse*, 206 U. S., 516, 533. To the same effect are *Irvine v. Putnam*, 167 Fed., 174; *Converse v. Mears*, 162 Fed., 767; *Goss v. Carter*, 84 C. C. A., 402; *Childs v. Cleaves*, 95 Me., 498; *Walters v. Porter*, 3 Ga. App., 73, 75; *Moore v. Ripley*, 106 Ga., 556; *Marion Trust Co. v. Blish*, 170 Ind., 686, containing an elaborate review of the cases.

<sup>47</sup> *Boyd v. Hall*, 56 Ga., 563; *Pierce v. Topeka Commercial Security Co.*, 60 Kan., 164; *Abbey v. Long*, 44 Kan., 688; *Jerman v. Benton*, 79 Mo., 148; *Am. Mortgage Co. v. Brower*, 32 So. (Miss.), 906; *Strauss v. Denny*, 95 Md., 690; *Cahill v. Original Big Gun Assn.*, 94 Md., 353; *Brown v. Traill*, 89 Fed., 641; *Straw and Ellsworth Co. v. Kilbourne Boot and Shoe Co.*, 80 Minn., 125.

trine is denied in other jurisdictions, based on the sound reason that the original subscription, as well as the secondary liability, is a trust fund for the benefit of creditors which cannot be impaired by any transaction between the immediate parties.<sup>48</sup>

In a larger number of jurisdictions stockholders are forbidden to set off the indebtedness of their corporation to them against their unpaid subscription.<sup>49</sup> Why should not the liability be regarded as a promise for the benefit of creditors in both cases? On what correct principle can the delusion be justified that the promise is indeed a promise to pay a stock subscription if needed to pay the debt of the corporation, but not a promise to pay the additional sum, the double liability, if needed to discharge the corporate indebtedness?

What, then, is the present legal liability of stockholders in insolvent corporations for assessments? First, by statute, common law, or comity their liability for the statutory sum beyond the original amount subscribed, as well as for a deficiency, in their subscriptions, can be enforced in most of the States by a statutory receiver without much regard to the domicile of the stockholders, whether they are living in the State where the corporation is domiciled, or in another State. The federal courts, however, still deny the authority of a chancery receiver to enforce both liabilities, while strongly emphasizing the right

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<sup>48</sup> *Matter of Empire City Bank*, 18 N. Y., 190; *Parker v. Carolina Sav. Bank*, 53 S. C., 583; *Ball Electric Light Co. v. Child*, 68 Conn., 522; *Buchanan v. Meisser*, 105 Ill., 638; *Mathews v. Albert*, 24 Md. 527; *Mechanics Sav. Bank v. Fidelity Trust Co.*, 87 Fed., 113.

<sup>49</sup> *Sawyer v. Hoag*, 17 Wall., 610; *Scovill v. Thayer*, 105 U. S., 143; *Bausman v. Kinneer*, 24 C. C. A., 473, revg. 73 Fed., 9; *Thompson v. Reno Sav. Bank*, 19 Nev. 103; *Bates v. Lewis*, 3 Ohio St., 459; *Efird v. Piedmont Land Co.*, 55 S. C., 78; *Macungie Sav. Bank v. Bastian*, 10 Pa. Week Notes, 71; *Humboldt Safe Dep. Co.'s Estate*, 3 Pa. Co. Ct., 621; *Whittington v. Farmer's Bank*, 5 Har. and J., 489; *Colorado Fuel Co. v. Sedalia Smelting Co.*, 13 Col. App., 474, 479; *Singer v. Given*, 61 Iowa, 93; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460; *Buchanan v. Meisser*, 105 Ill., 638; *Shickle v. Watts*, 94 Mo. 410; *Williams v. Traphagan*, 38 N. J. Eq., 57; *McAvity v. Lincoln Paper Co.*, 82 Me., 504; *Wheeler v. Millar*, 90 N. Y., 353; *Wilkinson v. Bertock*, 111 Ga., 187; *Richardson v. Merritt*, 94 Minn., 354; *Indiana Novelty Co. v. McGill*, 15 Ind. App., 1; *Liquidators of Maritime Bank v. Troop*, 16 S. C. (Can.), 456; *Barnett's Case*, L. R. 19 Eq., 449; *Calisher's Case*, L. R. 5 Eq., 214. *Contra—Salina Nat. Bank v. Prescott*, 60 Kan., 490, 495; *Shields v. Hobart*, 172 Mo., 492.

