GENERAL RULES OF PRACTICE

OF THE

NEW YORK (STATE)

COURTS OF RECORD

OF THE

STATE OF NEW YORK

Attention is called to the amended Rules of Practice in Foreclosure Cases, adopted by the Justices of the Supreme Court, October 12, 1910, to comply with the amended Rules of Practice. These rules will be found following page 708.

By MARCUS T. HUN
Former Reporter of the Supreme Court

ALBANY
MATTHEW BENDER & CO.

NEW YORK
BAKER, VOORHIS & CO.
1910

GENERAL RULES OF PRACTICE

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NEW YORK (STATE)

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STATE OF NEW YORK

WITH

ANNOTATIONS, NOTES, AND REFERENCES

TENTH EDITION

By MARCUS T. HUN
Former Reporter of the Supreme Court

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PREFACE.

The many important amendments to the Rules of Practice of the Supreme Court, made by the Appellate Division judges at the recent convention in April, 1910, the numerous important changes made in the Code by the enactment of the Consolidated Laws, and the decisions of the courts since the last edition in 1906, have rendered necessary the making of this new edition, from new type and plates.

All of the original work of Marcus T. Hun, former Supreme Court Reporter, has been retained and the same brought down to date.

Attention is called to the fact that indexes are given separately to both the Rules and the Notes.

ALBANY, *October* 12, 1910.

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1900.	1896.	1880, 1884 and 1888.	1877.	1874.	1871.	1858.
1	1	1	1	1 and 2	1 and 2	1 and 2
2	2	2	2	3	3	3
3	3	3	3	4 and 7	3 and 7	3
4	4	4	4	5	4	4
5	5	5	5	8 and 9	8 and 9	5 and 6
6	6	6	6	10	10	8
7	7	7	7	11	11	9
8	8	8	8	12	12	9
9	9	9	9	14	14	11
10	10	10	10	15	15	12
11	11	11	11	16	16	13
12	12	12	12	17	17	
13	13	13	13			
14	14	14	14	18	18	14
15	15	15	15	19	19	20
16	16	16	16	20	20	16
	17	17	17	22	22	17
17						
18	18	18	18	23 and 24	23 and 24	18
19	19	19	19	26	26	20
	20	20	Part of Rule 19			
20						
21	21	21	21	27	27	39
22	22	22	22	28	28	50
23	23	23	23	29	29	21
24	24	24	24	30	30	22
25	25	25	25	31	31	23
26	26	26	26	33	33	24
27	27	27	27	35	35	56
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29	29	29	29	37	37	30
30	30	30	30	39	39	32
31	31	31	31	40	40	33
32	32	32	32 and part of 34	41	41	34
33	33	33	33	42	42	35
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35	35	35	35	44	44	37
36	36	36	36	45		
37	37	37	37	46	46	39
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CORRESPONDING RULE — (Continued).

1900.	1896.	1880, 1884 and 1888.	1877.	1874.	1871.	1858.
42	42					
43	43	41 42	43	52	52	46
44	44	43	45	54	54	48
45	45	44	47	56	56	52
46	46	45	48	57	57	53
47	47	46	49	58	58	54
48	48	47 48	50 51	59 60	59 60	58 59
49	49	49	52	61	61	59
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52	52	52	55	64	64	63
53	53	53	56	65	65	64
54	54	54	57	66	66	65
55	55	55	58	67	67	56
56	56	56	59	68	68	67
57	57	57	60	69	69	68
58	58	58	61	70	70	69
59	59	59	62	71	71	70
60	60	60	63	72	72	71
61	61	61	64	73	73	72
62	62	62	65	74	74	73
63	63	63	67	76	76	75
64	64	64	68	77	77	76
65	65	65	69	78	78	77
66	66	66	70	79	79	78
67	67	67	72	81	81	80
68	68	68	73	82	82	81
		69	74	83	83	82
69	69	70	75	84	84	83
70	70	71	76	85	85	84
71	71	72	77	86	86	85
72	72	73	78	87	87	86
73	73	74	79	88	88	87
74	74	75	81	90	90	89
75	75	76	82	91	91	90
76	76	77	83	92	92	91
77	77	78	84	93	93	92
78	78	79	85			
79	79	80	86			
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81	81	82	88			
82	82	82	89	21	21	
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COURTS OF RECORD.

ADOPTION, REVISION AND GENERAL CONSTRUCTION OF RULES.

COURT OF APPEALS RULES.

The Court of Appeals may from time to time make, alter, and amend rules, not inconsistent with the Constitution or statutes of the State, regulating the practice and proceedings in the court. (Judiciary Law, § 51.)

RULES AS TO THE ADMISSION OF ATTORNEYS.

The rules established by the Court of Appeals touching the admission of attorneys and counselors to practice in the courts of record of the State, shall not be changed or amended except by a majority of the judges of that court. A copy of each amendment to such rules must, within five days after it is adopted, be filed in the office of the Secretary of State. (Judiciary Law, § 53, subd. 4.)

Exemptions as to the clerkship required on the examination allowable in the case of the graduates of certain law schools. (Judiciary Law, § 53, subd. 5.)

THE GENERAL RULES OF PRACTICE.

The justices assigned to the Appellate Division of the Supreme Court shall meet in convention at the Capitol, in the city of Albany, on the fourth Tuesday in October, eighteen hundred and ninety-five, and at least every second year thereafter. They must also meet from time to time at the same place whenever called together by at least five of said justices at a time to be fixed in the said call, a copy of which shall be delivered at least one week before the time fixed to the presiding justice of each department. The convention of justices assigned to the Appellate Division must establish rules of practice not inconsistent with this chapter or the Code of Civil Procedure, which shall be binding upon all the courts in this State, and all the judges and justices thereof, except the Court for the Trial of Impeachments and the Court of Appeals. The rules thus established are styled 'the General Rules of Practice.' (Judiciary Law, §§ 93, 94.)

Must prescribe the cases in which a discovery or inspection may be compelled. (Code of Civil Procedure, § 804.)

May prescribe rules of procedure where a commission has been issued by a court out of the State. (Code of Civil Procedure, § 915.)

May prescribe places of trial of issues. (Code of Civil Procedure, § 976.)

May prescribe as to the settlement of a case and exceptions. (Code of Civil Procedure, § 997.)

Are applicable to appeals in special proceedings. (Code of Civil Procedure, § 1361.)

May prescribe the manner in which notice of application to issue execution against the estate of a deceased debtor may be given. (Code of Civil Procedure, § 1381.)

POWER OF CONVENTION.

Rules may be made altering the practice under the Code previously settled by decisions of the court. (Havemeyer v. Ingersoll, 12 Abb. Pr. [N. S.] 301 [Sp. T. 1871].)

The Constitution does not authorize the delegation of the law-making power to a convention of judges. (Winston v. English, 14 Abb. Pr. [N. S.] 124, 125 [Supr. Ct. Gen. T. 1873].)

No general rule can be made inconsistent with the Code. (Rice v. Ehele, 55 N. Y. 524 [1874]; Lakey v. Cogswell, 3 Code R. 116 [N. Y. Com. Pl. 1850]; French v. Powers, 80 N. Y. 146 [1880]; Palmer v. Phœnix Ins. Co., 22 Hun, 224 [1880]; Gormerly v. McGlynn, 84 N. Y. 284 [1881].)

A rule cannot alter a statutory provision. (Glenney v. Stedwell, 64 N. Y. 120 [1876].)

POWER OF THE COURTS.

All matters of practice are in the first instance in the discretion of the courts in which the questions of practice arise.

Yet matters of practice come after a certain time to be governed absolutely by the custom of the courts. (Fisher v. Gould, 81 N. Y. 232 [1880]. See, also, McQuigan v. D., L. & W. R. R. Co., 129 N. Y. 50 [1891].)

The Supreme Court in the several judicial districts of the State has no power to create general rules. (Matter of Opening, etc., the Bowery, 19 Barb. 588 [Gen. T. 1855]. See, however, General Rules, Nos. 84 and 46.)

INHERENT POWER OF PROCEDURE.

Whatever judicial procedure is essential to enable courts to exercise their functions is authorized.

The powers of courts are either statutory or those which pertain to them by force of the common law, or are partly statutory and partly derived from immemorial usage, the latter constituting the inherent jurisdiction of the courts. (McQuigan v. D., L & W. R. R. Co., 129 N. Y. 50 [1891].)

JURISDICTION CONFERRED BY THE CONSTITUTION.

The power given to the Supreme Court by the Constitution cannot be limited by the Legislature or by the Code itself under any legislative authority. (People ex rel. The Mayor, etc., v. Nichols, 79 N. Y. 582 [1880].)

FORMATION OF THE SEVERAL APPELLATE DIVISIONS.

"There shall be an Appellate Division of the Supreme Court, consisting of seven justices in the first department, and of five justices in each of the other departments. In each department four shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case." (Const. of 1894, art. 6, § 2.)

WHO MAY NOT SIT IN REVIEW.

"No judge or justice shall sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any court of which he was at the time a sitting member." (Const. of 1894, art. 6, § 3.)

CASES NOT PROVIDED FOR.

Where its own rules do not cover the case, the court follows the practice of the King's Bench in England. (Dubois v. Philips, 5 Johns. 235 [Sup. Ct. 1809]; Miller v. Stettiner, 7 Bosw. 695 [Supr. Ct. Sp. T. 1862]; S. C., 22 How. Pr. 518; Mut. Life Ins. Co. v. Bigler, 79 N. Y. 568.)

PRE-EXISTING PRACTICE.

Although there is no saving in terms of the pre-existing practice, the rules cannot be deemed to abrogate it, where such practice was not dependent upon any court rule. (Miller v. Stettiner, 7 Bosw. 696 [Supr. Ct. Sp. T. 1862].)

GENERAL RULES FOLLOWED BY THE COURT OF APPEALS.

The General Rules of Practice established under section 17 of the Code of Civil Procedure are followed by the Court of Appeals in cases not otherwise provided for. (People ex rel. Wallkill Valley R. R. Co. v. Keator, 101 N. Y. 610–613 [1885].)

—— **Exceptions.**] Subdivision 10 of section 791 of the Code of Civil Procedure, which mentions among preferred causes "a cause entitled to preference by the General Rules of Practice" does not apply to the practice in the Court of Appeals. (Nichols v. Scranton Steel Co., 135 N. Y. 634 [1892].)

Section 1361 of the Code of Civil Procedure, providing that appeals from determinations in special proceedings "are governed by the provisions of this act and of the General Rules of Practice relating to an appeal in an action, except as otherwise specially prescribed by law" does not apply to appeals to the Court of Appeals. (Matter of Southern Boulevard R. R. Co., 128 N. Y. 93 [1891].)

EFFECT OF RULES.

Rules of courts have the force and effect of statutes. (Matter of Moore, 108 N. Y. 280 [1888]; People ex rel. The Mayor v. Nichols, 18 Hun, 535 [1879]; reversed, but not on this point, 79 N. Y. 582.)

DISREGARDING RULES.

The court may disregard its rules where a proper case is presented. (Clark v. Brooks, 26 How. Pr. 285 [N. Y. Com. Pl. Sp. T. 1864].)

The true object of technical rules is to promote justice or punish injustice. When they fail of these ends courts should neither encourage nor enforce them. (People v. Tweed, 5 Hun, 353 [1875]; affd., 63 N. Y. 194.)

The court will not depart from its customary modes of procedure, especially where such departure tends to infringe on the general rules of the court. (Battershall v. Davis, 23 How. Pr. 383 [Gen. T. 1861].)

The disregard of the rules will not be allowed to be interposed, as a defense to a remedy, which would have been open to his adversary in case a party had followed the rules in his pleading. (Goldberg v. Utley, 60 N. Y. 429 [1875].)

RULES — BY WHAT COURT CONSTRUED.

The rules of the Supreme Court are under its control, and its decision in reference thereto will not be reviewed by the Court of Appeals. (Evans v. Backer, 101 N. Y. 289 [1886]; Martine v. Lowenstein, 68 id. 456, 6 Hun, 225.)

Each court is the best judge of its own rules, and a higher court will not reverse any construction given to them, not palpably erroneous. (Coleman v. Nantz, 63 Penn. St. [13 Smith] 178 [Sup. Ct. 1869].)

CONSTRUCTION OF AMENDMENTS OF RULES.

The amendments of the rules of court are analogous to the amendments of the statutes and should receive the same construction. (Matter of Warde, 154 N. Y. 342 [1897].)

CONSTRUCTION GIVEN TO STATUTES BY RULES.

The rules made by the court, under authority of the Code, may be considered as giving construction to the statute. (Myers v. Feeter, 4 How. Pr. 241 [Sp. T. 1850]; S. C., 2 Code R. 147.)

PUBLICATION OF RULES.

A rule thus established [in pursuance of the provisions of section 94 of the Judiciary Law] does not take effect until it has been published in the newspaper published at Albany, designated pursuant to section 82 of the Executive Law, once in each week for three successive weeks. (Judiciary Law, § 95.)

A general rule or order of the Court of Appeals does not take effect until it has been published in the newspaper published at Albany, designated pursuant to section 82 of the Executive Law, once in each week for three successive weeks. (Judiciary Law, § 95.)

RULES OF THE CITY COURT OF NEW YORK.*

The justices of the court, or a majority of them, may, from time to time, establish rules of practice for the court not inconsistent with this act or with the General Rules of Practice established as prescribed in section 94 of the Judiciary Law. The latter govern the practice in the court, as far as they are applicable thereto. (Code of Civil Procedure, § 323.)

* The name "Marine Court of the City of New York" was changed to the "City Court of New York" by chapter 26 of the Laws of 1883.

PROCEEDINGS OF THE CONVENTION OF 1899.

At a convention of the justices of the Appellate Division of the Supreme Court of the State of New York, held at the Capitol, in the city of Albany, N. Y., on the 24th day of October, 1899, at one o'clock P. M. of that day, the following presiding justices and associate justices were present:

Hon. CHARLES H. VAN BRUNT, Hon. EDWARD PATTERSON,
Hon. GEORGE C. BARRETT, Hon. GEORGE L. INGRAHAM,
Hon. WILLIAM RUMSEY, Hon. CHESTER B. McLAUGHLIN,

Of the First Department.

Hon. WILLIAM W. GOODRICH, Hon. JOHN WOODWARD,
Hon. EDGAR M. CULLEN,

Of the Second Department.

Hon. CHARLES E. PARKER, Hon. JUDSON S. LANDON,
Hon. D-CADY HERRICK, Hon. MILTON H. MERWIN,

Of the Third Department.

Hon. GEORGE A. HARDIN, Hon. PETER B. McLENNAN,
Hon. WILLIAM H. ADAMS, Hon. WALTER LLOYD SMITH,

Of the Fourth Department.

On motion of Presiding Justice Van Brunt, it was

Resolved, That Presiding Justice Hardin be requested to act as chairman of the convention.

On motion of Presiding Justice Van Brunt, Mr. Marcus T. Hun was requested to act as secretary of the convention.

Presiding Justice Van Brunt stated the purpose of the convention, referring, among other things, to section 915 of the Code of Civil Procedure, as amended by chapter 502 of the Laws of 1899, providing that the General Rules of Practice must prescribe rules for the procedure where a commission to take testimony within the State has been issued by a court without the State.

Justice Ingraham moved that Rule 16 be amended by adding thereto Rule 17, so that, as amended, Rule 16 would read as follows:

"RULE 16. The order for granting the application shall specify the mode in which the discovery or inspection is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or to allow an inspection with copy, or by requiring him to produce and deposit the same with the clerk, unless otherwise directed in the order. The order shall also specify the time within which the discovery or inspection is to be made, and when papers, articles or property are required to be deposited or inspected, the order shall specify the time the deposit or the opportunity for inspection shall continue.

"The court or judge may direct that the order directing the discovery or inspection shall operate as a stay of all other proceedings in the case, either in whole or in part, until such order shall have been complied with or vacated."

Which motion was adopted.

Justice Ingraham moved that Rule 17 be amended so as to read as follows:

"RULE 17. Application for a subpœna to compel the attendance of a witness to obtain testimony under depositions taken within the State for use without the State, and proceedings thereon.

