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# Enforcement of Stockholders' Liability in Kansas Corporations

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THE ENFORCEMENT EXTRATERRITORIALLY OF THE STATUTORY LIABILITY  
of  
STOCKHOLDERS IN KANSAS CORPORATIONS.

A THESIS  
PRESENTED FOR THE CORNELL UNIVERSITY LAW SCHOOL THESIS PRIZE

by

JOHN MORRIS SUTTON, B.S.

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## INTRODUCTION.

During the past eight years, and especially the past three years, a considerable number of cases have arisen in which the statutory liability of stockholders in Kansas business corporations has sought to be enforced in jurisdictions other than Kansas.

Owing to the large amount of capital invested in Kansas enterprises by non-residents of that state, the decisions in these cases are of great importance. In many instances, persons residing in other states have invested money in Kansas corporations which have become insolvent, owing to improper management, and left more or less indebtedness unpaid. The creditors have frequently failed to satisfy their claims against the resident stockholders and have been compelled to look to the non-resident stockholders, or else suffer losses. The question, then, arises as to whether these creditors can enforce the liability of stockholders provided by the Kansas statutes in a suit brought in some other jurisdiction than Kansas.

The results reached by the various courts in trying to solve this problem are both interesting and important. It will be the purpose of the writer to set forth these results in the following pages, after first considering the general subject of enforcing the liability of stockholders in foreign corporations, and also the particular provisions of the Kansas statutes in question and their construction by the courts of Kansas.

## CHAPTER I.

The Enforcement of the Statutory Liability of Stockholders in  
Foreign Corporations.

The enforcement by the courts of the other states of the Kansas statutes, defining the liability of stockholders in Kansas corporation to corporate creditors is, of course, a topic belonging to the general subject of the extraterritorial force given to the statutes of another state. Accordingly, a study of the decisions of various jurisdictions which have dealt with the question of enforcing the statutes of another state, imposing liabilities upon stockholders of corporations created in that state, is of value in showing the attitude of the courts toward this problem.

In most of the jurisdictions of the United States, statutes have been enacted making stockholders of a corporation liable for the debts of the corporation to the extent of the amount unpaid on their subscriptions for stock of the corporation. Many of these statutes provide for a <sup>still</sup> further liability, which continues after the stockholder has fully paid for his stock. The most common example of the latter class is the liability to an

amount equal to the amount of stock owned by the stockholders, or the "double liability". This is called a statutory liability, because it did not exist at common law.

Of course, the liability of the stockholder for the amount unpaid upon his stock is clearly enforceable, since the stockholder must be deemed to have contracted with reference to the principle that the capital stock of the corporation is a representation as to the financial responsibility of the corporation upon which persons dealing with it may rely. One who deals with a corporation and becomes its creditor has a right to insist that, if the corporation possesses any resources, the resources shall be applied to the payment of the corporate debts. If any stockholder has not paid all of his subscription to the capital stock he should be compelled to pay it over for the benefit of the creditors of the corporation, since the creditors have relied upon the representation that the corporation, at least, possessed the capital stock it claimed to have. In other words, the unpaid capital stock is regarded as a trust fund for the benefit of the creditors of the corporation, and the liability of the stockholder <sup>for its payment</sup> is a contractual one.

The liability which continues after the stock is paid for

is a sort of guaranty to the creditors of the corporation that the debts of the corporation will be paid, or at least, paid to a certain extent. It may be said to be contractual in its nature so far as it may be assumed to have been contemplated by the stockholder when he purchased his stock. Of course, the stockholder is bound to know the law and must be presumed to have become a member of the corporation fully aware of the fact that the statutes have provided that he shall, in that case, undertake certain liabilities.

The nature of this extraordinary liability imposed by statute seems to have been important in every case in determining whether the liability should be enforced, especially outside of the jurisdiction where it was imposed. The text writers have separated the liabilities of stockholders into two general classes, the one contractual and the other penal. While it is held that the statutes of a state do not operate extraterritorially of their own force (*New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349), a large number of jurisdictions have enforced contractual liabilities imposed by statutes of another state, although they have refused to enforce penalties. This distinction between contractual and penal liabilities has been



regarded as very important.

The usual statutory liability of stockholders to the creditors of the corporation is quite generally held to be a contractual liability. Numerous decisions might be cited in support of this statement. But a few will suffice to illustrate what the courts consider to be the nature of the liability which by statute continues even after the subscriptions to the capital stock of the corporations are paid.

In Aultman's Appeal, 98 Pa., 505, Sharswood, C. J., says: "The defendants became owners of theis stock either by subscription or by assignment from subscribers, and assumed voluntarily all the obligations imposed upon them as owners. It was a contract, express or implied to pay not only for the stock owned or subscribed, but so much in addition as would be necessary for the purpose of securing the creditors of the company. This contract could be enforced in any state in which the defendants were amenable to the process of the courts.

Upon the construction of this statute we are bound to respect if not to follow implicitly the decision of the courts of Ohio."

In *Queenan v. Palmer*, 117 Ill. 619, the provision of a bank charter, that the stockholders should "be responsible, in their individual property, in an amount equal to the amount of stock held by them, respectively, to make good losses to depositors or others", was construed not to impose a penalty but a primary liability constituting a common fund for the benefit of creditors. The court points out in the opinion that the liability was imposed upon the stockholders as a class and not separately, as individuals and adds, "The imposition of a penalty is in the nature of punishment, for wrongful or tortious conduct in an individual, and is never imposed upon a class of persons in the aggregate, as a body."

The court, in *Dennis v. Superior Court*, 91 Cal. 548, says, "We think the personal liability of a stockholder of a corporation for his proportion of the indebtedness of the corporation is an obligation arising upon contract." On the other hand, there are numerous statutes imposing liabilities which are penal in their nature.

For example, a statute, making directors liable in their

individual capacities for contracting any debts exceeding the capital stock actually paid in, was held to be a penalty in *First National Bank of Plymouth v. Price*, 33 Md. 487. In that case the directors and officers contracting such debts were jointly and severally liable in their individual capacities for the whole amount of the excess.

Again, it is held in the *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175, that a statute, which provides that until certain things are done by persons forming a corporation, such as the filing of its articles of association in the office of a public officer, the stockholders in such corporation shall be liable for the debts thereof, is a penal statute because "designed as a punishment of the stockholders". So, in *Wiles v. Suydam*, 64 N. Y. 173, a similar statute was held a penalty, and it was pointed out that the statute made the stockholders liable for all the debts of the corporation in such a case.

Again, a statute requiring a corporation to publish an annual statement of its existing debts and, for a failure to do so, making stockholders responsible for a specified class of demands existing prior to or at the time when such publication should be given was held penal in *Cable v. McCune*, 26 Mo. 371.

In *Halsey v. McLean*, 12 Allen 438, a statute, which required every company organized under it annually within twenty days from the first day of January, to make and publish a report, stating the amount of its capital; the proportion paid in, and the amount of all existing debts; and that in case of failure to do this, then all the trustees of such a company should be jointly and severally liable for all the debts of the company then existing and for all that should be contracted before such report should be made, was regarded as penal by the court.

Again, in *Sayles v. Brown*, 40 Fed. 8, a statute, making stockholders of a company jointly and severally liable for all the debts of the company in the event of a failure to file in the town-clerk's office of the town where the manufactory was established, annually, a certificate, signed by the president and a majority of the directors, truly stating the amount of all assessments voted by the company and actually paid in, and the amount of all existing debts, was construed to impose a penalty.

Thus, the cases make plain the fact that a penal statute is "one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited." As Scott, C. J., in *Queenan v. Palmer*, 117 Ill. 619, says, "The imposition

of a penalty is in the nature of a punishment, for wrongful or tortious conduct in an individual, and is never imposed upon a class of persons in the aggregate, as a body."

It is a very generally accepted rule that if the liability imposed by the statute is penal in nature it will not be enforced outside of the jurisdiction in which it was enacted. Thus, in *Derrickson v. Smith*, 27 N. J. Law 166, the court says, "This being a suit to enforce a penalty inflicted by a statute of the state of New York, it is clear that it cannot be enforced in this state. Penal laws are strictly local, and affect nothing more than they can reach."

