

In the view taken by me, it is unnecessary to consider the charge made that the bonds are invalid and void by virtue of the laws of the state of Minnesota enacted March 7, 1887. While it is true that there is no explicit charge, in terms, of collusion between the trustee, the complainant in the foreclosure suit, and Van Horne, yet the facts set forth in the petition show that by the terms of the contract between the North Star Construction Company and Van Horne, the latter was enabled to obtain possession of the road and manage its affairs; and if it can be proved that the railroad company was so managed by him, as charged in the petition, with the fraudulent intent and purpose to render the company insolvent, to bring about a default in the payment of interest, and thus obtain the property and ownership of the railroad company on a foreclosure sale, and defraud the petitioners and other stockholders out of their entire interest, a court of equity should grant relief. The rule is well settled that in such cases the stockholders may intervene to protect their own interests. As stated by the United States supreme court, in the case of *Bronson v. Railroad Co.*, 2 Wall. 302:

"Undoubtedly, in the case supposed, it would be a reproach to the law, and especially in a court of equity, if the stockholders were remediless. But in such a case the court, in its discretion, will permit a stockholder to become a party defendant for the purpose of protecting his own interests. * * * It is true, the remedy is an extreme one, and should be admitted by the court with hesitation and caution; but it grows out of the necessity of the case, and for the sake of justice, and may be the only remedy to prevent a flagrant wrong."

True, Van Horne, in his affidavit, denies the allegations in regard to the proposal made to the North Star Construction Company to build the Duluth & Winnipeg Railroad upon the conditions set forth in the petition, and alleges that the same is in writing, and will speak for itself; but what the contract contained is not clearly set forth. It is not possible to settle the conflicting rights of the parties interested upon affidavits. The allegations of a fraudulent purpose to sacrifice the interests of the stockholders entitle the petitioners to a hearing upon evidence taken in the usual course pursued in equity cases. Whether those allegations can be sustained is a question for future determination. Prayer of petitioners is granted, and 20 days' time is given to put in an answer and to prepare and file a cross bill. Ordered accordingly.

NEAD v. WALL.

(Circuit Court, S. D. New York. December 10, 1895.)

NATIONAL BANKS—LIABILITY OF STOCKHOLDERS—PLEADING.

In an action by the receiver of a national bank to enforce the individual liability of a stockholder, an allegation in the complaint that on a given date the comptroller, having ascertained and determined that the assets, property, and credits of the bank were insufficient to pay its debts and liabilities, and as provided by the act of congress, made an assessment and requisition on the shareholders of the said bank of a given sum upon each share held and owned by them, respectively, at the time of its default, and directed the receiver to take all necessary steps to enforce the liability, is sufficient. *Kennedy v. Gibson*, 8 Wall. 498, distinguished.

This was an action by Benjamin M. Nead, as receiver of the National Bank of Middletown, as against Carrie S. Wall, to recover an assessment made upon her as a shareholder in the bank. Defendant demurred to the complaint. Overruled.

Dayton, Dumphy & Swift, for plaintiff.

Butler, Stillman & Hubbard, for defendant.

COXE, District Judge. This is an action by a receiver of a national bank to enforce the individual liability of a stockholder. The complaint alleges:

"That on the 19th day of November, 1894, said comptroller of the currency having ascertained and determined that the assets, property and credits of said association were insufficient to pay its debts and liabilities, and as provided by said acts of congress, made an assessment and requisition upon the shareholders of the said the National Bank of Middletown, of fifty dollars (\$50) upon each and every share of the capital stock held and owned by them respectively at the time of its said default, and directed the plaintiff as receiver thereof to take all necessary proceedings by suit or otherwise to enforce to that extent the said individual liability of the said shareholders."

The defendant demurs on the ground that the foregoing allegation is insufficient under the authority of *Kennedy v. Gibson*, 8 Wall. 498. In that case the bill alleged that the receiver had ascertained that the assets and credits of the bank were wholly insufficient to pay its debts and that it was necessary that recourse should be had to the personal liability of the stockholders. It contained no averment of any action by the comptroller touching the liability of the stockholders. The court said, page 505,

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability and whether the whole or a part, and if only a part, how much, shall be collected."

The question was whether the decision, which is a condition precedent to the action, should be made by the receiver or the comptroller. Of course the court decided that this duty devolved upon the latter. In short, the question there did not turn upon the exceedingly narrow point now presented and there is little to warrant the inference that the court would have held the bill insufficient had it contained the allegation quoted from the complaint at bar. It is possible that this allegation might have been drawn with greater accuracy and made to conform more closely to the rule of *Kennedy v. Gibson*, but the court is inclined to think that it cannot be held bad upon demurrer. If not in precise words certainly by necessary implication of law it contains all the necessary allegations. It states facts from which the conclusive presumption follows that the comptroller performed all the necessary requirements of the law. First. He decided that the assets of the bank were not sufficient to pay its liabilities. Second. He made an assessment upon the shareholders of \$50 per share, as provided by the national bank act. Third. He directed the receiver to enforce to the extent of \$50 per share the shareholders' liability. What more is necessary? How is it possible for the defendant to be misled? The plain import of the allegation is that on the 19th of

November, 1894, the comptroller reached the conclusion that it was necessary to enforce the stockholders' liability to the extent of \$50 per share for the reason that the assets of the bank were otherwise insufficient to pay its liabilities; under it the entire proceedings of the comptroller may be offered in evidence. *Young v. Wempe*, 46 Fed. 354, and cases cited. Would it have added materially to the perspicuity of the allegation if the pleader had alleged further, "that said assessment was made because it was necessary to enable the receiver to pay the said debts and liabilities, and the said comptroller, before making the said assessment, decided that it was necessary for the purpose of paying said debts and liabilities?" It is thought not. The criticism of the defendant is too metaphysical and refined to meet with much favor under the liberal rules of modern pleading. The demurrer is overruled; the defendant may answer within 20 days.

HUBBARD v. AMERICAN INV. CO.

(Circuit Court, D. Nebraska. December 3, 1895.)

JUDGMENTS—VALIDITY—JURISDICTION.

An action was brought against a Nebraska corporation in a Colorado state court. The defendant appeared specially, and objected to the jurisdiction of the court on the ground that the service upon it was insufficient. Its objections having been overruled, the defendant, protesting against the jurisdiction, but without appealing, answered to the merits, and filed a counterclaim. Judgment was rendered against it, and a suit afterwards brought on such judgment in the United States circuit court in Nebraska. *Held*, that the judgment of the Colorado court, even if erroneous, was not void, and in the suit on such judgment it was not open to the defendant to insist that the question of the jurisdiction of the Colorado court should be again litigated.

This was an action brought upon a judgment in favor of the plaintiff and against the defendant rendered in the district court of Arapahoe county, Colo. The defendant was a Nebraska corporation, but had been doing business in Colorado, and had filed a written appointment of an agent upon whom process might be served in Colorado, as required by the laws of that state. The record showed service on such agent. The defendant offered to prove that at the time service was made it had ceased to do business in Colorado, and that the person served had ceased to be its agent. To this testimony the plaintiff objected. Further facts appear in the opinion.

Roscoe Pound, for plaintiff.

C. A. Atkinson and G. A. Adams, for defendant.

SHIRAS, District Judge. I sustain the objections to this line of testimony offered by the defendant on the following grounds: It appears and is admitted that to the action brought by the present plaintiff against the present defendant in the district court of Arapahoe county, Colo., a special appearance was entered on behalf of the defendant, and the question of the jurisdiction of that court