"The petition prescribed by section 915 of the Code of Civil Procedure must state generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of a witness is material to the issues presented in such action or proceeding, and shall set forth the substance of or have annexed thereto a copy of, the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpœna to compel the production of books or papers, the petition shall specify the particular books or papers the production of which is sought, and show that such books or papers are in the possession of or under the control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken. Unless the court or judge is satisfied that the application is made in good faith to obtain testimony within sections 914 and

915 of the Code of Civil Procedure, he shall deny the application. Where the subpœna directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner, or to produce the original thereof and deposit the same with the commissioner. This subpœna must be served upon the witness at least two days, or in case of a subpœna requiring the production of books or papers, at least five days before the day on which the witness shall be commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpœnaed to attend and give his deposition may apply to the court to vacate or modify such subpœna.

"Upon proof by affidavit that a person to whom a subpœna was issued has failed or refused to obey such subpœna; to be duly sworn or affirmed; to testify or answer a question or questions propounded to him; to produce a book or paper which he has been subpœnaed to produce, or to subscribe to his deposition when correctly taken down, a justice of the Supreme Court or a county judge shall grant an order requiring such person to show cause before the Supreme Court, at a time and place specified, why he should not appear; be sworn or affirmed; testify; answer a question or questions propounded; produce a book or paper; or subscribe to his deposition, as the case may be. Such affidavit shall also set forth the nature of the action or special proceeding in which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the fact to be proved therein. Upon the return of such order to show cause, the Supreme Court shall upon such affidavit and upon the original petition, and upon such other facts as shall appear, determine whether such person should be required to appear; be sworn or affirmed; testify; answer the question or questions propounded; produce the book or paper, or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the court or judge shall make an order requiring such person to show cause before it or him at a time and place therein specified, why such person should

not be punished for the offense as for a contempt. Upon the return of the order to show cause the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the court or judge before whom the order to show cause is made returnable, the court or judge shall enforce the order and prescribe the punishment as in the case of a recalcitrant witness in the Supreme Court."

Which motion was seconded by Presiding Justice Van Brunt, and was adopted.

Justice Rumsey called attention to the delay attending the publication of the Session Laws, and read a communication addressed to the Governor and Legislature of the State of New York on this subject as follows:

"*To the Governor and Legislature of the State of New York:*

"The justices of the Appellate Division of the Supreme Court, in convention assembled, respectfully call your attention to the fact that the Session Laws for the session of 1899 have not yet been published or circulated in official form so that they can be referred to and used.

"The session closed early in May, except for an extra session held during the latter part of the month, during which several Session Laws were passed. Many of these laws took effect immediately and some on the first of September, and it is believed that on that last-mentioned date every one of them was in force. Many of them are of very considerable importance. They affect not only the election which is to take place in a very short time, but the manner of registering voters which has already been completed. Many of the sections of the Code of Civil Procedure were also amended during that session. It is impossible to get these in official form, except from the Secretary of State, until the Session Laws shall have been published.

"The failure to publish these important laws causes great inconvenience, and may well bring about public scandal.

"The delay this year has been unexampled in length, but a great delay occurs every year, and it is rarely that the official copies of the Session Laws are ready for publication until the first of September.

"We beg leave to suggest that this delay should not be permitted, and to request that some steps be taken to cause an earlier publication and delivery of the current laws of the State in an official form.

"*Resolved,* That the chairman and clerk of this convention be requested to send to the Governor, the Lieutenant-Governor and to the Speaker of the Assembly, a copy of this memorial and resolution."

Which communication, on motion of Justice Ingraham, as expressing the sense of the convention, was unanimously adopted.

Justice Landon called attention to the imperfect way in which the indices of the Session Laws were prepared and the want of uniformity in such indices from year to year, and offered a resolution that the Secretary of State be requested to take more care in the preparation of such indices, which was adopted.

Justice Ingraham moved that Rule 20 be added to Rule 19, so that, as amended, Rule 19 would read as follows:

"RULE 19. Every pleading, deposition, affidavit, case, bill, exceptions, report, paper, order or judgment, exceeding two folios in length, shall be distinctly numbered and marked at each folio in the margin thereof, and all copies either for the parties or the court shall be numbered or marked in the margin, so as to conform to the original draft or entry and to each other, and shall be indorsed with the title of the cause. All the pleadings and other proceedings and copies thereof shall be fairly and legibly written or printed, and if not so written or printed and folioed and indorsed as aforesaid, the clerk shall not file the same, nor will the court hear any motion or application founded thereon.

"All pleadings and other papers in an action or special proceeding served on a party or an attorney, or filed with the clerk of the court, must comply with section 796 of the Code of Civil Procedure and must be written or printed in black characters; and no clerk of the court shall file or enter the same in his office unless it complies with this rule. The party upon whom the paper is served shall be deemed to have waived the objection for non-compliance with this rule unless within twenty-four hours after the receipt thereof he returns such papers to the party serving the same with a statement of the particular objection to its receipt;

but this waiver shall not apply to papers required to be filed or delivered to the court.

"It shall be the duty of the attorney by whom the copy pleadings shall be furnished for the use of a court on trial, to plainly designate on each pleading the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings."

The question whether Rule 20 should be added to Rule 19 was put by the chairman, and was decided in the affirmative.

Justice Ingraham moved that Rule 20 be made to read as follows:

"RULE 20. Service and settlement of interrogatories.— Interrogatories to be annexed to a commission issued under article second of title three of chapter nine of the Code of Civil Procedure shall be served within ten days after the entry of the order allowing the commission. Cross-interrogatories shall be served within ten days after the service of the interrogatories, unless a different time is fixed therefor by the order allowing the commission. In case a party shall fail to serve such cross-interrogatories within the time limited therefor, he shall be deemed to have waived his right to propound cross-interrogatories to the witness to be examined under the commission. Either party may, within two days after the service of the cross-interrogatories, or within two days after the time to serve cross-interrogatories has expired, serve upon the opposing party a notice of settlement of the interrogatories and cross-interrogatories before a justice of the court or county judge. The time at which such interrogatories or cross-interrogatories shall be noticed for settlement shall be not less than two nor more than ten days after the service of the notice. If neither party serves such a notice within the time limited therefor, the interrogatories and cross-interrogatories are to be deemed settled as served, and shall be so allowed without notice."

Which motion was adopted.

Justice Ingraham moved that Rule 32 be amended so as to read as follows:

"RULE 32. Whenever it shall be necessary to make a case, or a case and exceptions, or a case containing exceptions, the same shall be made, and a copy thereof served on the opposite party within the following times:

"If the trial was before the court or referee, including trials by a jury of one or more specific questions of fact in an action triable by the court, within thirty days after service of a copy of the decision or report and of written notice of the entry of the judgment thereon.

"In the Surrogate's Court, within thirty days after service of a copy of the decree or order and notice of the entry thereof.

"If the trial were before a jury, within thirty days after notice of the decision of a motion for a new trial, if such motion be made and be not decided at the time of the trial, or within thirty days after service of a copy of the judgment and notice of its entry.

"The party served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing the case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted for settlement at a time and place to be specified in the notice, to the judge or referee before whom the cause was tried.

"Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the judge or referee for settlement, mark upon the several amendments his allowance or disallowance thereof, and shall also plainly mark thereon and upon the stenographer's minutes the parts to which the proposed amendments are applicable, together with the number of the amendment. If the party proposing the amendments claims that the case should be made to conform to the minutes of the stenographer, he must refer at the end of each amendment to the proper page of such minutes. The judge or referee shall thereupon correct and settle the case. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than ten days after the service of such notice. The lines of the case shall be so numbered that each copy shall correspond. The surrogate, on appeal from his court, may by order allow further time for the doing of any of the acts above provided to be done on such appeals.

"Cases reserved for argument and special verdicts shall be settled in the same manner. The parties may agree on the facts proven to be inserted in the case, instead of the testimony, on the approval of the judge.

"No order extending the time to serve a case, or a case containing exceptions, or the time within which amendments thereto may be served, shall be made unless the party applying for such order serve a notice of two days upon the adverse parties of his intention to apply therefor, stating the time and place for making such application."

Which motion was adopted.

Justice Ingraham moved that Rule 36 be amended by striking out the words "triable by jury" in the first line thereof, so that said rule should read as follows:

"RULE 36. Whenever an issue of fact in any action pending in any court has been joined, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant, at any time after younger issues shall have been tried in their regular order, may move at Special Term for the dismissal of the complaint, with costs.

"If it be made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court may permit the plaintiff, on such terms as may be just, to bring the said action to trial at a future term.

"Whenever in any action an issue shall have been joined if the defendant be imprisoned under an order of arrest, in the action, or if the property of the defendant be held under attachment, the trial of the action shall be preferred.

"Every cause placed upon the calendar of the Trial Term or Special Term for the trial of equity cases shall be moved for argument or trial when reached in its order, and shall not be reserved or put over except by the consent of the court unless otherwise permitted by special rule; and if passed without being so reserved or put over, it shall be entered on all subsequent calendars as of date when passed, and no term fee shall be taxed thereon for any subsequent term."

Which motion was adopted.

Justice Ingraham moved that Rule 40 be amended by striking out the first paragraph thereof and substituting the word "enumerated" in the first line of the second paragraph for the word

"such," and by substituting the word "five" for "eight" in the second sentence of the rule as amended so that said rule would read as follows:

"RULE 40. The papers to be furnished on enumerated motions at Special Term shall be a copy of the pleadings, when the question arises on the pleadings or any part thereof, a copy of the special verdict, return or other papers on which the question arises. The party whose duty it is to furnish the papers shall serve a copy on the opposite party, except upon the trial of issues of law, at least five days before the time for which the matter may be noticed for argument. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party shall be entitled to move on affidavit, and on four days' notice of motion that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.

"The papers shall be furnished by the plaintiff when the question arises on special verdict, and by the party demurring on the trial of issues of law, and in all other cases by the party making the motion. Each party shall prefix to his points a concise statement of the facts of the case, with reference to the folios; and if such statement is not furnished, no discussion of the facts by the party omitting such statement will be permitted."

Which motion was adopted.

Justice Ingraham moved that Rule 37 be amended so that the notice of eight days therein be shortened to a notice of five days.

Justice Herrick moved as an amendment thereto that the notice should continue to be eight days "except that, where the attorneys for the respective parties reside or have an office in the same city or village, that then the notice may be a notice of five days," which amendment of Justice Herrick was accepted by Justice Ingraham, so that the rule as amended would read as follows:

"RULE 37. All questions for argument and all motions made at Special or Trial Terms shall be brought before the court on notice of not less than eight days, unless a shorter time is prescribed by a judge or court, under section 780 of the Code, by an order to show cause, except that where the attorneys for the respective parties

reside or have their offices in the same city or village, such notice may be a notice of five days. If the opposite party shall not appear to oppose, the party making the motion shall be entitled to the rule or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the court shall otherwise direct. If the party making the motion shall not appear, the court shall deny the motion on the filing of the copy, notice of motion, or order to show cause.

"Such order to show cause shall in no case be granted unless a special and sufficient reason for requiring a shorter notice than eight days shall be stated in the papers presented, and the party shall, in his affidavit, state the present condition of the action, and whether at issue and, if not yet tried, the time appointed for holding the next Special or Trial Term where the action is triable. An order to show cause shall also (except in the first judicial district) be returnable only before the judge who grants it, or at a Special Term appointed to be held in the district in which the action is triable.

"No order, except in the first judicial district served after the action shall have been noticed for trial, if served within ten days of the Trial Term, shall have the effect to stay the proceedings in the action, unless made at the term where such action is to be tried, or by the judge who is appointed or is to hold such Trial Term, or unless such stay is contained in an order to show cause returnable on the first day of such term, in which case it shall not operate to prevent the subpœnaing of witnesses or placing the cause on the calendar.

"When the motion is for irregularity the notice or order shall specify the irregularity complained of.

"This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to an action for a divorce, or limited separation, or to annul a marriage.

"In the first judicial district all motions must be noticed to be heard at and all orders to show cause must be returnable at the Special Term for hearing of litigated motions except in cases where the special rules of the first judicial district shall require such motion to be made at some other term of the court."

Which motion, as amended, was adopted.

Justice Ingraham moved to amend Rule 41, so that the said rule would read as follows:

"RULE 41. In all cases to be heard in the Appellate Division, except appeals from non-enumerated motions, the papers shall be furnished by the appellant or the moving party, and in cases agreed upon, under section 1279 of the Code, by the plaintiff.

"The party whose duty it is to furnish the papers shall cause a printed copy of the requisite papers to be filed in the office of the clerk of the Appellate Division within twenty days after an appeal has been taken or the order made for the hearing of a cause therein, or the agreed case filed in the clerk's office, pursuant to section 1279 of the Code; but if it shall be necessary to make a case or case and exceptions after the appeal shall have been taken, or the order made for the hearing in the Appellate Division, the papers shall be filed within twenty days after the settlement and filing of the case, and shall serve upon his adversary three printed copies of such papers; such papers shall consist of a notice of appeal, if an appeal has been taken, a copy of the judgment roll, or the decree in the court below, and the papers upon which it was entered; if no judgment was entered, the pleadings, minutes of trial and the order sending the case to the Appellate Division, or the order appealed from, or the papers required by section 1280 of the Code of Civil Procedure. To these papers shall be attached the case or case and exceptions, if it is to be used in the Appellate Division. All the foregoing papers shall be certified by the proper clerk, or be stipulated by the parties to be true copies of the original. There shall be prefixed to these papers a statement showing the time of the beginning of the action or special proceeding, and of the service of the respective pleadings, the names of the original parties in full, and any change in the parties, if such has taken place. There shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured. The foregoing papers shall constitute the record in the Appellate Division. If the papers shall not be filed and served as herein provided by the party whose duty it is to do so, his opponent may move the court on three days' notice, on any motion day, for an order dismissing the appeal, or for a judgment in his favor, as the case may be.

"The papers in all appeals from non-enumerated motions shall consist of printed copies of the papers which were used in the court below, and are specified in the order, certified by the proper clerk or stipulated by the parties to be true copies of the original, and of the whole thereof. There shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured. They shall be filed with the clerk within fifteen days after the appeal is taken, and at the same time the appellant shall serve upon his adversary three printed copies thereof.

"If the appellant fails to file and serve the papers as aforesaid, the respondent may move, on any motion day, upon three days' notice, to dismiss the appeal."

Which motion was adopted.

Justice Ingraham moved to amend Rule 56 so as to read as follows:

"RULE 56. The referee appointed on such petition must report as to whether a sale, mortgage or lease of the premises (or any and what portion thereof) would be beneficial to the infant, lunatic, idiot or habitual drunkard, and the particular reason therefor, and whether the infant, lunatic, idiot or habitual drunkard is in absolute need of having some and what portion of the proceeds of such sale, mortgage or lease, for a purpose provided in section 2348 of the Code, in addition to what he might earn by his own exertions; and such referee shall also ascertain and report the value of the property or interest to be disposed of, specifically, as to each separate lot or parcel, and whether there is any person entitled to dower or a life estate, or estate for years, in the premises, and the terms and conditions on which it should be sold.

"And the referee's report shall give such further facts as are necessary or proper on the application.

"The facts in relation to the value of the property or interest to be disposed of required to be ascertained and reported upon by the referee must be proven on such reference by evidence of at least two disinterested persons, in addition to that of the petitioner, and the report shall not refer to the petition or any other papers for a statement of fact."

Which motion was adopted.

Justice Ingraham moved to amend Rule 62 so as to read as follows:

"RULE 62. Where lands in the county of New York or the county of Kings are sold under a decree, order or judgment of any court, they shall be sold at public auction, between eleven o'clock in the forenoon and three o'clock in the afternoon, unless otherwise specifically directed.

"Notice of such sale must be given, and the sale must be had as prescribed in section 1678 of the Code.

"Such sales in the county of New York, unless otherwise specifically directed, shall take place at the Exchange Sales Rooms, now located at No. 111 Broadway, in the city of New York.

"The Appellate Division of the Supreme Court in the first department is authorized to change the place at which said sales shall be made, may make rules and regulations in relation thereto, and may designate the auctioneers or persons who shall make the same.