In the case of *Huntington v. Attrill*, 146 U.S. 657 the question as to what constitutes a penal statute which cannot be enforced in the courts of another state is discussed and an important distinction is pointed out. Mr. Justice Gray says: "The test whether a law is penal in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual ..... The provision of the statute of New York, now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no

sense a criminal or quasi-criminal law. .... As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its law to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country." Accordingly it was decided that in case that a judgment obtained against the defendant in New York under the New York statute referred to ought to be enforced by the courts of Maryland. This same question came before the Privy Council of England a few months earlier in the case of *Huntington v. Attrill*, 1893, A. C. 150, as the plaintiff had sought to enforce his judgment against the defendant in Canada; and it was held that the action was to enforce a liability imposed for the protection of private rights and was remedial and not penal in the sense of being within the rule of international

law which prevents the courts of one country from executing the penal laws of another, or enforcing penalties recoverable by the state. This doctrine if applied to many of the cases involving statutes which have been considered penal and unenforceable ~~extraterritory~~<sup>ally</sup> would undoubtedly produce an opposite holding from the one which obtained, unless this decision be limited only to cases where a judgment already obtained is sought to be enforced.

As to the enforcement of the statutes of another state which are regarded as imposing a contractual liability the decisions of the various jurisdictions of this country do not seem to be uniform, and no little difference of opinion is manifested.

Some jurisdictions have uniformly enforced such a liability imposed by the statutes of another state.

The federal courts have invariably maintained this doctrine. For example, in *Flash v. Conn* 109 U.S. 371, where an action had been brought, in the first instance, in Florida to enforce a stockholder's liability under a New York statute, the court, after declaring that the action was not brought to enforce a penalty, says, "The right of the plaintiffs to sue upon the liability in any court having jurisdiction of the subject-matter

and the parties is, therefore, clear."

The Supreme Court of California in the case of Ferguson v. Snerman, 116 Cal. 169, held that the statute of another state, providing for a contractual liability on the part of stockholder which is not penal in its nature and does not depend for its enforcement upon remedies peculiar to the courts of the state which created the liability and which is enforceable in an action at law by a judgment creditor of the corporation in the state where the corporation was created, after return of execution unsatisfied against the corporation, will be enforced in California.

In Connecticut a similar rule seems to prevail. In the case of Paine v. Stewart, 33 Conn. 516, a statute of the state of Minnesota, imposing the usual double liability upon stockholders in Minnesota banks, was enforced.

In Georgia, the case of Howard v. Glenn, 85 Ga. 238, while not precisely in point nor an authority on this question seems to warrant the inference that stockholder's contractual liability incurred under the statute of another state will be enforced in Georgia. In that case, the creditors of an



insolvent Virginia corporation sought to collect an assessment upon the defendant's shares of stock and a judgment for the plaintiff was affirmed. A similar decision is found in *Morris v. Glenn*, 87 Ala. 628, which involved the same question.

In Iowa, the highest court of that state in the case of *Latimer and Ingles v. State Bank*, 102 Iowa 162, enforced the individual liability, to the amount unpaid on the shares of stockholders, imposed by a statute of South Dakota, as the statute neither provided a special remedy nor created an exclusive statutory liability, but practically left "the creditor to the same form of action that he could have brought if there were no statute."

The opinion of Johnston, J. in the case of *Howell v. Mangiesdorf*, 33 Kan. 194, contains this statement, "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in the state where personal service can be made upon the stockholders." This dictum clearly indicates the position of the Supreme Court of Kansas.

In Michigan, a very recent case, *Western National Bank of*

New York v. Lawrence, 76 N. W. Rep. 105 (1898), held that a creditor of a foreign corporation might bring an action in the courts of Michigan to enforce a liability provided by the statute of the other state, making a stockholder liable for the debts of the insolvent corporation for an amount equal to his stock.

Likewise, the Supreme Court of Minnesota in the case of First National Bank v. Gustin, etc. Mining Co., 42 Minn. 327 enforced a similar liability imposed by the laws of Dakota.

So, in Missouri a liability of this nature has been enforced upon more than one occasion.. In Hodgson v. Cheever, 8 Mo. App. 8, it is said, "The same comity which allows the corporations of this state to sue in other states upon contracts made under our laws, and not immoral or against public policy, should induce the courts of this state to afford a remedy where a citizen of this state undertakes obligations imposed by the laws of another state, which are not repugnant to good morals or our policy."

In New York the doctrine is, that while special remedies provided by foreign laws to enforce the liability of stockholders in foreign corporations must be applied by the courts of the state in the local jurisdiction and where the corporation

is domiciled, yet if the intent of the legislature was to impose an absolute personal liability on stockholders the statute of the foreign jurisdiction may be given extraterritorial force: Lowery v. Inman, 46 N. Y. 119. In that case the court in speaking of statutes, imposing such an absolute liability, declares that their "validity, interpretation and effect are to be determined by the lex loci but, the remedy is governed by the lex fori." Such a statute was construed in Ex parte Van Riper Riper, 20 Wend. 614, where the charter of a New Jersey bank sought to be enforced was held not to confine the creditor to any particular remedy.

In Oregon, the doctrine seems to be much the same as that of the New York courts. So, in Aldrich v. Anchor Coal Co., 24 Ore. 32, it was held that where the statute simply creates the liability, leaving the creditor to select any common-law remedy he may consider appropriate, the right so given may be enforced by a common-law action in any court having jurisdiction of the subject matter and the parties. Accordingly, the court enforced a statute of California which made each stockholder personally and individually liable for such proportion of each debt or claim against the corporation as the amount of his stock

should bear to the whole subscribed capital stock.

The Supreme Court of Pennsylvania in Aultman's appeal, 98 Pa. 505, held that it had jurisdiction to enforce the provisions of the laws of the state of Ohio making stockholders personally liable to creditors of the corporation in an amount equal to the stock subscribed by them, since it was not a penalty. This doctrine is further supported in Cushing v. Perot 175 Pa. 66.

The attitude of the Supreme Court of Tennessee may be understood from a dictum in Woods v. Wicks, 7 Lea 40, where it is said, "If the liability is in the nature of a contract, and is not opposed to the legislation or public policy of the state in which it is sought to be enforced, the courts will enforce it." But the particular statute construed in that case was a penal one.

On the other hand the decisions of several jurisdictions have been so uniformly opposed to enforcing the statutory liability of stockholders in foreign corporations that they have come to be regarded as denying the right of creditors in such corporations to enforce their claims outside of the sovereignty imposing the liability.

Thus, in Illinois in the case of Patterson v. Lynde, 112 Ill. 196, a demurrer to a bill filed by creditors of an insolvent

corporation of the state of Oregon against certain stockholders was sustained, on the ground that it was impossible to acquire jurisdiction of the corporation, and the non-resident stockholders had no property in Illinois. In *Young v. Farwell* 139 Ill. 326, it was decided that the creditor of the foreign corporation should first seek a remedy in the state under the laws of which the corporation was organized.

The doctrine of the Massachusetts courts is, that the extent of the stockholder's liability, the manner of its enforcement, and the status of the stockholders must be determined by the laws of the state where the corporation is domiciled and by the courts of that state. This reason for this is that the action to enforce such a liability is one which involves the relations between the stockholders of the foreign corporation and in which complete justice can be done only by the courts of the sovereignty where the corporation was created, and, in some cases, the enforcement of the foreign law would be injurious to citizens of Massachusetts: *Erickson v. Nesmith*, 4 Allen 233; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; and *Bank of North America v. Rindge*, 154 Mass. 203 support this doctrine.

In New Hampshire, it has been held that comity did not require the court to give effect to the statutes of Ohio in a case where a creditor of an Ohio corporation, which had no assets or stockholders residing in New Hampshire, filed a bill to enforce the individual liability of stockholders, the bill containing no recital of the remedial process by which that liability was enforced in Ohio. Being without information as to the remedy, the court feared that it might afford a remedy which was denied to persons in Ohio and which would be denied to persons seeking to enforce similar right under the New Hampshire laws: *Rice v. Hosiey Co.*, 56 N. H. 114.