of a statutory receiver to enforce both liabilities against stockholders.<sup>50</sup>

The Supreme Court of Wisconsin still resolutely adheres to its early position concerning the double liability of a stockholder—that it is statutory, that the remedy to enforce it is exclusive and therefore cannot be enforced in the courts of that State against a stockholder of an outside insolvent corporation.<sup>51</sup> The constantly lengthening array of adjudications by the courts of almost every State in the Union, that such liability is essentially contractual and the remedy therefor transitory, has not yet led a single judge to retreat from his position.<sup>52</sup> Of course, a State that refuses to recognize a statutory receiver from another State to sue a stockholder who may reside within its jurisdiction must expect the stockholders of its corporations residing elsewhere to be treated in like manner. How their escape will work has thus been described by Judge Quarles in a recent decision:

“It is a matter of common knowledge that in securing stock subscriptions little attention is paid in this commercial age to State lines. The stockholders of a Wisconsin corporation may be largely resident in Illinois or other adjoining States. If in case of insolvency there be no way to reach non-resident stockholders, then complete immunity will be enjoyed by them who may in many instances hold a large fraction of the stock.”<sup>53</sup>

Secondly, while the right of a statutory receiver to sue for the liabilities of stockholders, as above described, is almost everywhere recognized, the basis of his action, the judgment of the court on which he proceeds, is conclusive against stockholders only to a limited degree. In some States a stockholder is permitted to go as far in defending himself from liability as the corporation could have gone in the original controversy, the original judgment can be attacked by a member collateral notwithstanding the federal constitutional requirement, and the case be tried over again so far as he is concerned, in a suit against him, whenever such a course of procedure is deemed needful for his protection. This is the extreme form of the rule and pre-

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<sup>50</sup> See *Belfe v. Rundle*, 103 U. S., 222; *Davis v. Gray*, 16 Wall., 203; *Converse v. Mears*, 162 Fed., 767.

<sup>51</sup> *Hunt v. Whewell*, 122 Wis., 33.

<sup>52</sup> One Justice, Dodge, has been opposed to the Wisconsin rule from the beginning.

<sup>53</sup> *Converse v. Mears*, 162 Fed., 767, 774.

vails notably in New York,<sup>54</sup> Iowa,<sup>55</sup> Nebraska,<sup>56</sup> and South Carolina.<sup>57</sup> In most of the States, however, conclusiveness of a judgment against a corporation has some meaning left in a suit against a stockholder, though the limitations or modifications of the old rule are so numerous that no stockholder is likely to suffer injustice from its application. Whether such a judgment be regarded as conclusive against him, or only *prima facie* evidence, if he has any real defense to make, the courts everywhere evince a disposition to learn what it is and to give him the benefit of it. Yet the way is not yet clear of difficulties. For example, a corporation may be held for a debt that would not be regarded as valid in another State where a stockholder lives, and may, therefore, form the basis, or part thereof, of an assessment against him. But there is a partial answer: When he became a member, he submitted to the laws governing the corporation, even though his liability might be greater than the members of corresponding corporations living in his own State.

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<sup>54</sup> *Howarth v. Angle*, 162 N. Y., 179.

<sup>55</sup> *State v. Union Stock Yard State Bank*, 103 Iowa, 549.

<sup>56</sup> *Commonwealth Mutual Fire Ins. Co. v. Hayden*, 61 Neb., 454.

<sup>57</sup> *Union Bank v. Wands Mining and Mfg. Co.*, 17 S. C., 339.