"Such sales in the city of Buffalo shall, on and after May 1st, 1896, take place at the Real Estate Exchange Rooms, between the hours of nine and eleven in the forenoon and two and three o'clock in the afternoon, unless the court ordering the sales shall otherwise direct. Such sales shall, however, be made subject to such regulations as the justices of the Supreme Court of the Eighth District shall establish."

Which motion was adopted.

Justice Ingraham moved to amend Rule 70 by reducing the rate of interest from five to four per cent. After some discussion Presiding Justice Van Brunt moved that it be referred to a committee of three to be appointed by the chair to consider Rule 70 and to report at a future meeting of the convention, which motion was adopted, and Presiding Justice Van Brunt and Justices Cullen and Herrick were appointed such committee by the chairman.

Justice Landon offered as a substitute for the resolution already adopted on his motion, in reference to the Session Laws, the following:

Resolved, That, in order that the indices of the Session Laws shall be full, precise, systematic and uniform, it is recommended

that the Legislature make provision for their preparation by the reporter of this court, or under his supervision.

Which resolution was adopted.

The chairman appointed Justices Ingraham, Merwin and Adams as a committee to superintend the publication of the rules as amended, the same to take effect on the 1st day of January, 1900.

On motion, the convention was then adjourned, subject to a call to consider the action of the committee relating to Rule 70.

[Attest:] MARCUS T. HUN,
Secretary.

PROCEEDINGS OF THE CONVENTION OF 1910.

The convention of justices of the Appellate Division of the Supreme Court, met at the Capitol in the city of Albany, on the 1st day of April, 1910, pursuant to statute, for the purpose of amending the General Rules of Practice of the Supreme Court.

Justice Peter B. McLennan, P. J., Fourth Department, presided, and called the meeting to order.

On motion of Justice Ingraham, Justice McLennan was selected as presiding officer of the convention.

In the absence of Mr. Jerome B. Fisher, the Supreme Court Reporter, his deputy, Mr. Fletcher W. Battershall, was chosen secretary of the convention.

The meeting was held pursuant to the following call:

The undersigned justices of the Appellate Division of the Supreme Court, do hereby call a convention of the justices of the Appellate Division to meet at the Capitol in the city of Albany on the 1st day of April, 1910, at 12 o'clock noon, to take action in regard to the amendment of the General Rules of Practice, and for such other business as may come before the convention.

PETER B. McLENNAN, WILLIAM J. CARR,
GEORGE L. INGRAHAM, FRANK G. LAUGHLIN,
ALMET F. JENKS, JOHN PROCTOR CLARKE,
JOSEPH A. BURR, FRANCIS M. SCOTT,
EDWARD B. THOMAS, NATHAN L. MILLER,
CHESTER B. McLAUGHLIN.

On the call of the roll, the following justices of the Supreme Court answered to their names: Justices Ingraham, Laughlin, Clarke, Scott, Dowling, Jenks, Burr, Rich, Carr, Smith, Kellogg, Cochrane, Sewell, Houghton, McLennan, Spring, Williams, Kruse and Robson.

Justice Scott presented the following resolution:

Whereas, Upon the request made by the committee on Legal Ethics of the New York State Bar Association, the said association has offered to furnish the clerk of the Appellate Division of each department in the State with a sufficient number of copies of the canons of ethics adopted at the annual meeting of the said association in 1909, for the purpose of delivering a copy of said canons of ethics to each person admitted to the bar of this State at the time he is sworn in, now therefore,

Resolved, That the suggestion is hereby approved, and that the clerk of the Appellate Division of each department is directed to deliver to each person admitted to the bar, at the time he is sworn in before the Appellate Division in the several departments, a copy of the canons of ethics adopted by the New York State Bar Asssociation at its annual meeting held in Buffalo, on the 28th and 29th of January, 1909.

The resolution was adopted.

On motion of Justice Rich, all proposed amendments to the General Rules of Practice were ordered submitted to a committee to be later announced by the presiding officer of the convention before being finally acted upon by the convention.

Such committee was announced by the presiding officer of the convention as follows:

George L. Ingraham, P. J., Walter Lloyd Smith, P. J., Justice Almet F. Jenks, Justice Peter B. McLennan.

After a lengthy discussion of proposed amendments and other matters pertaining to the purposes of the convention, an adjournment was taken to April 30, 1910, in the city of New York.

Minutes of the Convention of Justices of the Appellate Division of the Supreme Court, held by adjournment at the court house of the Appellate Division, First Department, in the county of New York, April 30, 1910.

The convention was called to order by Justice McLennan.

On motion of Justice Ingraham, Supreme Court Reporter Jerome B. Fisher was appointed secretary of the convention.

The roll being called, the following named justices answered as being present: Justices Ingraham, Laughlin, McLaughlin, Clarke, Scott, Dowling, Woodward, Jenks, Burr, Smith, Kellogg, Cochrane, Sewell, McLennan, Spring, Williams, Kruse, Robson and Houghton.

On motion of Justice McLennan, a committee of three on style was ordered to be appointed, to which committee should be referred all proposed amendments to the rules, before the same were finally adopted. The committee was announced as Justice George L. Ingraham, Justice Almet F. Jenks and Justice Peter B. McLennan.

It was moved by Justice Ingraham, that the original certified copies of the General Rules of Practice adopted by the conventions held in 1895, 1899, and 1905 be filed with the Secretary of State and that the secretaries of the several conventions held in such years be and they are hereby authorized to file the same.

Motion adopted.

Justice Ingraham moved that the secretary of this convention be directed to cause each rule as amended and adopted by this convention to be filed in the office of the Secretary of State.

Motion adopted.

Justice Ingraham moved that the secretary of the convention be directed to cause the amendments adopted to the General Rules of Practice by this convention to be duly published as required by law.

Motion adopted.

After full deliberation on the various matters presented for the consideration of the convention, and the adoption of the rules as amended, and the adoption of a resolution that the rules as amended take effect September 1, 1910, the convention adjourned.

Sections of the Code of Civil Procedure and of the Judiciary Law Peculiarly Affecting the Supreme Court.

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§ 2. Appellate Division of the Supreme Court in each department — Supreme Court — a court of record. See Judiciary Law, §§ 2, 3.

§ 4. To have the same jurisdiction as heretofore, except as otherwise prescribed.

§ 5. Sittings of, are to be public except in certain cases. See Judiciary Law, § 4.

§ 6. Not to sit on Sundays, except in certain specified cases. See Judiciary Law, § 5.

§ 7. Certain powers of, enumerated.

§§ 8–14. Contempt of court, power to punish, etc. See Judiciary Law, § 750 *et seq.*

§ 17. Rules binding upon all the courts of this State, except the Court for the Trial of Impeachments and the Court of Appeals — how made and revised. See Judiciary Law, §§ 93, 94.

§ 18. General rules or orders of, do not take effect until published. See Judiciary Law, §§ 52, 95.

§§ 19, 20. Calendars of, how printed. See Judiciary Law, §§ 154, 193; County Law, § 240; State Finance Law, § 46.

§ 21. Appellate Division thereof may order certain papers to be destroyed. See Judiciary Law, § 87.

§ 25. An action or proceeding not discontinued by a vacancy or change in the judges of the court.

§ 26. In counties within the first and second judicial districts, a proceeding instituted before one judge continued before another.

§ 27. The seal kept by the county clerk of each county to be the seal of the Supreme Court of that county. See Judiciary Law, §§ 28, 158, 194. Code Civil Procedure, § 2507.

§ 30. Seal, when lost or destroyed, how replaced. See Judiciary Law, § 29.

§ 31. Court rooms, how provided for. See Judiciary Law, § 42; Greater N. Y. charter, § 62.

§ 34. Adjournment to a future day — jury summoned for. See Judiciary Law, §§ 7, 534, 540.

§ 35. Adjournment of a term in the absence of the judge. See Judiciary Law, § 6.

§ 36. When a court may be adjourned by the sheriff or clerk to a future day certain. See Judiciary Law, § 6.

§ 37. When trials may take place elsewhere than at the court house.

§ 38. When the Governor may change the place for holding courts. See Judiciary Law, § 38.

§ 39. The action of the Governor to be filed and published. See Judiciary Law, § 8.

§ 40. When a judge may change the place for holding court. See Judiciary Law, § 9.

§ 41. When a court in actual session may be adjourned to another place. See Judiciary Law, § 10.

§ 42. How the place for holding courts in New York may be changed. See Judiciary Law, § 11.

§ 43. When a court house is unfit for holding court, another place is to be appointed by the county judge. See Judiciary Law, § 12.

§ 44. Effect upon process or proceedings of a failure or adjournment of a term, or a change in the time or place of holding it.

§ 45. A trial commenced may be continued beyond the time fixed for the term to continue.

§§ 46–51. Disability of a judge to act or take fees in certain cases. See Judiciary Law, § 15 *et seq.*

§ 52. Substitution of an officer in special proceedings.

§ 53. Proceedings before such substituted officer.

§ 54. Judge to file a certificate of age. See Executive Law, § 29; Judiciary Law, § 23.

§ 56. Examination and admission of attorneys. See Judiciary Law, §§ 53, 56, 88, 460–465, 467.

§§ 60–81. Provisions concerning attorneys. See Judiciary Law and Penal Law.

§§ 82–99. Provisions concerning stenographers, clerk, crier, interpreter, sheriff and attendants upon court. See Judiciary Law and County Law.

§§ 100–189. Duties, etc., of sheriff or coroner in the execution of civil mandates — treatment of prisoners — jails — escapes. See Judiciary Law; Penal Law; Military Law; County Law; Prison Law.

§§ 217–243. Jurisdiction — designation of terms — distribution of business among the terms and judges — reporter — clerk — attendants — miscellaneous provisions. See Judiciary Law; Executive Law.

§§ 248–250. Reporter of the Supreme Court — papers and opinions to be furnished to — duties of — price of the reports. See Judiciary Law; Executive Law.

§§ 251–262. Stenographers appointment and duties of. See Judiciary Law.

§ 319. Removal of actions from the New York Marine Court (City Court) into the Supreme Court.

§§ 343–346. Removal of actions from the County Courts into the Supreme Court.

§ 354. A judge of the Supreme Court may make certain orders in the County Court.

§ 605. Injunction restraining a State officer must be issued by a term of the Supreme Court sitting in the department in which the officer is located.

§ 713. When receivers may be appointed.

§ 747. Power of the Supreme Court as to money paid into court.
§ 769 *et seq.* Motions in Supreme Court — where to be heard.
§ 803 *et seq.* Court may direct discovery of books, etc.
§ 915. Rules of procedure where testimony is to be taken within the State under a commission from a court out of the State.
§ 976. Regulations as to trial of issues in the Supreme Court.
§ 1056. Additional jurors — justice of Supreme Court may direct the drawing of. See Judiciary Law, § 527.
§ 1063. Supreme Court may order a special jury to be struck.
§ 1293 *et seq.* General provisions as to appeals.
§ 1340 *et seq.* Appeals to Supreme Court, from an inferior court.
§ 1346 *et seq.* Appeals to the Appellate Division of the Supreme Court.
§ 1356 *et seq.* Appeal from a final determination in a special proceeding.
§ 2404. Proceeds arising upon a sale under foreclosure by advertisement to be paid into Supreme Court.
§ 2570. Appellate Division may entertain appeals from Surrogates' Courts.
§ 3360 *et seq.* Proceedings for the condemnation of real property — to be brought in the Supreme Court — provisions governing the same.
§ 3390. Petition to sell corporate real estate may be presented to the Supreme Court. See Gen. Corp. Law, § 70; Joint Stock Assoc. Law, § 8.
§ 3420 *et seq.* Warrant to foreclose a lien on a vessel — application to be presented to a justice of the Supreme Court at chambers — provisions governing the proceeding. See Lien Law, § 85 *et seq.*

GENERAL RULES OF PRACTICE.

AS AMENDED TO APRIL 30, 1910, AND IN FORCE SEPTEMBER 1, 1910.

Adopted Pursuant to Section 17 of the Code of Civil Procedure (Judiciary Law, §§ 93, 94), by the Convention of Justices, Held on the 4th Tuesday of October, 1899, at the Capitol in the City of Albany.

RULE 1.

Application for Admission as Attorneys.

Within ten days after the first day of January in each year, the Appellate Division in each department shall appoint a Committee on Character and Fitness of not less than three for the department, or may appoint a committee for each judicial district within the department, to whom shall be referred all applications for admission to practice as attorney and counselor-at-law, such committee to continue in office until their successors are appointed. To the respective committees shall be referred all applications for admission to practice, either upon the certificate of the State Board of Law Examiners, or upon motion under Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counselors-at-law. The committee shall require the attendance before it, or a member thereof, of each applicant, with the affidavit of at least two practicing attorneys acquainted with such applicant, residing in the judicial district in which the applicant resides, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based, and it shall be the duty of the committee to examine each applicant, and the committee must be satisfied from such examination, and other evidence that the applicant shall produce, that the applicant has such qualifications as to character and general fitness as in the opinion of the committee justify his admission to practice, and no person shall be admitted to practice except upon the

production of a certificate from the committee to that effect, unless the court otherwise orders.

No applicant shall be entitled to receive such a certificate who is not able to speak and to write the English language intelligently, nor until he affirmatively establishes to the satisfaction of the committee that he possesses such a character as justifies his admission to the bar, and qualifies him to perform the duties of an attorney and counselor-at-law.

An applicant for admission to practice as an attorney and counselor-at-law on motion, under the provisions of Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counselors-at-law, must present to the court proof that he has been admitted to practice as an attorney and counselor-at-law in the highest court of law in another State, or in a country whose jurisprudence is based upon the principles of the common law of England; a certificate, executed by the proper authorities, that he has been duly admitted to practice in such State or country; that he has actually remained in said State or country and practiced in such court as attorney and counselor-at-law for at least three years; a certificate from a judge of such court that he has been duly admitted to practice and has actually continuously practiced as an attorney and counselor-at-law for a period of at least three years after he has been admitted, specifying the name of the place or places in which he had so practiced and that he has a good character as such attorney. Such certificate must be duly certified by the clerk of the court of which the judge is a member, and the seal of the court must be attached thereto. He must also prove that he is a citizen of the United States and has been an actual resident of the State of New York or of an adjoining State, for at least six months prior to the making of the application, giving the place of his residence by street and number, if such there be, and the length of time he has been such resident. He shall also submit the affidavits of two persons who are residents of the judicial district in which he resides, one of whom must be an attorney and counselor-at-law, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based. In all cases the applicant must appear in person before the court on the motion for his

admission, and also before the committee on character and fitness for the district in which the application is made. When the applicant resides in an adjoining State, and a motion is made to admit him to practice in this State without actual residence herein, in addition to the foregoing facts, the applicant must prove to the satisfaction of the court that he has opened and maintains an office in this State for the transaction of law business therein.

In all cases the applicant for admission must file with the clerk of the Appellate Division of the proper department the papers required for his admission as hereinbefore specified prior to or at the time of the motion for admission to practice.

Rule 1 of 1858, amended. Rule 1 of 1871, amended. Rule 1 of 1874, amended. Rule 2 of 1858, amended. Rule 2 of 1871, amended. Rule 2 of 1874, amended. Rule 1 of 1877, amended. Rule 1 of 1880, amended. Rule 1 of 1884. Rule 1 of 1888, amended. Rule 1 of 1896. Rule 1 as amended, 1910.

CODE OF CIVIL PROCEDURE.

§ 14. Attorneys and counselors may be punished for misconduct. See Judiciary Law, § 753.

§§ 49, 50. A judge, the partner of a judge and a judge's clerk — cannot practice in his court, nor in an action or special proceeding which has been before him. See Judiciary Law, §§ 17, 18, 21, 471.

§ 55. A party may appear in person or by attorney.

§ 56. Examination and admission of attorneys. See Judiciary Law, §§ 53, 56, 88, 460–465, 467.

§ 57. Rules, how changed. See Executive Law, § 30; Judiciary Law, § 53.

§ 58. Exemptions to graduates of certain law schools. See Judiciary Law, § 53.

§ 60. Attorneys residing in adjoining States.

§ 61. Clerks, etc., not to practice. See Judiciary Law, § 250.