The highest court of West Virginia follows the Massachusetts' doctrine in *Nimick and Co. v. Iron Works*, 25 W. Va. 184, by holding that a bill in equity, to ascertain and determine the extent of the individual liability of a stockholder in a corporation organized under the laws of Ohio, could not be sustained in the courts of West Virginia.

From this brief survey of the position of the various jurisdictions on the subject of enforcing foreign statutes imposing a personal or industrial liability on stockholders of corporations, it is evident that a classification which is founded

merely upon jurisdictions as a basis is not entirely satisfactory. Whether such statutes will be enforced seems to depend upon several considerations, such as, whether any injury will be done to the citizens of the state in which they are sought to be enforced, whether the policy of its own laws will be contravened or impaired and whether its courts are capable of doing complete justice to those liable to be affected by their decrees.

It should be noted, moreover, that a considerable number of authorities lay down the important rule that, special remedies providing for the enforcement of the individual liability of the stockholders, created by the laws of a state, must be enforced by the courts of that state exclusively, although if no remedy is prescribed the liability may be enforced wherever the person is found, if the liability is, of course, not penal. The following cases illustrate this rule: *Russell v. Pacific Railway Co.*, 113 Cal. 258, where the statute of Illinois authorized a proceeding against stockholders similar to that in cases of garnishment; *Fowler v. Lamson*, 146 Ill. 472, where the statute of Kansas permitted creditors of insolvent corporations whose execution against its property has been returned unsatisfied to have execution against the stockholders on the judgment against the

the corporation; *Erickson v. Nesmith*, 4 Allen 238, where the only remedy given to creditors of an insolvent corporation by the New Hampshire statute was a bill in equity; *Lowry v. Tremen*, 46 N.Y. 119, where a Georgia statute provided that a judgment and execution against the corporation should be a lien upon, and be enforced against the individual property of the stockholders made liable by the act; *Christensen v. Eno*, 106 N. Y. 97, where a statute of Missouri authorized a creditor of a corporation, whose execution upon judgment against the corporation had been returned unsatisfied, to issue execution thereon against any stockholder to the extent of the amount of stock held by him together with any amount unpaid thereon; *May v. Black*, 77 Wis. 101, where the constitution of Michigan provided that the stockholders' liability for all labor performed for a corporation might be enforced by an action in assumpsit . It has been said that the remedy does not enter into the contract itself; and for this reason the individual liability of stockholders can only be enforced by the remedies provided by the law of the forum: *First Nat. Bank v. Gustin, etc. Mining Co.*, 42 Minn. 327.

In brief, it may be said that one who becomes a stockholder in a corporation organized under the laws of a foreign state, is



deemed to have contracted with reference to those laws and the extent of his liability is to be determined by those laws. The courts of other states <sup>acting ex comitate and</sup> in the exercise of sound legal discretion will enforce such foreign laws, imposing a liability upon the stockholder, provided the liability is not penal nor opposed to the legislation and public policy of the state in which it is sought to be enforced. But while the right conferred by the foreign law will be enforced, a peculiar or special remedy prescribed thereby will not be given extraterritorial force but must be confined in its operation to the limits of the sovereignty where it was created.

## CHAPTER 11.

### The Kansas Statutes and their Interpretation by the Courts of that State.

Turning from the survey of the broad topic to the narrower one under consideration, the Kansas statutes in question must be next taken up.

The sections of the Kansas corporation law which define the liability of stockholders in Kansas business corporations and provide for the manner of enforcing this liability are to be found in chapter twenty-three of the Kansas General Statutes, which went into effect October 31, 1868, and remained practically unchanged to-day. They are as follows:

§32 (§50, C. 66, Gen. St. 1897) "EXECUTION AGAINST STOCK-HOLDERS: ACTION. If any execution shall have been issued against the property or effects of a corporation, except a railway, or a religious, or a charitable corporation, and there cannot be found any property whereon to levy such execution, the execution against may be issued any of the stockholders, to any extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the court in which the

action, suit, or proceedings shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

§46 (§51, C. 66, Gen. St. 1897) "LIABILITY. No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him."

§40, as amended, Laws 1893, C. 46, §1, (§45 Ch. 66, Gen. St. 1897) "HOW DISSOLVED. A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved, for the purpose of enabling any creditors of such corporations to prosecute suits against stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended

from business shall for three months after the passage of this act fail to resume the usual and ordinary business."

§44 (§49, Ch. 66, Gen. St. 1897). "ACTION AGAINST STOCKHOLDERS. If any corporation, created under this or any general statute of this state, except railway, or charitable, or religious corporation, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collection made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

§45 (§53, Ch. 66, Gen. St. 1897). "CONTRIBUTION. If any stockholder pay more than his due proportion of any debt of the corporation, he may compel contribution from the other stockholders by action."

§33 (§52, Ch. 66, Gen. St. 1897) . "NAMES FURNISHED. The clerk or other officer having charge of the books of any company, on demand of the plaintiff in any execution against the company, his agent or attorney, shall furnish such plaintiff, his agent or attorney with the names and places of residence of the stockholders (so far as known) and the amount of stock held by each, as shown by the books of the company."

The Constitution of the State of Kansas also provides for securing the payment of corporate debts, as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." (Art. XII, §2).

The statutes have been uniformly sustained by the Supreme Court and the Courts of Appeals of the state of

ansas, as will be seen from a review of the cases which have come before those courts for a construction of the comity statutes.

A large number of these cases have involved the application of the provisions of section thirty-two of the General Statutes of 1868, as will be seen from the following cases.

In Hentig v. James, 22 Kan. 326, it was said that the proceeding to obtain an execution upon notice and motion is "a special proceeding, limited in character and does not convey with it all the powers of a judgment. It assimilates to proceedings of garnishment, but allows the assistance of an action to recover the amount ordered to be paid. The amount charged against the stockholder is not a lien in real estate under order of the court until a levy is made after the execution."

In Howell v. Manglesdorf, 33 Kan. 194, is found the following statement as to the two remedies for enforcing the individual liability of stockholders: "In the one case, the judgment creditors of an insolvent corporation may proceed by a summary action on motion in the court where the judgment was rendered against the corporation; in the

other by an ordinary action to be instituted wherever personal jurisdiction of the stockholders can be acquired. Before the summary proceeding by motion can be maintained, notice to the stockholder must be given, in order that he may appear and make such defense as can be made and as is necessary to protect his interest. The statute does not define the form of the notice nor the time nor place of its service, but only prescribes that a "reasonable notice" in writing" shall be given to the person sought to be charged. ..

.... While the proceeding is summary in its character and its maintenance contingent upon the insolvency of the corporation, or upon the rendition of a judgment against the corporation and the return of an execution thereon of nulla bona, yet we cannot regard it as an interlocutory or auxiliary proceeding in the action against the corporation. In the action against the corporation no notice of its pendency is given to the stockholder; he is not directly interested in the action, as his liability is only secondary to the corporation and exists alone by reason of this statutory provision, and of that provision of the Constitution in pursuance of which the statute is enacted

(Const., art. 12, §2). His liability to the creditors of the corporation is in the nature of a guaranty; the action or proceeding to enforce the same does not accrue until the execution upon the judgment against the principal is returned unsatisfied. We think that the proceeding against the stockholder, whatever remedy may be employed, is an independent one. It will readily be conceded if the proceeding is distinct and independent, the issues between the parties are personal, and if the consequence of the proceeding is in the nature of a judgment in personam, that the notice or process of the court upon which the jurisdiction depends cannot be served beyond the jurisdiction of the state. Before either of the remedies pointed out by the statute can be employed by the creditors, the stockholder must be brought into court and have his day there. He is not concluded by the judgment against the corporation; that judgment is at most only prima facie evidence of his liability.

In *Wells v. Robb*, 43 Kan. 201, it was stated that the judgment creditors of an insolvent corporation who first move to charge a stockholder of the corporation on his liability under the statute acquires a priority of right to recover



against such stockholder with which a creditor subsequently moving cannot rightfully interfere.

