

poration, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder. *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263; *Dennick v. Railroad Co.*, 103 U. S. 11; *McDonough v. Phelps*, 15 How. Pr. 372; *Seymour v. Sturgess*, 26 N. Y. 134."

As this is a question of the proper construction to be given to a constitutional and statutory provision of a state, the decisions of the highest court of that state are binding upon this court. *Fairfield v. County of Gallatin*, 100 U. S. 47. But, if still higher authority were necessary, it will not be found wanting. A similar statute of the state of New York was before the United States supreme court in *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, in a suit brought against a stockholder of a New York corporation in the United States circuit court for the Northern district of Florida, where the supreme court held that:

"The liability created by a provision in a general act of the state of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified, is a contract, and not a penalty; and can be enforced by an action sounding in contract against a stockholder found in another state."

It was declared also that, the courts of New York having held that a liability of a stockholder to creditors arising under one of its general statutes for forming corporations was a contract, when the attempt was made to enforce it in New York, the supreme court would follow that interpretation in a suit to enforce such a liability in another state, and that the liability may be enforced by action at law, without resort to a court of equity. This case is an authority upon the case at bar, and answers all the contentions made upon the question of liability except such as are founded upon the evidence, which this court cannot review. A case similar to the one at bar arose and was heard on demurrer by the United States circuit court for the Southern district of California in 1893, under the same provisions of the Kansas statute and constitution, and the same ruling was made, the court following the decisions of the supreme court of Kansas. *Bank of North America v. Rindge*, 57 Fed. 279.

The judgment of the circuit court is affirmed.

UNITED STATES NAT. BANK OF NEW YORK v. FIRST NAT. BANK OF
LITTLE ROCK et al.

(Circuit Court of Appeals, Eighth Circuit. January 28, 1895.)

No. 507.

APPEAL—MOTION FOR REHEARING—FACTS NOT CONSIDERED—MISTAKE OF COUNSEL.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action by the United States National Bank of New York against the First National Bank of Little Rock, Ark., and S. R. Cockrill, its receiver, upon five notes indorsed by the Little

Rock Bank. At the trial a verdict was directed for the defendants. On writ of error sued out by plaintiff, the judgment entered by the circuit court was reversed, and the case remanded, with directions to award a new trial. 64 Fed. 985. Defendants move for a rehearing.

William C. Ratcliffe, for plaintiff in error.

Sterling R. Cockrill, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. A motion for a rehearing has been filed in this case. In support of the motion it is urged that the defendants in error asked an instruction in the nature of a demurrer to the testimony, which raised the question of the adequacy of the proof offered to fix the liability of the defendant bank as an indorser, and that this court in its decision overlooked the fact that such an instruction had been asked, and therefore erred in holding that the defendant bank waived or abandoned the defense of a want of proper demand and notice. It is only necessary to say that counsel are themselves mistaken in supposing that the record lodged in this court shows that such an instruction was asked. The record shows that at the conclusion of all of the evidence the plaintiff in error asked 10 instructions, all of which were refused, and that "the court, of its own motion," gave the instruction which is quoted in full in the opinion. 64 Fed. 985. It nowhere appears in the record that the defendant bank asked any instructions, or that it attempted, by instructions or otherwise, to avail itself of the defense that a proper demand was not made upon the makers of the several notes in suit to fix its liability as an indorser. That is a defense we think, that was neither considered nor determined by the trial court. We must adhere, therefore, to the conclusion announced in the opinion that the supposed defect in the proceedings taken to fix the liability of the defendant bank as an indorser is, upon the record now before us, insufficient to support the judgment.

The other points urged in support of the motion for a rehearing were sufficiently considered in the opinion now on file, and we find nothing in the argument of counsel that is adequate to alter the views heretofore expressed.

GULF, C. & S. F. RY. CO. v. CURB et al.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1895.)

No. 425.

PRACTICE—REMARKS OF COUNSEL IN ARGUING TO JURY—NEW TRIAL.

A new trial will not be granted on the ground of improper argument to the jury because plaintiff's counsel, in an action against a railroad company for personal injuries, said to the jury: "J. tells you that this woman is suffering from common female troubles. If J. believes this, why did he not have Dr. B. examine this woman?"—though the defendant had no