§ 62. Sheriffs, etc., not to practice. See Judiciary Law, § 473.

§ 63. None but attorneys to practice in New York city. See Penal Law, § 271.

§ 64. Penalty for violating or suffering violation of last section. See Penal Law, §§ 272, 1877.

§ 65. Death or disability of attorney, proceedings thereon.

§ 66. Attorney or counsel's compensation — lien for. See Judiciary Law, §§ 474, 475.

§ 67. Removal or suspension for malpractice, etc. See Judiciary Law, §§ 88, 477.

§ 68. Must be on notice — expenses, how paid. See Judiciary Law, §§ 88, 476.

§ 69. Removal or suspension, how to operate. See Judiciary Law, § 478.

§ 70. Punishment for deceit, etc. See Penal Law, § 273.
§ 71. Punishment for wilful delay of action. See Penal Law, § 273.
§ 72. Attorney not to lend his name. See Judiciary Law, § 479.
§ 73. Attorney not to buy claim. See Penal Law, § 274.
§ 74. Procuring claims to be placed in his hands or those of another person for prosecution, forbidden. See Penal Law, § 274.
§ 75. Penalty therefor. See Penal Law, § 274.
§ 76. Limitation of sections 73, 74, 75. See Penal Law, § 275.
§ 77. Rule the same, when a party prosecutes in person. See Penal Law, § 276.
§ 78. Partner of public prosecutor not to defend prosecutions. See Penal Law, § 278.
§ 79. Attorney not to defend where he has been public prosecutor. See Penal Law, § 278.
§ 80. Penalty therefor. See Penal Law, § 278.
§ 81. An attorney may defend himself civilly or criminally. See Penal Law, § 279.
§ 193. Court of Appeals to make rules for the admission of attorneys. See Judiciary Law, §§ 51, 53.
§ 565. When privileged from arrest. See Civil Rights Law, § 24.
§ 835. Attorneys and counselors not to disclose professional communications.
§ 1030. They are exempt from jury duty. See Judiciary Law, § 546.
§ 1995. Appearance by, in proceedings by State writ.
§ 2495. Surrogate, when not to practice — Monroe county surrogate.
§ 2509. Surrogate's clerk or other person employed in surrogate's office not to act as attorney before the surrogate.
§ 2528. Appearance by an attorney in the Surrogate's Court.
§ 2529. A surrogate's son or father not to practice before him or be employed as an attorney. See Judiciary Law, § 472.
§ 2886. Appearance by an attorney in a Justice's Court.
§ 2889. Who may act as attorney in Justice's Court — constable, law partner or clerk of justice, cannot act as an attorney before the justice. See Penal Law, §§ 271, 272.
§ 3116. Justice of the peace, sixth judicial district of the city of Brooklyn, to be an attorney.
§§ 3247, 3278. Liability of attorneys for costs.

See notes under Rules 10 and 11.

ADMISSION OF ATTORNEYS.

RULES OF THE COURT OF APPEALS. See upon this subject and the matters pertaining to it the Court of Appeals Practice by Edmund H. Smith.

(See, also, Judiciary Law, §§ 53, 56, 88, 460–465, 467; Code of Civil Procedure, § 60.)

Laws of 1886, chap. 425; 1894, chap. 760, and 1895, chap. 946.

ATTORNEYS AND COUNSELORS — Construction of rules, for admission of attorneys, interpreted.] (Matter of Ward, 154 N. Y. 342 [1897].)

—— **Race or sex does not debar.**] Race or sex is no cause for refusing persons admission to practice as attorneys and counselors-at-law. (Judiciary Law, § 467.)

—— **Citizenship of applicants for admission.**] An applicant for admission who has practiced for three years in another country must show among "the other qualifications required" that he is a citizen of the United States at the time of making his application; the fact that he has declared his intention to become a citizen is not enough. (Matter of O'Neill, 90 N. Y. 584 [1882].)

—— **Offices distinct.** Although candidates for admission to the bar were, before the adoption of the Code of Civil Procedure, admitted as attorneys and counselors at the same time, yet the offices were still distinct. (Easton v. Smith, 1 E. D. Smith, 318 [N. Y. Com. Pl. 1852]; Brady v. Mayor, etc., of New York, 1 Sandf. 569 [N. Y. Supr. Ct. 1848].)

—— **Office of public trust within the Constitution.**] Whether an attorney or counselor holds as such an office of public trust, within the meaning of the Constitution, considered. (Seymour v. Ellison, 2 Cow. 13.)

—— **Not a State officer.**] He is not an officer of the State. (Matter of Burchard, 27 Hun, 429 [1882].)

—— **An attorney is a public officer within the Nonimprisonment Act, chap. 300 of 1831.**] An attorney is a public officer within the provisions of the act of April 26, 1831, abolishing imprisonment for debt. (Waters v. Whittemore, 22 Barb. 593; Matter of Wood, Hopk. 6. See *contra*, Matter of Oaths Taken by Attorneys, etc., 20 Johns. 492.)

—— **Requirements as to publication of rules as to admission of attorneys, directory.**] The requirements of section 57 of the Code of Civil Procedure are merely directory, and a failure to comply with them in regard to the publication of the Court of Appeals rules relating to the admission of attorneys does not render such rules invalid. (Matter of Maxwell, 38 St. Rep. 479 [Supm. Ct. 1891].)

—— **Filing certificate nunc pro tunc.**] A law student cannot file a regents' certificate of examination *nunc pro tunc*. (Matter of Moore, 108 N. Y. 280 [1888]; Matter of Mason, 140 id. 658 [1893]; Matter of Klein, 155 id. 696 [1898].)

STUDY — Course of.] As to the requisite education and course of study, see Court of Appeals Practice by Edmund H. Smith. Rules taking effect July 1, 1907, did not require a law school to certify that its students had been graduated or had received a degree, but it is sufficient to state that the student successfully completed the prescribed course of study during the period named. (Matter of N. Y. Law School, 190 N. Y. 215.)

ADMISSION — Power of Supreme Court over — exclusive.] The general power over attorneys is exclusively in the Supreme Court. (Willmott v. Meserole, 16 Abb. [N S.] 308 [N. Y. Supr. Ct. Sp. T. 1875].)

—— **The court acts judicially.**] Courts, in admitting attorneys to and expelling them from, the bar act judicially, and their decision in such proceedings is subject to review on writ of error or appeal, as the case may be. (Bradwell v. The State, 16 Wall. 130–135 [1872].)

—— **Application for — is a special proceeding — an order denying it is**

appealable.] The application for admission is a special proceeding, and an order denying the right of the applicant to admission is appealable to the Court of Appeals. (Matter of Cooper, 22 N. Y. 67 [1860]; S. C., 11 Abb. Pr. 301.)

—— For proceedings in Supreme Court, after decision in the Court of Appeals, see 11 Abbott's Practice, 337.

—— **Good character of applicant — decision of Appellate Division of the Supreme Court conclusive.**] Where the justices of the Supreme Court pass unfavorably upon the good character of an applicant for admission as an attorney, their decision is not reviewable on appeal. (Ex parte Beggs, 67 N. Y. 120 [1876]; In re Graduates, 11 Abb. 301, distinguished [Court of Appeals, 1860].)

—— **Admission to practice denied to attorney from Italy.**] An application by a naturalized citizen, who had for more than three years practiced in the higher courts of the kingdom of Italy, for admission to the New York bar, denied, on the ground of the difference between the system of jurisprudence in that country and this. (Matter of Maggio, 27 App. Div. 129 [1898].)

REGISTRATION OF ATTORNEYS — Practicing attorneys are required to register.] (See Judiciary Law, § 468.)

—— **Filing of an oath nunc pro tunc.**] The Court of Appeals has no power, on original motion, to order the filing *nunc pro tunc* of an attorney's oath for the purpose of registration. (Matter of Caruthers, 158 N. Y. 131 [1899].)

OATH — Of office.] Each person admitted must, upon his admission, take the constitutional oath of office in open court, and subscribe the same in a roll or book, to be kept in "the office of the clerk of the Appellate Division of" the Supreme Court for that purpose. (Judiciary Law, § 466.)

—— **Of allegiance.**] The act of Congress of January 24, 1865 (13 Statutes at Large, 424), requiring all persons admitted to practice in the United States Courts to take the oath prescribed by the act of July 2, 1862 (12 Statutes at Large, 502), is unconstitutional. (Ex parte Garland, 4 Wall. 333 [U. S. Sup. Ct. 1866].)

DISBARMENT — General power of the court.] The general authority and control of the court over attorneys was not taken away or limited by the Code of Civil Procedure except in the special cases therein mentioned. (In re H ———, 87 N. Y. 521 [1882].)

—— **Power of Appellate Division to disbar attorney — disbarment in addition to criminal prosecution.**] The Appellate Division of the Supreme Court has power, under Code of Civil Procedure, section 67, to disbar an attorney for professional misconduct, regardless of a possible or pending indictment. If the charge involves a felony or a misdemeanor entirely distinct from the party's professional action, the court will stay its hand until the criminal trial has taken place; but if the charge involves professional misconduct, the fact that some of the acts complained of are felonies and that indictment may follow, is no reason for staying the proceeding to disbar. (Rochester Bar Assn. v. Dorthy, 152 N. Y. 596 [1897].)

—— **Duty of the court.**] It is the duty of the court, whenever a case is

presented charging an attorney-at-law with dishonest conduct in his professional character, and the case is properly proved, to administer the proper punishment by removing him from his office. (In the Matter of Ryan v. Opdyke, 143 N. Y. 528 [1894].)

—— **Not used to settle quarrels.**] It is not the province of the General Term of the Supreme Court to interfere in quarrels between a client and his attorney, except where the latter has been guilty of such unprofessional and dishonest conduct as requires his disbarment or discipline in other ways. (Berks v. Hotchkiss, 82 Hun, 27 [1894].)

—— **Misappropriation of client's money.**] Where attorney is charged with misappropriating money belonging to client and the money is subsequently refunded, the court will not permit the discontinuance of the proceedings, but will appoint a referee to inquire what action should be taken by the court. The court is not to be used merely as a means for the collection by a client of his claim against his attorney. (Matter of Rockmore, 130 App. Div. 586.)

—— **Power of court.**] Power to disbar an attorney for unfitness is not affected by the fact that the charges upon which disbarment proceedings are instituted rest upon him as an individual apart from professional misconduct. (Matter of Bauder, 128 App. Div. 346.)

—— **Powers of reviewing courts.**] In a proceeding to discipline an attorney the power of review in the Court of Appeals ends when it appears that the proceeding has been instituted and conducted in accordance with the statutes and rules authorizing it; that no substantial legal right of the accused has been violated; that no prejudicial error has been committed in the reception or exclusion of testimony, and that there is some evidence to sustain the findings upon which the order is based. The power and discretion of the Appellate Division in the infliction of punishment when guilt is established are not subject to review in the Court of Appeals. (Matter of Goodman [1910], 199 N. Y. 143.)

—— **Punishment and remedy — by summary proceedings — not by action.**] Where an attorney is in contempt for an act inconsistent with his relation to the court as attorney, and suitors have sustained damage, the remedy as well as the punishment must be by summary proceedings, and not by action. (Foster, Receiver, v. Townshend, 68 N. Y. 203 [Court of Appeals, 1877].)

—— **Admission to and removal from practice by Appellate Division.**] 1. Upon the certificate of the State Board of Law Examiners, that a person has passed the required examination, if the Appellate Division of the Supreme Court in the department in which such person lives shall find such person is of good moral character, it shall enter an order licensing and admitting him to practice as an attorney and counselor in all courts of the State.

2. An attorney and counselor who is guilty of any deceit, malpractice, crime or misdemeanor, or who is guilty of any fraud or deceit in proceedings by which he was admitted to practice as an attorney and counselor of the courts of record of this State, may be suspended from practice or removed from office by the Appellate Division of the Supreme Court. Any fraudulent act or representation by an applicant in connection with his admission shall

be sufficient cause for the revocation of his license by the Appellate Division of the Supreme Court granting the same.

3. Whenever any attorney and counselor-at-law shall be convicted of a felony, there may be presented to the Appellate Division of the Supreme Court a certified and exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be stricken from the roll of attorneys.

4. Upon a reversal of the conviction for felony of an attorney and counselor-at-law, or pardon by the President of the United States or Governor of this State, the Appellate Division shall have power to vacate or modify such order or debarment.

5. The presiding justice of the Appellate Division making the order of designation of a district attorney within the department to prosecute a case for the removal or suspension of an attorney or counselor, or the order of reference in such cases, may make an order directing the expenses of such proceedings to be paid by the county treasurer of the county where the attorney or counselor removed or suspended, or against whom charges were made as prescribed in section 476 of this chapter, had his last known place of residence or principal place of business, which expenses shall be a charge upon such county. (Judiciary Law, § 88.)

Before an attorney or counselor is suspended or removed as prescribed in section 88 of this chapter, a copy of the charges against him must be delivered to him personally, or, in case it is established to the satisfaction of the court that he cannot be served within the State, the same may be served upon him without the State by mail or otherwise as the court may direct, and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any district attorney within a department, when so designated by the Appellate Division of the Supreme Court, to prosecute all cases for the removal or suspension of attorneys and counselors. (Judiciary Law, § 476.)

Any person being an attorney and counselor-at-law who shall be convicted of a felony shall upon conviction cease to be an attorney and counselor-at-law, or to be competent to practice law as such. (Judiciary Law, § 477.)

—— **Under control of court.**] An attorney remains after his disbarment subject to the power of the court which may return to client money wrongfully withheld. (Matter of Burnham, 58 Misc. 576; Matter of McIntosh, 112 N. Y. Supp. 513; Matter of Shanley, 57 Misc. 8.)

—— **Proceedings proper for.]** An order to show cause, founded upon proper papers presented, served with the papers upon the attorney personally, is the proper mode of proceeding. (In re Percy, 36 N. Y. 651 [1867]; Ex parte Robinson, 19 Wall. 505 [1873].)

—— **Court to institute proceedings — proper practice.**] An attorney gave notice of a motion at General Term on behalf of his client for the respondent to show cause why an order should not be made striking his name from the roll for certain alleged acts of misconduct set forth in the moving papers. Held, that all proceedings to disbar or suspend attorneys and counselors should originate in the action of the court itself. Every person desiring such investi-

gation should, in the first instance, present to the court affidavits or other authentical papers for its examination preliminary to any proceeding. In a proper case the court will institute the proceedings of its own motion. (In the Matter of Brewster, 12 Hun, 109 [Gen. T. 1877].)

—— **The court may act summarily.**] The court has power to inquire into the right of an attorney to practice, and to revoke his license in a summary proceeding. (Matter of Burchard, 87 Hun, 429 [1882].)

An attorney is not an officer of the State. (*Ib.*)

—— **Court will await result of trial.**] Where attorney is charged with felony court will await result of criminal trial before disbarring. (Rochester Bar Ass'n v. Dorthy, 152 N. Y. 596.)

—— **Commission to take testimony — irregular.**] In proceedings to disbar an attorney, the court has not authority, except with the consent of the attorney, to issue a commission to take testimony out of the State. (In the Matter of an Attorney, 83 N. Y. 166 [1880].)

—— **Waiver of irregularity.**] (As to the right of an attorney to waive irregular proceedings, see Matter of an Attorney, 86 N. Y. 563 [1881].)

—— **Unwarranted proceeding to disbar is not a contempt of court.**] It seems, that the court has no power to punish as for contempt a client whose application to have his attorney disbarred proved totally unwarranted. (Matter of Dunn, 27 App. Div. 371 [1898].)

WHAT JUSTIFIES DISBARMENT. (See causes stated in sections cited, *supra.*)

—— **A felony forfeits the office.**] An attorney and counselor-at-law who shall be convicted of a felony shall, upon such conviction, cease to be an attorney and counselor-at-law, or to be competent to practice law as such. Judiciary Law, § 88. See also, Bank of N. Y. v. Stryker, 1 Wheeler's Crim. Cas. 330; Matter of Niles, 48 How. Pr. 246 [N. Y. Com. Pl. Gen. T. 1875].)