In Hoyt v. Dunker, 50 Kan. 574, it was held that judgment creditors of a corporation seeking the enforcement of their rights against stockholders thereof must strictly comply with the terms of the statute requiring the judgment creditors of a corporation to pursue the property of the corporation as long as any property thereof can be found upon which an execution can be levied, before resorting to the proceeding therein provided against the stockholders. So, in Lumber Co. v. Neal, 3 Kan. ~~613~~ App. 399, it was asserted that the court has no power to entertain a motion for an order allowing execution against a stockholder of a company until the record of the case in which the motion is made shows that the corporate property has been exhausted.

The case of Van Demark v. Barons, 52 Kan. 779, furnishes the rule that the liability of a stockholder in a corporation against whom an execution may be issued, according to the Kansas statutes, is measured by the number of shares held by him at the time the execution became operative; and a bona fide transfer of the stock terminates the liability.

In McClelland v. Cragun, 54 Kan. 599, it was held that a motion made for execution against a stockholder of a corporation can be made only in the court where the judgment against the company was rendered and from which execution on such judgment might issue. A notice of motion for execution against a stockholder for a corporate debt, which states the nature of the order to be applied for, and the names of the parties, the court, and the place of application duly served by a constable is sufficient to confer jurisdiction. Notice of a motion for execution in such case may be served on a stockholder in any county in the state.

The cases of Merrill v. Meade, 6 Kan. App. 620 and Beers v. Bunker, 6 Kan. App. 697, both support the proposition that no liability for the debts of a corporation can be enforced against a stockholder until judgment upon the debts has been rendered against the corporation and an execution issued thereon and returned nulla bona, or until the corporation has been dissolved or has suspended business for more than one year.

The majority of the court in the case of Musgrave v. Glen Elder Association, 5 Kan. App. 393, decided that in a

proceeding by a creditor of a corporation against a stockholder in the same under the statute (§32, C. 23, Gen. St. 1868) making the stockholder liable to corporate creditors to the extent of his stock, the stockholder might set off such claims as he had paid on execution; that as a matter of equity he is entitled to set off the amount of the first debts of the corporation which he has voluntarily paid to a creditor; and that where the stockholders is himself a creditor of the insolvent corporation, he will be permitted in equity to plead the indebtedness of the corporation to himself as a set-off against his liability to other creditors.

The case of Ball v. Reese, 58 Kan. 614 is authority for the proposition, that in a proceeding to enforce the individual liability of a stockholder, a judgment against the corporation, rendered by a court having jurisdiction, will, in the absence of fraud and collusion, be deemed to be final and conclusive as to the amount of the indebtedness and the liability of the corporation to pay the same.

The section which relates to how a corporation is dissolved. (§40, C. 23, Gen. St. 1868), is construed in the case of

Valley Bank v. Congregational Sewing Society, 28 Kan. 423.

In this case the petitioners alledged that the defendant corporation had long ceased to do business and was insolvent. The court deemed this allegation sufficient to authorize the commencement of an action for the dissolution of the corporation, but as no such action had been brought and it did not appear that the corporation was dissolved, the court declared that the stockholders were not primarily liable to the creditors of the bank for its debts. "A statement that a corporation has ceased to transact business and is insolvent is not equivalent to an allegation that the corporation is dissolved." It is stated in the opinion that a corporation is dissolved - "First, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction."

Speaking of this provision of the statute as to corporation, which has suspended business for more than one year next preceding the commencing the action, being deemed to be dissolved, for the purpose of enabling a creditor to enforce the liability of a stockholder, the court in Dawson v. Sholley, 4 Kan. App. 367, says, "It may be conceded that outside

of a statutory provision there is not a general rule, but our legislature has seen fit to create this statutory liability, and stockholders in the corporations governed thereby must be presumed to purchase their shares with full knowledge of the obligations resting upon them."

An illustration of the action by creditors against stockholders of a corporation which has been dissolved, leaving debts unpaid (§44, C. 23, Gen. St. 1868), is furnished in the case of *Abbey v. Dry Goods Co.*, 44 Kan. 415, in which the liability of the stockholders of a corporation, which had been dissolved, was sought to be fixed. The court held that under the statute (§44) the liability of the stockholders to the corporate creditors is several and not joint, and each must be sued separately, as the liability might be for different sums, and each stockholder might have a separate and distinct defense. This decision is approved in *Howell v. National Bank*, 52 Kan. 133. And in *Dawson v. Sholley*, 4 Kan. App. 367, it is held that this section (§44) creates a primary liability, thus making the stockholders primarily liable in the amount provided by the statute for the unpaid corporate debts.

In *Clevenger v. Hansen*, 44 Kan. 182, it was held that where two or more suits are commenced, under the section (§44), and judgments are obtained in such suits at the same term, and executions are issued thereon during the term in which the judgment was rendered or within ten days thereafter, the fund raised thereon, or upon anyone of such executions, must be distributed pro rata among all such execution creditors.

The other sections of the corporation law which have been set forth do not need illustration in this connection and the constitutional provision (Art. 12, §2) has already been referred to in the extract from the opinion in *Howell v. Manglesdorf*, 33 Kan. 194.

From the foregoing examination of the Kansas statutes and decisions it is apparent that the statutory liability of stockholders in Kansas corporations is regarded as a guaranty for the payment of the corporate debts. To enforce this liability, the corporate creditor who has obtained judgment against the corporation and taken execution thereon which is returned nulla bona, may proceed by a summary action on motion in the court where the judgment was

rendered, after a reasonable notice in writing to the person or persons sought to be held liable; and upon such motion the court may order execution to issue against any of the stockholders to an extent equal in amount to the stock owned by such stockholder, together with any amount unpaid thereon; or the judgment creditor may proceed by ordinary action to charge the stockholders with the amount of the judgment obtained against the corporation. But, before proceeding against the stockholders, the creditors must first exhaust the property of the corporation. Furthermore, if a corporation has been formally dissolved, or be deemed to be dissolved by reason of having suspended business for more than one year, leaving debts unpaid, the creditors of the corporation may sue all persons who were stockholders at the time of the dissolution, without joining the corporation in such action; but each stockholder must be sued separately. The stockholder in such case may set off any sums which he has already paid on execution on account of the debts of the corporation. If, however, one stockholder pays more than his due proportion of the corporate debts he may compel contribution from the other stockholders.

## CHAPTER III.

Decisions by the Courts of other States upon the Liability of Stockholders in Kansas Corporations.

During the past few years, actions have been brought in several jurisdictions outside of the state of Kansas to enforce the liability of stockholders in Kansas corporations. Besides the federal courts, decisions<sup>upon or,</sup><sub>^</sub> relating to these statutes now exist in the following jurisdictions: California, Illinois, Massachusetts, Michigan, Missouri, New York, Ohio, Pennsylvania and Rhode Island. An examination of the decisions of these jurisdictions upon this subject will reveal the attitude of each toward the question.

While the extraterritorial enforcement of these Kansas statutes has not yet been decided in a case before the Supreme Court of the United States, several cases of this sort have been decided by the Circuit Courts<sup>and Circuit Courts</sup><sub>^</sub> of Appeals.

Thus, in *Bank of North America v. Rindge*, 57 Fed. 279, a creditor of a Kansas banking corporation was permitted, in an action at law brought in the Southern District of California, to enforce the liability of a stockholder in the



bank under §32 C. 23 of the General Statutes of 1868 of Kansas. It was held that under this statute the creditor may either proceed summarily in the court where judgment has been given against the corporation and execution returned nulla bona, or he may proceed by an ordinary action at law wherever personal jurisdiction of such stockholder can be acquired. *Howell v. Mangelsdorf*, 33 Kan. 194, was approved.

In *Rhodes v. United States Nat. Bank*, 66 Fed. 512, the plaintiff, a Kansas corporation, was permitted, to enforce, in an action of assumpsit against a citizen of Illinois, a stock liability under the laws of Kansas relating to stockholders in insolvent corporations of that state. The court points out that "the effect of the decisions in Kansas is that the statute (§32, Ch. 32, Gen. St. 1868) creates and enforces a personal liability upon every stockholder to an amount equal to the amount of stock owned by him, that such liability is several and not joint, that it exists in favor of each creditor of the corporation severally against each shareholder, and that the obligation is by contract in the nature of a guaranty, and may be enforced by an action

in any tribunal where proper service can be had."

In *Mc Vickar v. Jones*, 70 Fed. 754, the liability imposed by the Kansas statute (§32, Ch. 23, Gen. St. 1868) was held to be enforceable in a federal court sitting in New Hampshire; and that the procedure for the enforcement of such liability in a federal court should conform somewhat to the mode of enforcement in the state where the liability is created. It was also held that it is not necessary in such an action that other stockholders within the jurisdiction should be joined as parties, or that it should be averred that there are no other stockholders than the defendant within the jurisdiction; nor is it necessary in such an action to aver that there is at the time of bringing suit no property of the corporation sufficient to satisfy the execution, nor that the corporation has never been dissolved nor that the plaintiff is not a stockholder.

The Circuit Court for the Southern District of New York in the case of *National Bank of Oxford v. Whitman*, 76 Fed. 697, also held the stockholders' liability, provided for by the constitution (Art. 12, §2) and the statute (§32, Ch. 23, Gen. St. 1868) of Kansas, to be enforceable in an

action brought outside the state of Kansas. The court followed *Howell v. Manglesdorf*, supra, and, among other things, said: "The action itself is personal; no special proceedings are provided for in it; and according to the decisions of the Supreme Court of the United States, it would appear to be transitory." The court asserted that the refusal of the New York courts to assume jurisdiction in such a case cannot take from the federal court that which properly belongs to it.

The defendant in this last case brought to the Circuit Court of Appeals for the Second Circuit; but the judgment of the lower court was affirmed. The opinion of the appellate tribunal, which is to be found in *Whitman v. National Bank of Oxford*, 83 Fed. 289, discusses the Kansas statutes in question and reviews many of the leading decisions of various state courts upon this subject. The court asserts that as the Kansas statute is not penal it is unimportant whether the liability is called statutory or one based upon contract. "It is statutory because it did not exist at common law, and it is contractual because everyone who becomes a member of the company by subscribing to

its stock assumes this liability.'" It is furthermore pointed out that two modes of procedure are provided by the statute: one of a summary character, which can be used in the case of resident stockholders, but which is useless against non-residents; the other of a transitory character, so that creditors may not lose the benefit of the constitutional provision for their protection, against non-resident stockholders.

In the case of American Freehold Land-Mortgage Co. v. Woodworth, 79 Fed. 951, where an action at law was brought in a United States Circuit Court in New York to charge a stockholder in a Kansas corporation, under the Kansas statute, to the extent of his liability, with a judgment against the corporation recorded in a federal court in Kansas, it was held sufficient to allege the recovery of the judgment and the return of the execution thereon unsatisfied, without averring the original debt, as the Kansas statute makes the judgment at least presumptive evidence; and that it is immaterial that the New York courts in similar cases require the original debt to be recited, as that question is one of proof, and not of pleading.

The United States Circuit Court for the district of Kansas, in the case of New York Life Ins. Co. v. Beard, 80 Fed. 66, entertained a bill in equity in the nature of a creditors' bill, on behalf of the complainant and such other creditors of the defendant corporation as might desire to join in the suit to enforce the double liability under the Kansas statute of a number of the stockholders of a Kansas corporation, and also the liability for unpaid stock. It was held that the provision of the Kansas statute (Gen. St. Kan. Ch. 23, §32), permitting a judgment creditor after return of execution against the corporation unsatisfied to procure an execution against any stockholder for an amount equal to his stock or to proceed by action to charge the stockholder with the amount of the judgment, contemplates a proceeding either at law or in equity as the circumstances may require; and that, while the liability is a several one against such stockholder, yet to avoid a multiplicity of suits a bill in equity may be maintained against a number of stockholders.

In American Freehold Land-Mortgage Co. v. Woodworth, 82 Fed. 269, a federal court in New York overruled a demurrer to a bill in equity in a suit by a judgment creditor

of an insolvent Kansas farm-mortgage company to enforce the defendant's liability as a stockholder of that corporation under the Kansas statute, although the insolvent corporation was in the hands of a receiver at the time.

The case of Mechanics Savings Bank v. Fidelity Insurance, Trust and Safe-Deposit Co., 87 Fed. 112, was an action at law by a Rhode Island corporation against a Pennsylvania corporation, as administrator of the estate of a deceased stockholder in a Kansas investment company against which the plaintiff had obtained a judgment in a Kansas court but upon which execution had been returned unsatisfied. It was held that under the provisions of the constitution and statutes of Kansas an action at law by a single judgment creditor will be against a single stockholder to enforce such liability. It was also decided that the contingent liability incurred by the deceased "when he became a stockholder did not abate upon his death, but survived; and that upon the happening of the event which rendered the liability absolute, his estate became chargeable therewith."

In Schiffer v. Trustees of Columbia College, 87 Fed. 166,

which was an action at law brought in a federal court in New York to enforce the individual liability of the defendants as stockholders in a Kansas corporation it was said that, "The liability of the stockholder being contractual and transitory, the limitation of time within which such liability shall be enforced against the person sued thereon is a matter to be determined by the laws of the state in which the action is brought." Hence, the Kansas statute of limitations would not apply in such a case. The chief decided in this case, however, was one of pleading, which was against the plaintiff.

The United States Circuit Court for the District of Massachusetts in the case of *Dexter v. Edmonds*, 80 Fed. 467 (1898) decided that the Kansas statute (§32, C. 23 Gen. St. 1868) does not merely provide a remedy for the enforcement of rights created by the Constitution of the state of Kansas, but creates substantive rights, which may be enforced in other jurisdictions in accordance with the forms of remedy there provided. The court was of the opinion that the rights given by such a statute are neither

repugnant to the public policy of the United States, or justice or good morals, nor calculated to injure the United States or its citizens. The judgment which the plaintiff had obtained against the corporation in Kansas was held to be conclusive of its indebtedness, being made so by the statutes of the state in which the corporation is located.

The case of *Brown v. Trail*, 89 Fed. 641, was an action at law brought in a federal court in Maryland by a judgment creditor of the Western Farm-Mortgage Trust Co., a Kansas corporation, to charge the defendant as a stockholder in that company, under the statute of Kansas. In the opinion it is stated that the liability, which was sought to be enforced, "is in the nature of a suretyship for the benefit of the creditor, and is not an asset of the corporation, which passes to the receiver, and it cannot be recovered by him." It was decided that a plea that the plaintiff, at the time his claim against the defendant accrued, was himself a stockholder in the same corporation, states a good defense to the extent of the plaintiff's own statutory liability as



such stockholder, but no further, as the fact of his being a stockholder does not preclude the plaintiff from maintaining the action for the balance remaining due him after deducting the amount of his own liability.

Thus, it is clear that the federal courts have, sofar, uniformly decided that the individual liability under the statutes of Kansas of a stockholder of a Kansas corporation may be enforced in the federal courts.

Passing to the decisions of the state courts upon the enforcement of these Kansas statutes, considerable diversity of opinion is encountered.

Examining the decisions in the different states in the alphabetical order of the states, California comes first. In this jurisdiction there has been, at least, one decision upon this subject. In *Ferguson v. Sherman*, 116 Cal. 169, the judgment creditor creditor of a Kansas corporation sought to enforce against California stockholders in that corporation their statutory liability for the judgment debt. The Kansas corporation was made a party defendant. The plaintiff alleged, in substance, that a judgment had been

obtained against the corporation in the circuit court of the United States for the district of Kansas, and that execution thereon had been returned wholly unsatisfied; that under the Constitution and laws of Kansas execution may, under such circumstances, be issued against any of the stockholders; or the plaintiff in the execution may maintain an action at law against any one or more of the stockholders, etc. The court decided that the action could be maintained, the statute of the state which created the corporation being the measure of the liability of its stockholders. The view of the federal courts, that the contract of stockholders in a Kansas corporation, as respects personal liability under the Kansas statute, is in the nature of a contract of guaranty, was approved. The Kansas corporation in this case was a street railroad company and the defendants contended that such a corporation was exempt from the operation of the particular statutes in question, on the ground that it should be considered a railroad corporation. But the court held that the exemption of the stockholders of railroad corporations from a statutory liability, by the Constitution of Kansas,

is an immunity in the nature of a grant or privilege, which is to be construed so as to restrict rather than broaden the grant from the state, and was not designed to apply to stockholders of street railroad corporation. The court clearly regarded the action against the stockholders to recover a debt of the corporation as transitory in character and not a remedy peculiar to the state of Kansas, although it was declared that the remedy by execution against the stockholders after execution against the corporation had been returned unsatisfied is peculiar and unenforceable in other forums.