—— **What crime does not forfeit his office.**] A criminal act, subjecting an attorney to indictment, does not work a forfeiture of his office, unless the crime is of a base nature. (Bank of N. Y. v. Stryker, 1 Wheeler's Crim. Cas. 330.)

—— **A crime, notwithstanding its pardon, may be considered.**] Where an attorney has been convicted of forgery and thereafter pardoned by the Governor, it was held that the pardon did not affect the right of the court to punish him for professional misconduct involved in the offense. (Matter of Attorney, 86 N. Y. 563 [1881].)

—— **Bad moral character.**] To warrant a removal, the character must be bad, in such respect as shows the party unsafe and unfit to be trusted with the powers of the profession. When there can be no reliance upon the word or oath of a party, he is manifestly disqualified. (In re Percy, 36 N. Y. 654 [1867].)

—— **Changing the verification of a pleading.**] An attorney who has changed the verification of a pleading disbarred because thereof. (Matter of Loew, 5 Hun, 462 [Gen. T. 1875].)

—— **Use of an undertaking on a second application.**] An attorney, without re-execution of an undertaking, presented it to another court after it had been

used upon an unsuccessful application. Held, that said attorney should be suspended for two years for his misconduct. (Matter of Goldberg, 61 St. Rep. 277 [Supm. Ct. 1894].)

—— **Fraudulently imposing upon the court is good ground for suspension from practice.**] The interposition by an attorney-defendant, as a counterclaim, of a cause of action of which he had procured an assignment to himself, and which had been merged in a judgment entered upon stipulation in a former action in which he had been an attorney and so imposing upon the court, and the concealment of a material fact in the cause, which was a fictitious controversy, and both sides of which he controlled, held to be sufficient cause for suspending him for two years. (Matter of V——, 10 App. Div. 491 [1896].)

—— **Deceit or malpractice.**] Facts sufficient to sustain an order of disbarment on the ground of deceit or malpractice. (Matter of Randel, 158 N. Y. 216 [1899]; Ex parte Loew, 5 Hun, 462 [Gen. T. 1875].)

—— **Deceit, defined.**] The use of the word "deceit" in section 67 of the Code of Civil Procedure, in regard to the disbarment of attorneys, implies wrong insinuations or the concealment of facts with intent to mislead the court or injure persons on the part of an attorney while acting professionally. (Matter of Post, 26 St. Rep. 640 [Supm. Ct. 1889].)

—— **Malpractice, defined.**] The use by an attorney of methods and practices unsanctioned and forbidden by law is defined by the word malpractice in reference to lawyers, and means evil practice while acting professionally. (Matter of Baum, 30 St. Rep. 174 [Supm. Ct. 1890].)

—— **Deceit, practiced in his character as such, though not in a suit.**] If deceit is practiced by a solicitor in his character as such, although not in a suit pending in the court, he may be removed from his office as solicitor. (Matter of Peterson, 3 Paige, 510 [1832].)

—— **Failure to pay over money.**] An attorney should be disbarred who has several times by summary order been directed to pay over money in his hands, and who, in a criminal proceeding, has retained money given him to settle such proceeding, and who has unlawfully possessed himself of mortgaged chattels and has been found guilty of other fraudulent acts. (Matter of Titus, 50 St. Rep. 636 [Supm. Ct. 1892].)

—— **Deceiving client.**] Attorney who to secure his fee settles with a party against whom he was retained to enforce claims and assigns his contracts with his clients to enforce such claims and notifies them to settle directly with the other party, held guilty of malpractice. (Matter of Clark, 184 N. Y. 222.)

—— **Using funds belonging to estate.**] Using funds belonging to estate and borrowing money from administrator, etc., held to warrant suspension. (Matter of Freedman, 113 App. Div. 327.)

—— **Purchasing fraudulent certificate.**] Attorney who by fraud and deceit procured his admission to practice by purchasing certificate that he had been admitted in the courts of New Jersey, and on which a court seal had been falsely imposed, disbarred. (Matter of Leonard, 127 App. Div. 492.)

—— **Payment of money for adjournments of court, etc.**] Attorney who paid money to an assistant clerk of court for adjournments, etc., disbarred. (Matter of Boland, 127 App. Div. 746.)

—— **Concealment of fact of conviction.**] Concealment by foreign attorney applying for admission in this State of the fact that he had been convicted of a crime in such foreign State calls for disbarment; and it does not affect the result that he was pardoned unconditionally by the Governor of the foreign State or that his conviction was subsequently decided to be unjust. (Matter of Pritchett, 122 App. Div. 8.)

—— **Frauds upon clients.**] Attorney who verified and filed objections to the probate of a will against the wishes of his client, suspended for two years. (Matter of Randall, 122 App. Div. 1.)

Attorney disbarred for obtaining possession and control of property belonging to an insolvent client in fraud of creditors, for effecting the security of a single client in violation of the Bankruptcy Act, and for perjury and subornation of perjury in the bankruptcy proceedings. (Matter of Joseph, 135 App. Div. 589.)

Attorney disbarred because when retained on a contingent fee he continued to prosecute the trial of an action and asserted his client's right to a verdict after having discovered that the case was founded upon perjured evidence.

The rule that a person cannot be convicted upon the uncorroborated testimony of an accomplice does not obtain in its strictness in a proceeding to disbar an attorney. (Matter of Hardenbrook, 135 App. Div. 634.)

Attorney disciplined by suspension from practice for two years for fraud and chicanery, in that he drew an answer denying knowledge of facts which were true to his own knowledge, attempted to induce the court to accept false answers to impede a recovery of judgment where there was no defense, and drew deeds whereby his client attempted to place his property beyond the reach of creditors. (Matter of Goodman, 135 App. Div. 594.)

Attorney disbarred for expending on his own account moneys collected for his client and concealing from the latter the fact that the same had been collected. (Matter of Gifuni, 137 App. Div. 351.)

Attorney disbarred for obtaining money upon the false representation that he had been retained in an action, and for converting the sum so obtained to his personal use. (Matter of Andrews, 137 App. Div. 353.)

—— **Taking testimony upon written interrogatories.**] Proceeding to disbar an attorney is a special proceeding, and the Appellate Division has the power under section 888 of the Code of Civil Procedure to issue a commission on the application of parties moving for a disbarment to take testmony upon written interrogatories. (Matter of Spencer, 137 App. Div. 330.)

—— **Regularity of criminal prosecution will not be inquired into.**] The regularity of a criminal prosecution wherein an attorney was convicted of murder in the first degree by a court of competent jurisdiction will not be inquired into on a motion to strike his name from the roll of attorneys. (Matter of Patrick, 136 App. Div. 450.)

—— **To aid in manufacturing evidence tending to deceive.**] The fact that an attorney aids in manufacturing evidence which, though not absolutely false, tends to deceive, will justify his disbarment. (Ex parte Gale, 75 N. Y. 526 [1879].)

As to the necessity for proof of a fraudulent motive to justify disbarment, see note to 18 L. R. A. 401.

WHAT IS NOT PUNISHED BY DISBARMENT — Instituting without cause proceedings to disbar another attorney — he is chargeable with costs.] When an attorney, from improper motives and without just cause, institutes proceedings to procure the removal from the bar of another attorney, he is properly chargeable with the costs and disbursements incurred in such proceedings. (In the Matter of Kelly, 62 N. Y. 198; S. C., 3 Hun, 636 [Gen. T. 1875].)

—— **Writing to judge who tried case.]** Writing to justice who tried case, complaining of his conduct and by inference reflecting on the integrity of the court, held highly objectionable but not warranting greater punishment than reprimand. (Matter of Manheim, 113 App. Div. 136.)

—— **Scandalous matter in pleading.** The responsibility for the insertion of irrelevant and scandalous matter in pleadings rests upon the attorney preparing the same and he is chargeable with the costs of a motion to have such matter stricken therefrom. (McVey v. Cantrell, 8 Hun, 522 [Gen. T. 1876].)

—— **Action by, as a party, not ground for his disbarment.]** Acts committed by an attorney as a party to a suit do not afford grounds for his disbarment. (Matter of Post, 26 St Rep. 640 [Supm. Ct. 1889].)

—— **Double punishment.]** The disbarment of an attorney for acts committed as a party to a suit, and for which he has paid the penalty, would be a double punishment and should not be inflicted. (*Ib.*)

—— **An attorney taking vexatious proceedings for delay, censurable.]** When, in a criminal case, all the forms of law have been observed and the defendant has had every opportunity to make his defense, and his conviction has been affirmed by the highest court of the State, the contest in the courts should end.

As to whether, it being the duty of attorneys and counselors of the courts of this State to aid in the administration of justice, if they in such case engage in vexatious proceedings, merely for the purpose of undermining the final judgment of the courts and defeating the law, they do not expose themselves to the disciplinary power of the Supreme Court, *quære*. (People of the State of New York v. Jugiro, 128 N. Y. 589 [1891].)

—— **Imprisonment for the non-payment of a fine.]** Upon the failure of the attorney to pay the amount of costs and disbursements awarded against him, a precept may lawfully issue committing him to the county jail until such payment be made. (In the Matter of Kelly, 62 N. Y. 198; S. C., 3 Hun, 636 [Gen. T. 1875].)

—— **Return of records by — how enforced.]** How an attorney should be compelled to return an affidavit taken from the clerk's office. (Wood v. Kroll, 43 Hun, 328 [Gen. T. 1887].)

—— **Actions and conduct held censurable.]** Making affidavits upon which he secured extension of time to serve complaints in actions which he had been instructed to discontinue, held sufficient to warrant suspension from practice for one year. (Matter of Hanses, 120 App. Div. 377.)

Attorney admonished but not suspended for allowing collecting agency to send out under his name dunning letters containing false statement that an action had been brought against the debtor. (Matter of Hutson, 127 App. Div. 492.)

Act of attorney in inducing complainant to withdraw a charge of petit lar-

ceny by the payment of money held censurable. (Matter of Woytisek, 120 App. Div. 373.)

Fact that an attorney when testifying upon a criminal trial against a third person refuses to answer certain questions on the ground that the answers might tend to incriminate him will not justify his disbarment. (Matter of Kaffenburgh, 188 N. Y. 49.)

Attorney not responsible, when acting as agent for client, for debts contracted. (Argus Co. v. Hotchkiss, 121 App. Div. 378.)

Conduct of an attorney in hiring "ambulance chasers" at a percentage of the fee obtained by the attorney from the cases thus obtained is a violation of the Code and of the Penal Law, although he paid the same person a regular salary for services in investigating cases and preparing them for trial. (Matter of Shay, 133 App. Div. 547.)

Attorney proceeded against can only be convicted upon evidence good at common law, given, if he chooses, in his presence by witnesses subject to cross-examination. (Matter of Joseph, 125 App. Div. 544.)

READMISSION TO PRACTICE — Application for.] An application for leave to resume practice by an attorney who was disbarred on the ground that he had been convicted of a crime must be determined under the law as it existed when the conviction took place; and under the statute as it existed in 1887 the attorney has the right to show that the crime of which he was found guilty was one involving no moral turpitude or any other circumstance showing that the fact of conviction alone should not be deemed sufficient cause for his removal. (Matter of Darmstadt, 35 App. Div. 285 [1898].)

REVIEW — Order suspending an attorney — how far reviewable by the Court of Appeals.] An order of the General Term suspending an attorney is reviewable in the Court of Appeals. The measure of punishment is within the discretion of the court below, but the adjudication of guilt or innocence upon the facts is reviewable. (In re Eldridge, 82 N. Y. 161 [1880]. See Broadwell v. The State, 16 Wall. 130–135 [1872].)

—— Decision by General Term — not reviewable in Court of Appeals.] The decision of the General Term denying, with costs, an application to disbar an attorney is not reviewable in the Court of Appeals. (In the Matter of Kelly, 59 N. Y. 595 [1875].)

WHO CANNOT PRACTICE — Judges not allowed to practice.] No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office, nor shall any judge of the Court of Appeals or justice of the Supreme Court, or any county judge or surrogate hereafter elected in a county having a population exceeding 120,000, practice as an attorney or counselor in any court of record in this State or act as referee. (Art. 6, § 20, Const. amend. of 1894. See, also, Seymour v. Ellison, 2 Cow. 13.)

—— New York city — none but attorneys to practice in.] See Code of Civil Procedure, § 63; Judiciary Law, § 271.)

—— A judge — the partner of a judge and a judge's clerk — cannot practice in his court.] (See Code of Civil Procedure, §§ 49, 50; Judiciary Law, § 741.)

—— Partner of district attorney, or other public prosecutor, not to defend.] (See Code of Civil Procedure, § 78; Judiciary Law, § 278.)

—— **Public prosecutor — when unable to act — punishment.**] (See Code of Civil Procedure, § 79; Judiciary Law, § 278.)

—— **Surrogate not to practice.**] (Code of Civil Procedure, § 2495. See art. 6, § 20, Const. of 1894.)

—— **Surrogate's clerk, or other person employed in surrogate's office, not to practice before the surrogate.**] (Code of Civil Procedure, § 2509.)

—— **A surrogate's father or son not to practice before him, or be employed as an attorney.**] (See Code of Civil Procedure, § 2529; Judiciary Law, § 472.)

—— **Constable, law partner or clerk of justice cannot practice before the justice.**] (See Code of Civil Procedure, § 2889; Penal Law, §§ 271, 272.)

—— **Sheriff's, etc.**] A sheriff, under sheriff, deputy sheriff, sheriff's clerk, constable, coroner, crier or attendant of a court shall not, during his continuance in office, practice as an attorney or counselor in any court. (See Code of Civil Procedure, § 62; Judiciary Law, § 473.)

—— **Clerk, etc.**] The clerk, deputy clerk or special deputy clerk of a court shall not, during his continuance in office, practice as an attorney or counselor in that court. (See Code of Civil Procedure, § 61; Judiciary Law, § 250.)

—— **Constitutional right — citizen of another State.**] A citizen of another State has not a right under the Constitution to practice. (Matter of Henry, 40 N. Y. 560.)

—— **Right to practice not protected by United States Constitution.**] The right to practice in the State courts is not a privilege or immunity of a citizen of the United States, within the meaning of the first section of the Fourteenth Amendment of the Constitution of the United States. (Bradwell v. The State, 16 Wall. 130 [1872].)

—— **Nonresidents — cannot practice.**] An attorney-at-law who is a nonresident of this State has no authority or right to, and cannot practice in the courts of this State. (Richardson v. Brooklyn City & Newton R. R. Co., 22 How. 368 [Sp. T. 1862].)

—— **Nonresidents — may practice in this State, when.**] A person regularly admitted to practice as attorney and counselor in the courts of record of the State, whose office for the transaction of law business is within the State, may practice as such attorney or counselor, although he resides in an adjoining State. But service of a paper which might be made upon him at his residence, if he was a resident of the State, may be made upon him by depositing the paper in a post office in the city or town where his office is located, properly inclosed in a post-paid wrapper, directed to him at his office. A service thus made is equivalent to personal service upon him. (See Code of Civil Procedure, § 60; Judiciary Law, § 470.)

—— **An alien cannot be admitted.**] An alien cannot be admitted to practice law as an attorney and counselor-at-law in this State. (In re O'Neill, 90 N. Y. 584 [1882].)

—— **Punishment.**] All persons are punishable for assuming to be officers, attorneys, solicitors or counselors of any court, and acting as such without authority. (Code of Civil Procedure, § 14, subd. 4. See Judiciary Law, § 753.)

A district attorney and his partner and a public prosecutor, when punishable to taking part in an action. (See Code of Civil Procedure, § 80; Penal Law, § 278.)

—— **Action against attorney by client for unauthorized settlement.]** Plaintiff must establish that the settlement was unauthorized, the validity of the claim and that it was worth more than the amount collected thereon. (Vorth v. McEachen, 181 N. Y. 28 [1905].)

—— **Effect of appearing by one forbidden to practice.]** Attorney who sends someone who is forbidden to practice to appear for him in an action cannot afterwards raise that question as to an act of such a person. (Kerr v. Walter, 104 App. Div. 45.)

—— **Corporations — may not practice law.]** Practice of the law is not a lawful business for a corporation to engage in. (Matter of Co-operative Law Co., 198 N. Y. 479, affg. 136 App. Div. 901.)

UNITED STATES COURTS — Attorneys and counselors of.] Attorneys and counselors of the United States courts are not officers of the United States, but are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character. (Ex parte Garland, 4 Wall. 333.)

As to change of attorneys, see notes under Rule 10.

As to appearance by attorneys, see notes under Rule 9.

RULE 2.

Papers — Where Filed — Change of Venue — Indorsements.

The papers, in cases pending in the Appellate Division, shall be filed with the clerk of such division of the department in which the case is pending. In all other cases where no provision is made by the Code, papers in the Supreme Court shall be filed in the office of the clerk of the county specified in the complaint as the place of trial. In Surrogates' Courts, in the office of the surrogate; in other courts of record, in the office of the respective clerks thereof. In case the place of trial be changed to another county, all subsequent papers shall be filed in the county to which such change is made. All papers served or filed must be indorsed or subscribed with the name of the attorney or attorneys, or the name of the party if he appears in person, and his or their office address, or place of business.

Rule 3 of 1858, amended. Rule 3 of 1871. Rule 3 of 1874, amended. Rule 2 of 1877, amended. Rule 2 of 1880. Rule 2 of 1884. Rule 2 of 1888, amended. Rule 2 of 1896.

CODE OF CIVIL PROCEDURE.

§ 23. Writs and other process issued out of courts of record, to be returned to the clerk.

§ 344. Where an action is removed from County Court to Supreme Court — papers on file to be transmitted.

§ 562. Papers on order of arrest must be filed.
§ 590. Order of arrest with papers accompanying it and his return must be filed by the sheriff within ten days.
§ 626. Affidavit used on obtaining an order vacating an injunction must be filed.
§ 639. Affidavits on attachment to be filed within ten days.
§ 726. Where original pleading or paper is lost or withheld — how supplied.
§ 816. Bonds and undertakings to be filed with the clerk of the court.
§ 824. Summons and pleadings to be filed with clerk within ten days after service.
§ 825. Papers in special proceedings — where to be filed.
§ 988. Change of place of trial — duty of clerk to deliver papers.
§ 989. When an order changing the place of trial takes effect — appeal therefrom.
§ 990. Issue of law — where triable — judgment on, where to be filed.
§ 1010. Decision of an issue tried by the court must be filed within twenty days after the final adjournment of the term.
§ 1019. Referee's report must be filed or delivered to prevailing party within sixty days after the final submission.
§ 1237. Judgment roll to be filed with the clerk.
§ 1239. Time of filing judgment roll to be noted on it by the clerk.
§ 1672. *Lis pendens* to be recorded and indexed.
§ 1715. Sheriff, in action of replevin, to file return.
§ 1820. Bond of guardian, suing for his ward's legacy, must be filed.
§ 1895. Proof of service of summons in an action for a penalty.
§ 3367. Condemnation proceedings — the decision on issues arising therein is to be filed or delivered to prevailing party within twenty days after final submission.
§ 3372. Offer to purchase must be filed ten days before service of the petition.
See notes to Rules 3 and 4.

FILING PAPERS — What is a filing.] The mere coming of a remittitur to the hands of the clerk of the court below is not an actual filing. This was so held where the clerk on being served with a stay handed the remittitur back to the attorney, without having marked it filed, and refused to file it. (See Cushman v. Hadfield, 15 Abb. Pr. [N. S.] 109, and note [Ct. of App. 1873].)

—— Who may file a paper.] Where the office being vacant a person in charge received a paper and marked it filed, etc., it was held to be a valid filing. (Bishop v. Cook, 13 Barb. 326 [Gen. T. 1850].)

—— Where a motion is made out of court on notice.] When a motion is made before a judge out of court upon notice, it is the duty of the respective attorneys to file the papers used by them on such motion. (Savage v. Relyea, 3 How. Pr. 276; S. C., 1 Code R. 42 [Sp. T. 1848].)

—— Motion after judgment — papers, where filed.] The papers used upon a motion made after the entry of a final judgment in the action, together with the order made thereon, must be filed in the office of the clerk of the county where the judgment was entered, within ten days, or the order may be set aside as irregular. Curtis v. Greene, 28 Hun, 294 [1882].)

—— **Judgment on appeal — papers, where to be filed.**] Where the defendants entered judgment of nonsuit, and filed the roll in Ulster county, the county named in the complaint, and on appeal to the General Term at Albany, the judgment was affirmed, and the defendants entered judgment and filed another roll in Albany county, held, that the latter judgment was irregular. (Andrews v. Durant, 6 How. Pr. 191 [Sp. T. 1851]; S. C., 1 Code R. [N. S.] 410.)

—— **Filing — how compelled.**] An attorney will be compelled to do so upon a mere suggestion, and the defendant cannot object that the filing of the affidavit will criminate him. (Anonymous, 5 Cow. 13 [1825].)

—— **Costs allowed on a motion to compel the filing of a paper.**] Costs may be allowed on an *ex parte* motion to compel the filing of a pleading where the party omits to file it after service of a notice requiring him to do so. (Langbein v. Gross, 14 Abb. Pr. [N. S.] 412 [Com. P. Sp. T. 1873].)

—— **Presumption as to filing, as regards notice of lis pendens — not indulged.**] The rule of *lis pendens* is not a favorite of the court, and it will not be presumed in order to sustain a notice of the pendency of an action that a complaint was filed prior to the entry of judgment. (Leitch v. Wells, 48 N. Y. 586 [1872].)

—— **Records delivered to clerk before nine presumed to be filed at nine.**] Records of judgments delivered to the clerk to be filed before the hour of nine o'clock in the morning will be considered as filed at the hour of nine. (Wardell v. Mason, 10 Wend. 573 [1833]; France v. Hamilton, 26 How. Pr. 180 [Gen. T. 1862].)

(See as to filing judgments and issuing executions thereon out of office hours, Hathaway v. Howell, 54 N. Y. 98 [1873].)

—— **Notice of filing — when not necessary.**] Where a party files a pleading in pursuance of an order of the court, he is not bound to notify the party who obtained the order that the pleading is filed. (Douoy v. Hoyt, 1 Code R. [N. S.] 286 [N. Y. Com. P. Sp. T. 1852].)

—— **Entry of judge's order not necessary.**] As a rule, an *ex parte* order of a judge need not be entered, although the papers should be filed. (Albrecht v. Canfield, 92 Hun, 240 [1895].)

—— **Entering and filing distinguished.**] There is a material difference between entering and filing an order. When filed without the signature of the clerk, there is no entry of it. (Selley v. Irish Indust. Exposition, 53 Misc. 46.)

FAILURE TO FILE — Effect of.] On motion to set aside an order for a defect in the affidavits, if it appears that a sufficient affidavit was used on the hearing of the motion, though not filed, the order should not be set aside. (Vernam v. Holbrook, 5 How. Pr. 3 [Sp. T. 1850]; Curtis v. Greene, 28 Hun, 294 [1882].)

—— **Rights of the unsuccessful party.**] If a party entitled to enter an order fails to do so within twenty-four hours after the decision has been made, any party interested may have it drawn up and entered. (Peet v. Cowenhoven, 14 Abb. Pr. 56 [Chamb. 1861]; Matter of Rhinebeck & Conn. R. R. Co., 8 Hun, 34 [Gen. T. 1876].)

—— **Injunction dissolved — when papers were not filed.**] An injunction dissolved on the ground that the papers had not been filed as required by the

rules. (Johnson v. Casey, 28 How. Pr. 492 [N. Y. Supr. Ct. Sp. T. 1865].) The court may grant relief. (Leffingwell v. Chave, 5 Bosw. 703 [Supr. Ct. Sp. T. 1860]; 19 How. Pr. 54; 10 Abb. 472.)

—— **An attachment not vacated because of a failure to file the papers on which it was granted.]** An attachment will not be vacated as a matter of course for the failure to file within ten days the papers on which it was issued. (Woodward v. Stearns, 10 Abb. Pr. [N. S.] 395 [N. Y. Com. P. Sp. T. 1871]; Brash v. Wielarski, 36 How. Pr. 253 [N. Y. Supr. Ct. Sp. T. 1868].)

LEAVE TO FILE AFTER THE TIME — Power of the court to allow a paper to be filed after the time allowed therefor has expired.] The court has power to permit a plaintiff to file a reply after the time limited in an order which required him to file it or directed that it be deemed abandoned, where the omission is explained, *e. g.*, where a copy by inadvertence was filed instead of the original. (Short v. May, 2 Sandf. 639 [1849].)

—— **An answer may be inserted in the judgment-roll after the roll has been filed.]** A judgment-roll may be amended by attaching a copy answer when the answer has been omitted when it was made up. (Renouil v. Harris, 1 Code R. 125 [N. Y. Sup. Ct. 1849].)

—— **Filing papers nunc pro tunc.]** Where papers in an order for service by publication were delivered to the clerk and he retained them in his possession instead of filing them, a subsequent order on the making up of the judgment-roll directing the filing of the papers *nunc pro tunc* was the proper method of correcting the record. (Fink v. Wallach, 109 App. Div. 718.)

INDORSEMENT — Must be on the copy as well as on the original.] It is not sufficient that the indorsement be made on the original order only. It must also be made on the copy served. (Dent v. Watkins, 49 How. Pr. 275 [Chamb. 175]. See, however, Forward v. French, 52 id. 88 [Sp. T. 1876].)

—— **Essential on notice to limit time to appeal.]** A notice of the entry of judgment which is not indorsed or subscribed both with the name of the attorney and his office address or place of business is irregular and ineffectual to limit the time to appeal. (Kelly v. Sheehan, 76 N. Y. 325 [1879].)

—— **Indorsement concealed.]** A notice of the entry of a judgment or order, to be effective to limit the time to appeal, must be so given that it would be negligence to fail to observe it; and an indorsement so made that it is concealed when the cover is folded, so that it is possible to open and read the order without discovering the notice of entry, is insufficient. (Weeks v. Coe, 36 App. Div. 339 [1899].)

—— **The omission to indorse does not vitiate the paper — it is merely an irregularity.]** The omission to indorse upon a paper served the post office address or place of business of the attorney as required by the General Rules of Practice (No. 2) does not necessarily vitiate either the paper or the service; it is a mere irregularity, and the party served may either return the paper or move to set it aside. After receiving it without objection, however, he cannot safely disregard the functions which the paper is designed to perform. (Evans v. Backer, 3 How. Pr. [N. S.] 504; 101 N. Y. 289 [1886].)

—— **What is a sufficient indorsement.]** Where, upon a copy of a judgment served, was indorsed the name of the attorney with his post office address and

business address, and below was indorsed a notice of judgment, signed by the attorney, without giving any address, held that this was a sufficient compliance with Rule 2. (People ex rel. W. V. R. R. Co. v. Keator, 101 N. Y. 610 [1885]; Falker v. N. Y., W. S. & B. R. Co., 100 id. 86 [1885].)

—— **Admission of due and proper service — waives the defect of omitting the address of the attorney.]** An admission of "due and proper" service of a judgment and notice of entry thereof constitutes a waiver of a defect in the notice of entry consisting in the omission of the attorney serving it to subscribe thereto his office address as well as his name. (Patterson v. McCann, 23 N. Y. Weekly Dig. 70 [Supreme Court, Gen. T. 1886].)

—— **Filing — how compelled.]** A judgment debtor may compel the creditor's attorney to file an order for the examination of a third party in supplementary proceedings, although the judgment has itself been paid and the judgment creditor has obtained an order discontinuing the proceeding against the third person, and although the order and affidavit upon which it was granted may tend to criminate the person who obtained it. (Sinnott v. First National Bank, 34 App. Div. 161 [1898].)

—— **Meaning of "resided" in section 984 of Code of Civil Procedure.]** The word "resided" means a permanent residence, one's home, as distinguished from a mere stopping place. It is nearly synonymous with "domicile." (Washington v. Thomas, 103 App. Div. 423.)

DESTRUCTION OF RECORDS — Power to destroy records only exercised in exceptional cases.] The power of the court to remove its records from the clerk's office, for the purpose of destruction, should only be exercised in exceptional cases, as in case of mistake or of irrelevant and scandalous accusations. (Schecker v. Woolsey, 2 App. Div. 52 [1896].)

—— **Office hours in county clerk's office.]** (See note under Rule 8.)

RULE 3.

Motion Papers to be Specified in Order — Where Filed — Effect of Non-filing — Entry of Order.

When any order is entered, all the papers, used or read on the motion on either side, shall be specified in the order, and shall be filed with the clerk, unless already on file or otherwise ordered by the court, or the order may be set aside as irregular, with costs. The clerk shall not enter such order unless the motion papers are filed, and unless the order is signed by the justice presiding at the court at which the motion was heard. When an opinion has been delivered by the court, it shall be filed with the order and shall be considered a part of the record upon which the order was made; and if the order does not state the grounds upon which it was made, the opinion may be considered to ascertain such grounds.

When the affidavits and papers upon a non-enumerated motion

are required by law or by the rules of the court to be filed, and the order to be entered in a county other than that in which the motion is made, the clerk shall deliver to the party prevailing in the motion, unless the court shall otherwise direct, a certified copy of the rough minutes, showing what papers were used or read, together with the affidavits and papers used or read upon such motion, with a note of the decision thereon, or the order directed to be entered, properly certified. It shall be the duty of the party to whom such papers are delivered to cause the same to be filed, and the proper order entered in the proper county within ten days thereafter, or the order may be set aside as irregular, with costs.

Rule 3 of 1858, amended. Rule 3 of 1871, amended. Rule 7 of 1871, amended. Rule 4 of 1874, amended. Rule 7 of 1874, amended. Rule 3 of 1877, amended. Rule 3 of 1880. Rule 3 of 1884. Rule 3 of 1888, amended. Rule 3 of 1896. Rule 3 as amended, 1910.

CODE OF CIVIL PROCEDURE.

§ 768. An application for an order is a motion.
§ 769. Where motions in the Supreme Court are to be heard.
§ 770. To whom motions may be made in New York city.
§ 771. Motions may be transferred.
§ 772. What judges may take orders out of court.
§ 773. Limitation as to orders made by county judges.
§ 774. Order made by a judge not of the court in which the action is brought — how reviewed.
§ 775. Stay of proceedings — duration of.
§ 776. When a second application for an order must be made to the same judge.
§ 777. An application for judgment cannot be withdrawn without permission — subsequent application.
§ 778. Penalty for violating the two last sections.
§ 779. Costs of motions — how collected.
§ 780. Notice of motion to be eight days.
§ 3343, subd. 20. The word "order" refers to an order made in a civil action or special proceeding.

ORDER — Definition of.] The provision of the Code which declares "every direction of a court or a judge made or entered in writing," is to be "denominated an order," so far as regards appeals therefrom, properly includes only mandates on parties or officers on final determination of rights. Every decision or resolution of a court or judge does not become an order by being put in writing when otherwise it would not be. (Howard v. Freeman, 6 Robt. 511 [Gen. T. Supr. Ct. 1866].)

—— **Order to be submitted to adverse party before being entered.**] Where an order is special in its provisions, the party entitled to draw up the same should submit a copy thereof to the adverse party, that he may propose amendments thereto before it is submitted to the register to be settled and entered. (Whitney v. Belden, 4 Paige, 140 [1833].)

—— **Duty of attorney, not of judge, to see that the order is proper.**] It is the duty of the attorney and not of the judge to see that an order taken is not too broad for the case on which it is founded. (La Farge v. Van Wagenen, 14 How. Pr. 57 [Sp. T. 1857].)

—— **Order, by whom entered.**] An order must be entered by the prevailing party with the clerk of the county where the papers are filed. (Savage v. Relyea, 3 How. Pr. 276 [Gen. T. 1848]; S. C., 1 Code R. 42.)

—— **When the unsuccessful party may enter the order.**] The unsuccessful party can enter the order when the successful party neglects to do so for twenty-four hours. (Peet v. Cowenhoven, 14 Abb. Pr. 56 [Chamb. 1861]; Matter of Rhinebeck & Conn. R. R. Co., 8 Hun, 34 [Gen. T. 1876].)