The decisions of the Supreme Court of Illinois have not been quite so favorable to creditors of Kansas corporations. In *Fowler v. Lamson*, 146 Ill. 476, where a creditor filed a bill alleging the recovery of a judgment against a Kansas corporation and that execution thereon had been unsatisfied. The plaintiff also, among other declarations, set forth the provisions of the Kansas statutes. The court held that the bill could not be maintained in the state of Illinois. "Judgments have not been obtained in this state, or elsewhere, against appellees. The proceeding is an attempt to enforce

their individual liability as stockholders, by compelling them to pay judgments against the corporation." The court in discussing the remedies provided by the Kansas statutes, such as execution against the stockholders (§32 C. 23 Gen. St. 1868) and action against the stockholders after dissolution of a corporation, leaving debts unpaid (§44) said, "It is well settled that these special remedies having been provided for the enforcement of the individual liability of stockholders created by the laws of Kansas, they alone can be pursued to enforce that liability." Then the court decides that this is an "insuperable objection," since the rule is, that when such a special remedy is given the liability cannot be enforced in another state.

In Tuttle v. The Nat. Bank of the Republic, 161 Ill. 497, it was held that the action at law in that case could not be maintained in the courts of Illinois under the facts appearing in the records. The provision of the Kansas Constitution (Art. 12, §2), providing for the securing of dues from corporations, was construed by the court as not self-executing, it appearing from the

provision itself that legislation is contemplated as necessary for its enforcement. It was asserted that the Kansas legislature has not adopted any statute declaratory of the extent of the security of dues from corporations and as to the time a stockholder's liability attached with reference to the time of contracting the indebtedness; but it has only attempted to declare the remedy. The remedies, such as execution against the stockholders (§32, C. 23, Gen. St. 1868) and, in case some of the stockholders are unable to pay their share, making the others liable for the deficiency (§44), the court declares to be special remedies which will not be enforced outside of Kansas. In this case three justices dissented, contending that the provision of the Kansas constitution is self-executing and that an action to enforce the liability is transitory.

The latest reported Illinois case on this subject, *Bell v. Farwell*, 52 N. E. Rep. 346, decided in Dec. 1898, however, holds that while the provision in the Kansas constitution (Art. 12, §2) is not self-executing, the liability of stockholders imposed by the laws of Kansas is contractual and therefore can be enforced in other states. Distinguishing

this case from Tuttle v. Bank, supra, the court says, that in the declaration in this case there are three provisions (§§32, 40, and 44, C. 23, Gen. St. 1868) of the Kansas statutes set forth and relied upon, and, also, the construction placed upon the statutes by the Supreme Court of Kansas, which were not before the court in the Tuttle case. The court adds, that had the statutes and their construction by the Kansas court been before it in the Tuttle case, "a different result might have been reached on the question of remedy." In this case, the action was one in assumpsit and the court decides that under the circumstances a resort to a court of equity in Kansas does not seem to be required before bringing this action in Illinois. With these views, the court overruled the demurrer to the declaration.

Massachusetts is the jurisdiction that has undoubtedly been most frequently stated to be strongly opposed to enforcing the liability of stockholders in Kansas corporations.

In the first Massachusetts case in which this liability

was sought to be enforced, that of Bank of North America v. Rindge, 154 Mass. 203, the judgment creditor of a Kansas state bank brought an action in contract against a resident of California, who was found in Massachusetts. The plaintiff had recovered a judgment in Kansas against the corporation and took out execution thereon but could find no property to levy upon. In his declaration, he averred that by the laws of Kansas an execution may be issued, in such a case, against any of the stockholders to an amount equal to their stock or an action may be brought to charge the stockholders with the amount of the judgment. A demurrer to the declaration was sustained. In the opinion, it is stated that, "the declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory, or rest merely in judicial decisions." The court regretted that it was not free to determine the case upon an examination of the statute of Kansas, but felt bound to "take the case as the parties present it to us." The court declares that, "the question can hardly be considered as an open one in this Commonwealth", as it had

often declined to enforce liabilities of stockholders in foreign corporations. It is urged that, if the plaintiff in such a case without first having obtained a judgment in Kansas establishing the defendant's liability as a stockholder, could maintain an action directly against him in Massachusetts then the plaintiff might a similar action against him in any other state where service upon him could be obtained. This would enable a dishonest creditor to recover several times one against stockholders residing in different states as it would be difficult for them to ascertain what steps the plaintiff had already taken. This might give rise to a large amount of litigation, it is said. It is also pointed out that in case of several actions in different states questions of priority of the claims of various creditors might ensue, upon which the decisions of the state courts might not be uniform, and so the defendant might have to pay more than once. The court seems to have thought that an action should first be brought in the state where the corporation is established to ascertain and determine the amount of each stockholder's liability, and it is practically decided that as this was not



done in this case the action could not be maintained.

But in *Handcock National Bank v. Ellis*, 166 Mass. 414, where the plaintiff's declaration averred, insubstance, that under the statute of Kansas, as construed in the highest court of that state, the liability of the defendant as a stockholder is contractual and that in subscribing to the capital stock the defendant thereby guaranteed payment to the judgment creditors of an amount equal to the par value of the stock owned by him; and that an action to enforce this liability is transitory, and may be brought in any court of general jurisdiction where personal service can be made upon the stockholder, it was held that, "the averments are sufficient to set forth that the defendant is such a stockholder as by the law of Kansas would be liable to the plaintiff." As the case came up on demurrer, it was decided that judicial notice could not be taken of the Kansas statutes or of their interpretation by the Kansas courts, but only the averments of the declaration could be considered. The court calls attention to the fact that the declaration in this case sets forth that according to the law of Kansas the defendant is liable to the corporate creditor as

upon a contract, which is suable anywhere. "The facts alledged in this respect are different from those in any case heretofore presented to this court." It is conceded that while the alledged liability is different from that which exists in Massachusetts, yet the construction which is given in Kansas will be adopted; and "jurisdiction exists in Massachusetts to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration."

In the later case of Coffing v. Dodge, 167 Mass. 231, decided in 1897, the action was in contract, with courts in tort. One of the counts of the declaration was to enforce the defendant's liability as a stockholder in a corporation which had guaranteed certain notes and mortgages belonging to the plaintiff. The court decided that the ruling that the plaintiff could not recover upon this count was correct. The court distinguishes this case from Bank v. Ellis, supra by stating that in this case "there is no distinct allegation that the liability is contractual, nor that it has been so construed by the courts of Kansas, nor are there any allegations from which it can be seen that no injustice to others will be done," as was set forth in that case.

Thus it is clear that the Massachusetts courts will not enforce the liability of a stockholder in a Kansas corporation, unless the plaintiff properly alleges and shows that the liability is contractual, that it has been so construed by the courts of Kansas, and that no injustice can be done to the defendant, the corporation, or other creditors or stockholders by entertaining the action.

The Supreme Court of Michigan, in the case of *Western National Bank v. Lawrence*, 76 N. W. Rep. 105, decided in 1898, permitted a judgment creditor of a Kansas corporation, upon whose judgment execution against the corporation had been returned unsatisfied, to maintain an action at law in Michigan for the purpose of charging the defendant to the amount of his stock in the corporation. In his declaration the plaintiff set forth the provisions of the Constitution and statutes of Kansas under which it was claimed the defendant became liable. In the opinion it is said, "We are satisfied that to enforce this contract does not import the law of one state into another state, and give it an extraterritorial effect, in any proper

sense. It merely allows the law to be read for the purpose of determining the contract into which the stockholder has entered. The contract is expressed by the statute and what the stockholders have written and done under it, when taken and read together as a whole." It is also stated that, "while the liability is statutory, it is one which arises on contract of subscription to the capital stock; and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction where personal service may be had upon the stockholder."