—— **Duty of the clerk to enter the order — party not prejudiced by his failure to do so.**] It is the duty of the clerk to enter orders of the court, and his delay or omission to make actual and speedy entry of orders in the minutes will not be allowed to prejudice the substantial rights of parties. (People v. Central City Bank, 53 Barb. 412 [1867].)

—— **Entry of — during session of court.**] It is not necessary to the validity of an order of the Court of Sessions, transferring an indictment to the Court of Oyer and Terminer, that it should be entered during its session. (People v. Myers, 2 Hun, 6 [1874].)

—— **Decision ineffectual until order entered — date to be that of entry of order.**] Neither party can have any benefit from a decision of the court until the order upon such decision is drawn up and perfected, and where it is material to either party the caption or date should be made to correspond with the time of the actual entry of the order. (Whitney v. Belden, 4 Paige, 140 [1833].)

—— An order vacating an injunction must be served and the papers used must be filed before it takes effect. (Code of Civil Procedure, § 626.)

—— **Appeal proper, only after order entered and papers filed.**] An appeal will not lie from an order until it is entered and the motion papers are filed with the clerk. (Smith v. Dodd, 3 E. D. Smith, 215 [Gen. T. Com. P. 1854]; Star Fire Ins. Co. v. Godet, 2 J. & S. 359 [Gen. T. Supr. Ct. 1872]; Plato v. Kelly, 16 Abb. 188 [Gen. T. 1862]; Galt v. Finch, 24 How. Pr. 193 [Gen. T. 1862]; Marshall v. Francisco, 10 id. 147 [Gen. T. 1854]. See Code Civ. Pro. § 1304.)

—— **Chamber order — must be filed in the department in which the appeal is taken.**] Where a chamber order is made in one department, in an action pending in another department, no appeal therefrom will lie in the latter department until the order has been entered there. (Clinch v. Southside R. R. Co., 2 Hun, 154 [1874]; Hoffman v. Tredwell, 5 Paige, 83 [1835]; Whitney v. Belden, 4 id. 140 [1834].)

—— **Appeal from chamber order of county judge — proper, only after entry**

of the order.] An appeal from a chamber order of a county judge can only be taken after the order has been entered in the county clerk's office. (Pool v. Safford, 10 Hun, 497 [Gen. T. 1877]; Whitaker v. Desfosse, 7 Bosw. 678 [Gen. T. Supr. Ct. 1861].)

—— **A chamber order need not be entered.]** An order granted by a judge at chambers, *ex parte*, need not be entered with the clerk, but may be disregarded, unless the affidavit used on the motion, or a copy thereof, is served with a copy of the order. (Savage v. Relyea, 3 How. Pr. 276; S. C., 1 Code Reporter, 42 [Sp. T. 1848].)

—— **Order signed by county judge on a County Court caption, a chamber order.]** Where a petition for the appointment of a guardian *ad litem* for an infant plaintiff is addressed to the county judge, but the order for the appointment is entitled as having been made at a term of the County Court, the court will disregard the caption of the order and hold the order valid upon the assumption that the county judge acted in the capacity in which he was called upon to act and in which he had a right to act. The fact that the order was entered as an order of the County Court does not estop the plaintiff from asserting its true character, as the validity of an order does not depend upon the form of its entry. (Albrecht v. Canfield, 92 Hun, 240 [1895].)

—— **Recital in order.]** A party is entitled to have recited in an order all the papers used by him or his adversary on the motion, unless there is scandalous matter, which the court is authorized to strike out. (Deuterman v. Pollock, 36 App. Div. 522 [1899].)

—— **To specify papers read.]** The requirement that the order on a non-enumerated motion shall specify all the papers used or read on the motion, is complied with by a statement that the motion was made upon all the papers and proceedings in the action. (Hobart v. Hobart, 85 N. Y. 637 [1881]. See, however, Deutermann v. Pollock, 36 App. Div. 522 [1899].)

—— **What is too indefinite.]** A recital in the words "and on all papers and proceedings herein" is too indefinite. (Faxon v. Mason, 87 Hun, 139 [1895].)

—— **An order should recite all papers used on the motion.]** A party appearing upon a motion is entitled to have recited in the order disposing of the motion all of the papers used by him or his adversary thereon. (Deutermann v. Pollock, 36 App. Div. 522 [1899].)

—— **Conditions when not imposed on a failure to recite in the order and to file an affidavit used on a motion.]** Where an important affidavit made upon a motion has neither been recited in the order made on such motion, nor filed, nor made part of the record, and a sufficient excuse is shown therefor, it is improper to impose, as a condition of allowing it to be recited in the order and filed, that the party seeking such relief should admit service, or submit to service upon her, of a judgment entered in the action. (Thousand Island Park Assn. v. Gridley, 25 App. Div. 499 [1898].)

—— **Resettlement of an order which does not contain proper recitals.]** If an order does not contain the proper recitals, the proper practice is to move for its resettlement. (Mooney v. Ryerson, 8 Civ. Pro. Reports, 435 [N. Y. City Court Sp. T. [1885].)

—— **Resettlement, not allowed to effect a removal of a motion.]** A party whose motion to resettle an order, by reciting therein certain papers used upon the motion has been denied, has no right to make motions, ostensibly to resettle orders, but which have for their object the same relief which was refused by the original order denying his motion for resettlement, as such procedure amounts, in effect, to renewals of the original motion without leave. (Deutermann v. Pollock, 36 App. Div. 522 [1899].)

—— **Power of justices of the Appellate Division as to granting orders.]** No justice of the Appellate Division shall exercise any of the powers of a justice of the Supreme Court, other than those of a justice out of court, and those pertaining to the Appellate Division or to the hearing and decision of motions submitted by consent of counsel. (Const. of 1894, art. 6, § 2.)

—— **Court cannot direct that certain papers used upon a motion need not be printed in the appeal papers.]** There is no provision of the Code or Rules which authorizes the Special Term to direct that papers submitted upon a motion heard at Special Term, and which have been duly filed and are recited in the order entered upon such motion, need not be printed in the papers to be used on the argument of an appeal from such order; the power to make such direction can be exercised only upon the theory that some of the papers which have been so submitted, filed and recited were not actually used, or that they were not considered by the court in deciding the motion. (Manhattan Railway Co. v. Taber, 7 Misc. Rep. 347 [Supm. Ct. 1894].)

—— **Motion defined.]** (See Matter of Jetter, 78 N. Y. 601.)

—— **Nonenumerated motions — what are.]** (See Rule 38.)

—— **Nonenumerated motions — for what day noticed.]** **(Rule 21.)**

See notes to Rules 2 and 4.

—— **Motion — where made.]** The practice of moving before one judge at Special Term to declare void the order or judgment of another judge at Special Term is not sanctioned by any provision of the Code of Civil Procedure, or by any other controlling authority. (Platt v. N. Y. & Sea Beach Ry. Co., 170 N. Y. 451 [1902]. See, also, Code Civ. Pro., §§ 772, 774, et seq.)

On an appeal from an order of a County Court it was objected that the order, which was without a caption, was a judge's order and not a court order, it was held that the application having been made to County Court and the order reciting that fact, the order should be regarded as a court order. (Lawson v. Spear, 91 App. Div. 411.)

See Terry v. Green, 53 Misc. 10.

RULE 4.

Filing Undertaking and Affidavit — Injunction — Attachment.

Except where otherwise expressly provided by law, it shall be the duty of the attorney of the party required to give a bond or undertaking to forthwith file the same with the proper clerk; and in case such bonds and undertakings shall not be so filed, any party to the action or special proceeding, or other persons interested,

shall be at liberty to move the court to vacate the proceedings or order as if no bond or undertaking had been given. It shall also be the duty of the attorney to file the petition or affidavit upon which an injunction, attachment, order of arrest, or writ, has been granted within ten days after the same shall have been served. In case of a failure so to file such petition or affidavit, the opposing party may move to vacate the order, warrant or writ, and the same shall be vacated by the court or judge granting the same, unless for proper cause shown time to file the same shall be extended.

Rule 4 of 1858, amended. Rule 4 of 1871. Rule 5 of 1874, amended. Rule 4 of 1877, amended. Rule 4 of 1880. Rule 4 of 1884. Rule 4 of 1888, amended. Rule 4 of 1896.

CODE OF CIVIL PROCEDURE.

§§ 562, 590. Arrest — papers on which the order was granted, to be filed.
§ 576. Bail — examination of persons offered as.
§ 602. Order substituted for writ of injunction.
§ 603. Injunction, where right thereto depends on the nature of the action.
§ 604. Injunction — dependent on extrinsic facts — affidavits on application for, what to state.
§ 605. Injunction restraining a State officer only granted at a term of the Supreme Court sitting in the department in which the officer is located.
§ 606. Injunction — by whom granted, except where specially prescribed by law.
§ 607. Proof sufficient to justify the granting of an injunction.
§ 626. Order vacating an injunction — when it takes effect.
§ 636. Attachment — affidavit on an application for, what to state.
§ 639. Affidavit to be filed with clerk within ten days after the granting of the warrant.
§ 642. Validity of undertaking not affected by improper granting of warrant, want of jurisdiction, or other cause.
§ 815. Bonds and undertakings not affected by change of parties.
§ 816. Bond or undertaking given in an action or special proceeding must be filed with the clerk, except as otherwise provided for.
§ 1307. Undertaking given on appeal, must be filed.
§ 1536. Bond of guardian *ad litem* for infant party in partition must be filed.
§ 3272. Undertaking to be filed, where security for costs is required.
§ 3421. Undertaking on an application to foreclose a lien on a vessel must be filed.

See notes under Rules 3 and 5.

ATTACHMENT — Not vacated because of failure to file the affidavit.] The failure to file an affidavit, on which an attachment was issued within ten

days, is not ground for vacating the attachment. (Brash v. Wielarksy, 36 How. Pr. 253 [Sp. T. 1868]; Woodward v. Stearns, 10 Abb. Pr. [N. S.] 395 [Sp. T. 1871].)

—— **Affidavits on — filed under section 639 of the Code.**] The time for filing the affidavits on an attachment is provided for by section 639 of the Code of Civil Procedure.

—— **Affidavit — what to contain.**] The affidavit must set out the evidence upon which the plaintiff relies. (Delafield v. Armsby Co., 62 App. Div. 262; Murphy v. Jack, 142 N. Y. 215.)

Where an attachment is sought in an action to recover unliquidated damages, affidavits must contain *prima facie* proof that damages to the amount claimed have been sustained. (Chazy Marble Lime Co. v. Derby, 88 App. Div. 150.)

—— **Affidavit — cannot be attacked collaterally.**] A warrant of attachment, issued upon affidavits sufficient to give the justice jurisdiction, cannot be questioned collaterally. (Rogers v. Ingersoll, 103 App. Div. 490.)

INJUNCTION — Failure to file papers — relief granted.] Where a party, by inadvertence, fails to file the papers upon which an injunction is granted, the court may relieve him upon or without terms. (Leffingwell v. Chave, 5 Bosw. 703 [Sp. T. Supr. Ct. 1860]; 19 How. Pr. 54; 10 Abb. 472. See Johnson v. Casey, 3 Robt. 710; S. C., 28 How. Pr. 492 [Sp. T. 1865]; O'Donnell v. McMurn, 3 Abb. Pr. 391 [Sp. T. 1856].)

UNDERTAKING — Rejection of sureties on — a new undertaking must be filed and justification take place, in what time.] Under an order, on rejection of proposed sureties, granting appellant ten days' time to file an undertaking with new sureties, the new undertaking must not only be filed, but justification of the sureties must be had, within the time. (Chamberlain v. Dempsey, 13 Abb. Pr. 421 [Supr. Ct. Sp. T. 1862]; S. C., 22 How. Pr. 356.)

—— **Vacating order of arrest because of insufficient undertaking.**] A motion to vacate an order of arrest because of the insufficiency of the undertaking, cannot be denied, where such insufficiency exists, upon the condition of a sufficient undertaking being filed. (Bondy v. Collier, 13 Misc. Rep. 15 [1895].)

—— **Not void, as taken colore officii.**] When an undertaking given upon procuring an injunction is not invalid as having been taken *colore officii*, because of its terms being unusual. (Candee v. Wilcox, 26 Hun, 666 [1882].)

—— **Undertaking to stay proceedings on appeal, when to be filed.**] An undertaking to stay proceedings on appeal must be filed and served with the notice of appeal, and not afterwards. (New York Central Inc. Co. v. Safford, 10 How. Pr. 334 [Sp. T. 1854].)

—— **Filing — necessary.**] An undertaking on appeal is not effectual until filed. (Webster v. Stevens, 5 Duer, 682 [Supr. Ct. Sp. T. 1856]; S. C., 3 Abb. Pr. 227.)

—— **Rights, etc., of sureties.**] Rights and liabilities of sureties upon an undertaking given upon the issuing of an attachment. (Baere v. Armstrong, 26 Hun, 19 [1881].)

—— **Cancelling of an undertaking on file.**] The propriety of cancelling an

undertaking on file is doubtful. Where there are other persons in interest besides those who consent to the order, it should not be done. (Dry Dock, East Broadway, etc., R. R. Co. v. Cunningham, 45 How. Pr. 458 [Gen. T. 1873]. See, also, Cunningham v. White, 45 How. Pr. 486 [Sp. T. 1873].)

—— **Enforcement.**] An undertaking on appeal from an order which required the restoration of a fund by deposit in a certain bank, can be enforced only by requiring such deposit and not by payment of the sum to the party for whose benefit the undertaking was given, where rights of other parties in the action are involved. (Mossein v. Empire State Surety Co., 117 App. Div. 820.)

—— **Liability of surety.**] Surety on an undertaking on arrest, held liable for but one cause of action. (McLean v. Fidelity & Deposit Co., 56 Misc. 23.)

It is a defense to an action on an undertaking to stay execution, that the sureties were excepted to and failed to justify and that the bond was not approved. (Montrose v. Levinson, 114 N. Y. Supp. 136.)

Validity of undertaking must be determined by an action brought thereon. (Riddle v. MacFadden, 60 Misc. 569.)

—— **Right of sureties to be discharged.**] Presentation by a surety of a petition to the court asking to be discharged and the action to be taken therein, provided for. (Code Civ. Pro., § 812.)

As to amendments of undertakings, justification, etc., see notes under Rule 5.

RULE 5.

Sureties, Justification of — Bonds to be Proved or Acknowledged — Attorney or Counselor Cannot be Sureties.

Whenever a justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or, if the security offered is by way of mortagage on real estate, to require proof of the value of such real estate. And all bonds and undertakings, and other securities in writing, shall be duly proved or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

In no case shall an attorney or counselor be surety on any undertaking or bond required by law, or by these rules, or by any order of a court or judge, in any action or proceeding, or be bail in any civil or criminal case, or proceeding.

Rule 5 of 1858, amended. Rule 6 of 1858. Rule 8 of 1871, amended. Rule 9 of 1871. Rule 8 of 1874, amended. Rule 9 of 1874, amended. Rule 5 of 1877. Rule 5 of 1880. Rule 5 of 1884. Rule 5 of 1888. Rule 5 of 1896.

CODE OF CIVIL PROCEDURE.

§§ 573–590. As to bail and their justification.
§ 810. Bonds and undertakings must be acknowledged or proved, and certified as a deed to be recorded.
§ 811. Party need not join with sureties — when one surety is sufficient.
§ 812. Form of bond or undertaking — affidavit of sureties — in what case may be omitted — approved by court or judge.
§ 813. When several sureties may justify, each in a smaller sum than the bond or undertaking.
§ 814. Suitor may sue on bond, etc., taken for his benefit to the people or a public officer.
§ 815. Bonds and undertakings not affected by change of parties.
§ 816. To be filed with clerk, except when a different disposition thereof is directed.
§ 827. Special reference may be ordered for the approval of a bond or undertaking.
§ 1305. Security on appeal, may be waived by written consent of respondent.
§ 1307. Undertaking on appeal, must be filed with the clerk.
§ 1308. New undertaking on appeal, to be given when sureties are insolvent.
§ 1309. Action upon undertaking on appeal — at what time maintainable.
§ 1335. Exception to, and justification of sureties on an appeal to the Court of Appeals.