In Missouri at least two cases, involving this question, have arisen.

In *Eagley v. Tyler*, 43 Mo. App. 195, the Kansas City Court of Appeals permitted the statutory liability of a stockholder in a Kansas corporation to be enforced in a suit at law. The court stated that it was immaterial what the pleader might call the action, whether a proceeding in equity

or an action in law, as the facts were set forth which constituted a good petition whether in law or in equity. The laws of Kansas creating the liability sought to be enforced were pleaded by the plaintiff in his petition. In the opinion it is asserted that the defendant's liability "grows out of his contract to pay the unsatisfied creditor of the corporation a sum equal to the amount of stock owned. "The stockholder of the foreign corporation is, by virtue of his subscription, a contracting party with the creditors thereof. The laws of its corporate organization, as contained in the special charter, or as set out in the general statutory provision under which said foreign corporation is organized, enter into and make the terms of the stockholder's engagement. This contract, so made, will (when not immoral or opposed to the public policy of the forum) be enforced everywhere, not ex proprio vigore but only ex comitate."

The highest court of Missouri, in *Guerney v. Moore*, 131 Mo. 650, allowed a judgment creditor of an insolvent Kansas corporation to recover against a stockholder in the

same, an amount equal to the amount of stock owned by the latter together with the amount still unpaid on his shares of stock. It was held that the liability of the defendant did not accrue until the execution was returned no property found, or the corporation was insolvent or dissolved. The Kansas statute, imposing this liability was declared not to be penal in its nature. In the opinion occurs the following argument: "It does not follow that because the people of this commonwealth have restricted the liability of stockholders in corporations created by virtue of our own laws to the amount of their stock that they will refuse to enforce in their courts the contracts of its own citizens who voluntarily go into other states and become stockholders in corporations under their laws which impose upon stockholders a personal liability in excess of the amount of stock taken. Such a contract is not against public policy. It contravenes no principle of good morals and has no mischievous tendency. It is not in any sense repugnant to our ideas of honesty or justice." The court remarks

Massachusetts

that the reasoning in the <sup>^</sup>case of Bank v. Rindge, supra, is "to

our minds entirely unsatisfactory."

In New York, the leading case of *Marshall v. Sherman*, 148 N. Y. 9 (1895), which was an action brought by a creditor of a Kansas banking corporation, which had been dissolved leaving debts unpaid, to enforce the liability of a stockholder in that corporation, the court sustained a demurrer to the complaint. The complaint averred, in substance, the incorporation of the bank under the laws of Kansas; that it had been dissolved, leaving debts unpaid; that the defendant was a stockholder; that the plaintiff had recovered a judgment in the courts of Kansas; that execution thereon had been returned unsatisfied; that the corporation was insolvent but a portion of the debt had been paid to plaintiff. The complaint also set forth the provisions of the Constitution of the state of Kansas and the statutes (§§32 and 44, C. 23, Gen. St. 1868) which <sup>it</sup> was claimed imposed a legal liability upon the defendant to pay the money still due. But there was no allegation as to the meaning or effect of these statutes, of the provision of the Constitution set fourth under the decisions of the courts of Kansas, nor any allegation that any judgment had been obtained against the

defendant in the courts of the state under those statutes.

The defendant demurred to the complaint on the grounds, among others, that there was a defect of parties defenant, in that all the stockholders were not made defendants, and also, that the complaint did not state facts sufficient to constitute a cause of action. The court under the circumstances, placed its own construction upon the statutes and decided that the provision of the Constitution referred to is not self-executing; and that statutes were enacted to make it effectual and that it was these enactments not the Constitution itself which the plaintiff sought to enforce. It was held that the statutes set forth in the complaint provide for a special and peculiar remedy and were "intended to operate and be enforced only within that jurisdiction." It was pointed out that it would be clearly impossible to enforce some of their provisions in New York state; and, hence, if it was apparent that they could not as a whole scheme be given full effect in New York, some particular provision ought not to be detached from the general context for the purpose of ascertaining whether or not it is enforceable beyond the local jurisdiction, but they should be construed as a



whole. It was further pointed out that in New York the liability of a stockholder to the corporate creditors seems to be regarded as contractual only up to the time when the capital stock has been fully paid in; and that in the case under consideration the liability could not be said to arise upon contract in the general sense, as it would not exist but for the terms of the statute. "The voluntary purchase of the stock by the defendant would not of itself create any liability." And, so, the liability in this case was held to be a secondary and special liability, conditional upon the failure of the corporation itself which owes the debt to pay it. It was held, moreover, that if the action could be maintained, under any circumstances, in New York it must be in the form and by such procedure as like liabilities created under New York statutes are enforced against New York citizens. But in New York an action at law by a single creditor against a single stockholder for the recovery of a certain sum of money cannot be maintained under the New York statutes declaring the liability of stockholders. In such cases a suit in equity must be brought by or in behalf of all the creditors against all the stockholders. Since in

this action neither the number of stockholders nor the amount of the capital stock were stated, it was held that the equitable proportion of the debts which the defendant should pay could not be <sup>de</sup> <sub>A</sub>termined. The court deemed it unfair to compel the defendant to pay this claim and then leave him to another action or, perhaps, several actions in several states, to obtain contribution from the other stockholders. To carry out the purpose of the law there should be a proceeding in equity for an accounting, to which all the stockholders are made parties. Thus, it may be said that it was held in this case, that the New York courts will not enforce the liability of a stockholder in a Kansas corporation, if it appears that those statutes provide a peculiar and special remedy and that it will be impossible to do complete justice to all the parties in interest.

It may be well to mention, in this connection, that much the same doctrine is adopted by one of the lower courts of Ohio in the case of *Wyatt v. Moorehead*, 7 Ohio Decisions 381 (1897). In that case, the Kansas statutes were set forth in the plaintiff's petition, among other averments it was held that the plaintiff ought not to be permitted to enforce in Ohio the

remedy provided by the laws of Kansas until a proper proceeding, the relation of the insolvent corporation and its creditors and stockholders had been determined, and the amount which each solvent stockholder should contribute had been ascertained. It was also pointed out that since the defendant is "not liable to any individual creditor, the latter ought not to be permitted to recover to the full extent of the former's liability, and compel him to institute a suit in another state, or it may be several suits in several states for contribution from the other stockholders.

The Supreme Court of Pennsylvania in the case of Cushing v. Perot, 175 Pa, 66, held that in an action in that state by a foreign creditor of a Kansas corporation against a stockholder therein to recover the liability imposed on stockholders by the Kansas statutes an affidavit of defense is sufficient which avers that suit has already been brought and judgment obtained against the defendant in the state where the company was incorporated on his liability as a stockholder and execution has been levied on his real estate there. Mr. Justice Mitchell, in his opinion, makes this statement: "In regard to

the Kansas statute under consideration, my individual opinion is that by the weight both of reason and authority the liability created by it is contractual and should be enforced by any court having jurisdiction of the parties "but as this was not the point in issue in the case, he concludes by saying that he leaves to be decided when they arise, the ultimate questions whether the courts of Pennsylvania will enforce the statutory liability under the Kansas law, and if so, whether against separate stockholders or only in the form provided by the Pennsylvania practice in similar cases.

The Supreme Court of Rhode Island in the case of Hancock Nat. Bank v. Farnum, reported in 40 Atl. Rep. 341 (1898), sustained a demurr<sup>r</sup>er to a complaint in an action brought by a creditor of a Kansas Corporation against a stockholder to enforce the latter's liability. In his declaration, the plaintiff alleged that the defendant owed the plaintiff a sum of money equal to the amount of his stock under the laws of Kansas which were set forth. The plaintiff alleged that according to the decisions of the Supreme Court of Kansas, the stockholder's liability is contractual, several and transitory, and that, having been so decided,

under the provisions of the United States Constitution relating to the full faith and credit being given to statutes, decrees, and judgments of other states, this action should lie. But the court pointed out that these opinions of courts are not judgments; and that the portion of the opinion in Howell against Manglesdorf, supra , as to the liability being statutory and in the nature of a guarantee was really a dictum. It was asserted that even an opinion of the Kansas court which declared the liability to be contractual would not be binding because it would not be a judgment, to which full faith and credit must be given. The court construed the liability imposed by the Kansas statutes to be a mere statutory liability, "incidental to ownership of stock" rather than a contract, which is not enforcable under the laws of Rhode Island, and which comity did not require it to enforce.

The foregoing seemed to be all of the cases on the enforcement outside of the state of Kansas, of the statutory liability of stockholders in Kansas business corporations, which have risen prior to the year 1899. For the study of these decisions it is apparent that there is no little difference of opinion on this question among the courts of different jurisdictions, some

of this diversity arising from the difference in the point of view taken and some of it being in direct conflict. Accordingly, a discussion of the important points involved is rendered necessary in order to serve as a conclusion for<sup>A</sup>this investigation of the decisions on the question. .

## CONCLUSION.

The difference of opinion, referred to, arises over both the nature of the liability and the manner of its enforcement.

As to the nature of the liability, it may be said that while the courts are agreed that the liability of a stockholder for the debts of the corporation to the extent of the amount unpaid upon his stock is contractual and hence should be enforced in any jurisdiction where personal service upon the defendant may be had, yet some courts contend that a liability to the corporate creditors which is declared to continue after the stock is fully paid for is merely statutory and comity does not require the courts of other states to enforce. In other jurisdictions, on the other hand, it is held that this liability, while statutory, in the sense that it does not exist at common law but is imposed by statute, must be deemed to be contractual and <sup>extra</sup> enforceable territorially, since it arises upon the contract of subscription to the capital stock of the corporation, the stockholder being considered to contract with reference to all

the provisions of the charter and statutes creating the corporation. In some decisions it has been said that this liability is in the nature of a contract of guaranty.

As regards those courts which construe this liability to be purely statutory, at least one of the cases already cited - the Rhode Island case of Hancock Nat'l Bank v. Farnum, supra seems to clearly hold that the personal liability imposed by the Kansas statute is merely statutory, " incidental to ownership of stock" rather than contractual; and that comity does not require it to be enforced by other states. In Marshall v. Sherman, supra , it was pointed out that in New York, a stockholder's liability to the corporate creditors up to the time all of the capital stock is paid in might be considered contractual and that the "double" liability imposed by the Kansas statute cannot be considered as arising upon the contract, in the general sense.

On the other hand, several of the United States Circuit Court decisions, and decisions from California, Michigan and Missouri, which have been cited, declare that this liability



is contractual in nature arising upon the subscription to stock and may be enforced by the courts of other states than Kansas.

Doubtless much may be said in favor of either view. From the standpoint of the stockholders, it would seem but fair that they should not be held liable for the debts of the corporation beyond whatever may remain unpaid upon their subscriptions to the capital stock. When the capital is once paid in, those who deal with the corporation ought to be compelled to contract with that alone in view, and not expect to hold the stockholders as guarantors of the payment of the corporate debts. In fact, the corporation laws of some states, such as Illinois and New York, do not hold stockholders to any personal liability to creditors after the capital stock has been fully paid in. To be sure, a corporation is a somewhat different entity to deal with than a single person or a partnership, but those who do business with it ought to look out for themselves and not expect to rely upon more than the actual assets of the corporation. One who deals with a merchant, for example,

who is conducting a business in his own name and on his own behalf, is not permitted by statute to look to some third person for the payment of the merchant's debts. He must look to the property of the merchant, and if he has been so imprudent as to trust the merchant too far, he must bear the loss. Of course, the wrongful acts of the officers of a corporation are not to be excused; but there are usually statutes which particularly provide for such cases, making those officers themselves liable. Hence, much may be said in favor of the argument that the "double" liability imposed by the Kansas statute is purely statutory and ought not to be enforced extraterritorially. But, on the other hand, it seems to be the opinion of many authorities that the stockholder in subscribing to the stock must be deemed to contemplate the law under which the corporation was created, and must abide by it.

As to the method prescribed for enforcing this liability another important difference of opinion exists.

While it is generally conceded that the summary proceeding to procure execution against the stockholder after return of

execution unsatisfied against the corporation is a special remedy which will not be enforced outside of the state of Kansas, many of the decisions cited, such as those of the federal courts, California, Michigan and Missouri held that the alternative remedy of action to charge the stockholder with the amount of the judgment was transitory and may be brought in other jurisdictions than Kansas.

But in *Marshall v. Sherman* supra, the court construed the Kansas statute (§32) providing for both of these remedies as a whole and declined to separate the two remedies, holding that the statute provided peculiar remedies which would not be enforced.

In most of the cases cited the action against the stockholder was brought upon a judgment obtained in Kansas obtained against the corporation, but in one or two of the decisions at least the court referred to the Kansas statute (§44) providing for an action against the stockholders of any corporation which had been dissolved leaving debts unpaid. In *Fowler v. Lamson*, supra, and *Tuttle v. Nat. Bank*, supra, it is spoken of

as a special remedy, probably because it is provided that the action may be brought against the stockholders without joining the corporation and also in case any of the stockholders are unable to pay their share of the execution the deficiency shall be divided among the others.

It would seem, however, that an action at law or in equity to charge the stockholder with the amount of the judgment upon which execution could not be satisfied against the corporation, is not a peculiar or special remedy. The courts of other states are capable of entertaining it and should give due respect to the judgment obtained in Kansas, since the United States Constitution provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." But, according to the Illinois and Massachusetts decisions, the Kansas laws creating the liability, and their judicial interpretation in that state must be pleaded as facts.

The Kansas statute does not state whether the action shall be brought in law or equity. While the federal courts, and courts of California, Michigan, and Missouri have permitted

a single creditor to bring such an action at law against a single stockholder, it is manifest that complete justice to all parties interested can hardly be done in such an action. It is possible for a dishonest creditor to recover the full amount of his claim against a stockholder in one state and then recover against the stockholders in distant states. Moreover, it would be difficult and expensive for one stockholder in one state to compel contribution from other stockholders scattered, perhaps, throughout the country. In *Marshall v. Sherman*, supra, the court suggested that a proceeding in equity for an accounting, to which all the stockholders are parties should be had. In this manner the proper share of the debts which each stockholder should pay could be determined.

Likewise, the court in *Tuttle v. Nat. Bank*, supra, pointed out that the proper proceeding in such a case is for the courts of the state in which the corporation existed to state an account, wind up its affairs, and determine the relations of the stockholders, creditors, and the corporation, to each other, before attempting to enforce the liability of stock-

holders in other states; and then if necessary, the creditors may appeal to the courts of the states where <sup>the</sup> other stockholders <sup>^</sup> are domiciled for adequate relief.

Although the liability is a several one against each stockholder, the federal court in the case of New York Life Ins. Co. v. Beard, supra, permitted a bill in equity against a number of stockholders to be, in order to avoid multiplicity of suits.

Perhaps, the best solution of this problem is that which is suggested by the opinion in Cushing v. Perot, supra, namely that a receiver be appointed by the court to take charge of the assets and represent all parties both creditors and stockholders and pursue the common remedy for the benefit of all the creditors. In this way the rights of each person might be protected and no one be compelled to pay more than his fair proportion. To be sure, the authorities are by no means reconcilable as to the right of a receiver of a corporation to sue in behalf of the creditors to recover the statutory liability of stockholders (1). Some of the Illinois and .....

(1) High on Receivers, §317a.

New Yorkt decisions seem to deny this right. The receiver cannot do this, it is said, because this liability is not an asset of the corporation which passes to the receiver but it is an obligation which runs directly from the stock holder to the creditor (1): *Brown v. Trail*, supra, although the court in *Cushing v. Perot*, supra, seems to have been cognizant of this general rule, it accepts that, if the liability under the Kansas statutes is contractual, then it should be regarded as an asset for the payment of the corporate debts and the right to sue upon it should pass to the receiver.

In conclusion, it may be said that, thus far the greater number of the decisions have favored the enforcement of the statutory liability of stockholders in Kansas corporations, but some authority of great weight has taken an opposite position. The arguments are not all on one side, by means, but it may safely be asserted that this statutory liability is likely to be enforced in most jurisdictions, if the proper procedure is followed, except in cases where the substantive right itself is denied.

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(1) Cook on Corporations, §218.

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