AMENDMENTS TO UNDERTAKING — Undertaking given on procuring an arrest.] The court has power to allow an amendment of an undertaking given on procuring an order of arrest. (Irwin v. Judd, 20 Hun, 562 [1880].)

—— Allowed even upon appeal.] To cure any mere formal defect in the approval thereof. (Ten Eick v. Simpson, 11 Paige, 177 [1844].) **As to the amount** — (Eldridge v. Howell, 4 Paige, 457 [1834].)

—— Where it has not been proved or acknowledged.] (Conklin v. Dutcher, 5 How. 386, 388 [Gen. T. 1850]; Harrington v. The Am. Life Ins. & Trust Co., 1 Barb. 244 [Sp. T. 1847]; Bellinger v. Gardiner, 12 How. Pr. 381 [Sp. T. 1856]; S. C., 2 Abb. 441; Beach v. Southworth, 6 Barb. 173 [Gen. T. 1849]; S. C., 1 Code R. 99.)

—— By adding the names of other sureties, where by mistake or inadvertence the requisite number have not joined in the undertaking.] (Potter v. Baker, 4 Paige, 290 [1834]. See Kissam v. Marshall, 10 Abb. 424 [Sp. T. 1860] and cases cited.)

—— Where it has not been acknowledged before a proper officer.] Ridabock v. Levy, 8 Paige, 197 [1840].)

—— When given on procuring an arrest.] (Irwin v. Judd, 20 Hun, 562 [1880].)

—— Use of a seal on an undertaking implies a consideration.] (Grim v. Little, 43 Misc. 421.)

JUSTIFICATION — Affidavit of.] The affidavit of justification should be annexed to and filed with the undertaking. (Van Wezel v. Van Wezel, 3 Paige, 38 [1831].)

—— **In what amount on appeal to the Appellate Division of the Supreme Court.**] Sureties on an appeal to the Appellate Division of the Supreme Court must justify in double the amount of the judgment and costs. (Heppock v. Cottrell, 13 How. Pr. 461 [Sp. T. 1857].)

—— **Must be double the sum specified in the undertaking.**] An undertaking given in proceedings of claim and delivery, on which there were four sureties, and only three justified, and the aggregate amount of their justification was less than double the sum specified in the undertaking, held insufficient. (Graham v. Wells, 18 How. Pr. 376 [Sup. Ct. Chamb. 1857].)

—— **That sureties justify to more than is necessary is not objectionable.**] It is no objection to an undertaking on appeal that the sureties justify in more than twice the amount specified therein. (Hill v. Burke, 62 N. Y. 111 [1875].)

—— **Failure to justify in double the judgment and the $500 does not invalidate the undertaking.**] That the sureties to an undertaking fail to justify in double the amount of the judgment, and to double the $500 limited for costs and damages, does not invalidate the undertaking. (Hill v. Burke, 62 N. Y. 111 [1875]; Rich v. Beekman, 2 Code R. 63 [1849].)

—— **Partial justification — may sustain appeal, when.**] An undertaking on appeal, in form sufficient to effect a stay of proceedings, but in which the justification was not in a sum sufficient for that purpose, held sufficient to sustain the appeal. (Newton v. Harris, 8 Barb. 306 [Sp. T. 1850].)

—— **Effect of the failure of the sureties excepted to, to justify.**] The effect of the failure of sureties to justify after they are excepted to, is the same as if the undertaking had not been given by them. (Manning v. Gould, 90 N. Y. 476 [1882].)

—— **Sureties not released by their failure to justify.**] The sureties on an undertaking on appeal are not released from liability by their failure to justify after being excepted to. (McSpedon v. Bouton, 5 Daly, 30 [Gen. T. 1873].)

—— **Sureties not discharged because further sureties are required.**] Sureties are not discharged because of the parties being directed to furnish further sureties. (Jewett v. Crane, 13 Abb. Pr. 97 [Gen. T. 1861].)

—— **When a substitute not required for an insolvent surety.**] Where one surety becomes insolvent, if the other surety is abundantly able to satisfy the judgment, or if the judgment is otherwise well secured and the appeal is likely to be soon disposed of, the appellate court may refuse to require the appellant to file a new undertaking. (Dering v. Metcalfe, 72 N. Y. 613 [1878].)

—— **Default by plaintiff, after requiring justification.**] Where, after a notice of qualification was duly served the plaintiff failed to appear and the bill was approved by default, the court has no power to open such default. (Lewis v. Stevens, 93 N. Y. 57 [1883].)

—— **Agreement to accept surety — without justification — effect of.**] It was agreed by the attorneys that a surety on an undertaking on appeal should be accepted without justification on his part, defendant's attorney promising to have it so marked upon the undertaking by the court; which, however, was never done, although the appeal was taken as though it had been.

In an action brought upon the undertaking against the sureties thereto, they claimed that it could not be maintained, for the reason that the approval of the sureties had never been indorsed on the undertaking as required by section 196 of the Code of Procedure. Held, that the consent to accept the surety was a waiver of the justification, and no indorsement was necessary. (Gopsill v. Decker, 4 Hun, 625 [Gen. T. 1875].)

As to bail and their justification, see Code of Civil Procedure, sections 573 to 590, and Sheriff, *post*.

—— **Time within which a justification must take place where a new undertaking is filed.]** (See Chamberlain v. Dempsey, 13 Abb. Pr. 431 [Supr. Ct. Sp. T. 1862]; S. C., 22 How. Pr. 356.)

INDORSEMENT — Effect of failure to have.] When the undertaking filed on granting an order of arrest, is not indorsed with the approval of the justice granting the order, the order will, on motion, be vacated with costs. (Newell v. Doran, 21 How. Pr. 427 [Sp. T. 1861].) Copy of indorsed paper should contain the indorsement. (Dent v. Watkins, 49 How. Pr. 275 [Chamb. 1875].)

See, however, Forward v. French, 52 How. Pr. 88 (Sp. T. 1876).

See notes under "Indorsement" under Rule 2.

ATTORNEYS — Cannot become bail.] Miles v. Clarke, 4 Bosw. 632, affirming 2 id. 709; Craig v. Scott, 1 Wend. 35; King v. Sheriff of Surrey, 2 East, 181; Laing v. Cundall, 1 H. Bl. 76, note a; Wheeler v. Wilcox, 7 Abb. 73; Coster v. Watson, 15 Johns. 535.)

—— **Attorneys — who may be sureties on undertakings.]** The rule that an attorney and counselor shall not be surety on any undertaking or bond, does not apply to a person whose name still appears on the roll of attorneys, but who has abandoned the practice of the law to engage in another occupation. (3 How. Pr. [N. S.] 214 [Sp. T. Sup. Ct. 1886]; Stringham v. Stewart, 8 N. Y. Civ. Pro. Rep. 420 [Sup. Ct. Sp. T. 1886.]

—— **Liability of, on an undertaking.]** Where an attorney, without objection, becomes surety on an undertaking, he incurs no other or different responsibility than attaches to the obligation he signs, and the same can be enforced in no other or different manner than if it were the obligation of a person not an attorney or officer of the court. (Wilmont v. Meserole, 48 How. Pr. 430 [Sp. T. 1875]; S. C., 16 Abb. [N. S.] 309.)

SHERIFF — Cannot become bail.] (Bailey v. Warden, 20 Johns. 129; Banter v. Levy, 1 Chitt. 713; Bolland v. Pritchard, 2 W. Bl. 799; Doldern v. Feast, 2 Grange, 889, and note 1.)

—— **Discharged by qualification of bail.]** Where a sheriff has been discharged from liability under an order of arrest by the qualification and allowance of bail, the court has no power to renew his liability. (Lewis v. Stevens, 93 N. Y. 57 [1883].)

CITY COURT (of New York) — **Attachment — justification.]** On an undertaking given to discharge an attachment, issued from the New York City Marine Court, the sureties may justify before a county judge of the county in which they reside. (Seed v. Teale, 2 N. Y. Weekly Digest, 545 [Marine Court, 1876].)

RULE 6.

How Sheriff's Return Compelled.

At any time after the day when it is the duty of the sheriff, or other officer, to return, deliver, or file any process, or other paper, by the provisions of the Code of Civil Procedure, or by these rules of the courts, any party entitled to have such act done, except where otherwise provided by law, may serve on the officer a notice to return, deliver, or file such process, or other paper, as the case may be, within ten days, or show cause, at a Special Term to be designated in said notice, why an attachment should not issue against him.

Rule 8 of 1858. Rule 10 of 1871, amended. Rule 10 of 1874, amended. Rule 6 of 1877. Rule 6 of 1880, amended. Rule 6 of 1884. Rule 6 of 1888. Rule 6 of 1896.

CODE OF CIVIL PROCEDURE.

§ 14. Neglect to return — punishment for. See Judiciary Law, § 753.
§ 23. Writ or other process must be returned to the clerk, unless otherwise prescribed.
§ 102. Sheriff may make return by mail.
§ 103. Liability and punishment of sheriff for neglect to execute mandate in special proceedings.
§ 186. Former sheriff, after election of his successor, must execute mandate in his hands. See County Law, § 195.
§ 339. Execution and return of process issued from City Court of New York.
§ 577. Arrest and bail — duty of sheriff if bail is given.
§ 590. Arrest and bail — filing of papers if bail is not given.
§ 712. Return of sheriff where a warrant of attachment is annulled, etc.
§ 725. The return may be ordered amended by the court.
§ 825. In special proceedings; return, where to be filed.
§ 1715. Return of sheriff, in replevin — when to be made.
§ 1716. How return compelled.
§ 1818 *et seq.* Suit on sheriff's bond.
§ 2270. Notice to delinquent officer to show cause.

RECEIPT — For process.] The sheriff must give receipt for process delivered to him if required. (Code of Civil Procedure, § 100.)

DELIVERY TO DEPUTY — Liability of sheriff.] If the sheriff acts on an execution which was delivered to his deputy, he is liable for not returning it. (People v. Waters, 1 Johns. Cas. 137 [Sup. Ct. 1799]; S. C., Col. & C. Cas. 82.)

—— Delivery of process must be known to him.] The sheriff is not in contempt for not acting on process which never came to his personal knowledge, and

was not lodged at his office. (People v. Waters, 1 Johns. Cas. 137 [Sup. Ct. 1799]; S. C., Col. & C. Cas. 82.)

—— **Delivery to a person in charge of the business in the office of the coroner — when sufficient.**] (Manning v. Keenan, 9 Hun, 686 [Gen. T. 1877].)

RETURN — Process may be returned on the morning of the return day.] An officer may return process on the morning of the day of its return, and is not responsible, though he might, subsequent to the return, have executed the process. (Hinman v. Borden, 10 Wend. 367 [1833].)

—— **Sheriff to serve and return a declaration within a reasonable time.**] A declaration delivered to a sheriff to be served must be served and returned within a reasonable time. (Anon., 10 Wend. 572 [1833].)

—— **An officer is bound to use diligence in executing process.**] An officer having process requiring the arrest of a party is bound to use all reasonable endeavors to execute it. (Hinman v. Borden, 10 Wend. 367 [1833].)

—— **Sheriff is bound to levy under an execution regular on its face.**] It is the duty of a sheriff to levy under an execution regular upon its face; and it is no excuse for his omission that it varies from the amount for which the judgment was rendered. (Parmelee v. Hitchcock, 12 Wend. 96 [1834].)

—— **Sheriff not liable, if the execution was void.**] If the execution be void the sheriff is not liable for an escape of a debtor. (Ginochio v. Orser, 1 Abb. Pr. 433 [N. Y. Com. Pl. Sp. T. 1855].)

—— **Sheriff not excused for an escape by showing that the execution was irregular.**] The sheriff cannot protect himself in an action for an escape by showing irregularity in an execution against the person upon which the arrest was made. (Ginochio v. Orser, 1 Abb. Pr. 433 [N. Y. Com. Pl. Sp. T. 1855].)

—— **Irregularity in issue of writ — sheriff cannot take advantage of.**] When a sheriff cannot avail himself of the irregularity of the issuing of the writ. (Hinman v. Brees, 13 Johns. 529 [1816].)

—— **Sheriff to return writ without an order of the court.**] It is the duty of a sheriff to return a writ without an order of the court for that purpose. (Hinman v. Brees, 13 Johns. 529 [1816].)

—— **Effect on a return of a reversal of the order requiring it to be made.**] Where a return is made by a sheriff in pursuance of an order from which an appeal has been taken, the return should be canceled in case the order be reversed on the appeal. (Benedict, etc., Manuf'g Co. v. Thayer, 21 Hun, 614 [1880].)

—— **Demand for return not necessary before suit.**] If the sheriff does not return the *fi. fa.* by the sixtieth day after he receives it, he is liable to an action without being first called upon to make the return by rule or notice. (Corning v. Southland, 3 Hill, 552 [Sup. Ct. 1842].)

—— **Attachment to compel — an action may be brought.**] A sheriff is bound to return an execution according to the requisition of the statute; if he fails to do so he is liable to an attachment or an action at the election of the party aggrieved. (Wilson v. Wright, 9 How. Pr. 459 [Sp. T. 1854].)

—— **Damages for a failure to make — proof of.**] The plaintiff in an action against a sheriff for a failure to return an execution is only entitled to recover the damages sustained by the neglect of the sheriff; and where in such a case

it appears only that there was a small amount of property of the judgment debtor upon which a levy could have been made, it is error for the court to direct a verdict for the full amount of the execution, unless it appear beyond dispute that the full amount thereof could have been realized therefrom. (Dolson v. Saxton, 11 Hun, 565 [Gen. T. 1877].)

—— **Return by the deputy, as to the amount collected on an execution, conclusive on the sheriff.]** In an action by the plaintiff in an execution against a sheriff for the moneys collected upon it, the return is conclusive evidence in favor of the plaintiff of the amount, and, although made by a deputy of the sheriff, it cannot be impeached by him. (Sheldon v. Payne, 7 N. Y. 453 [1852].)

—— **Return of an execution after action commenced — damages — effect of return nulla bona.]** After the commencement of an action brought against the sheriff for a failure to return an execution within sixty days, he returned the same indorsed *nulla bona*. Upon the trial the plaintiff proved the issuing of the execution, and its return and indorsement after the commencement of the action. Held, that, as the return was made by a public officer of an official act he was bound by law to do, it was evidence in favor of the officer making it; that, as the plaintiff did not contradict the return, he was entitled to recover only nominal damages. (Bechstein v. Sammis, 10 Hun, 585 [Gen. T. 1877].)

—— **Effect of return of "not found" on the bail — their rights if the return is false.]** The return by a sheriff to an execution against the person of "not found" subjects the bail of the defendant to an action upon his undertaking, and is conclusive upon him. If the return is false, the bail has a right of action against the sheriff for the damage sustained by reason thereof. (Cozine v. Walter, 55 N. Y. 304 [1873].)

—— **Return of "discharged on bail" — when made by new sheriff.]** The old sheriff has no right to return a writ of *capias ad respondendum* after he is out of office, but should deliver it to the new sheriff with the assignment of the prisoner so that the new sheriff may return it with his indorsement of the discharge of the defendant on bail, by which the plaintiff will know the situation of the defendant. The new sheriff is not bound to give notice to the plaintiff of his having let the defendant to bail. (Richards v. Porter, 7 Johns. 137 [1810]. See, however, Code of Civil Pro., § 186.)

—— **Sheriff, after expiration of his term, may complete execution of a fi. fa.]** After a sheriff has gone out of office, he may complete the execution of a *fi. fa.* (Wood v. Colvin, 5 Hill, 228 [1843].)

CORRECTION OF RETURN — A return may be corrected, after an action for a false return has been commenced.] The return of a sheriff may be amended by leave of court, on proper terms and on due notice, after the commencement of an action for an insufficient and false return. (People v. Ames, 35 N. Y. 482 [1866].)

—— **A corrected return may be read in evidence with the same effect as if originally so made.]** Such a return may be read in evidence with the same effect as if originally made in the amended form. (People v. Ames, 35 N. Y. 482 [1866].)

—— **Omission of the sheriff to indorse the proper return on an execution —**

amendable nunc pro tunc.] The omission of the sheriff to indorse upon an execution the proper return before it is filed, is amendable *nunc pro tunc* after the filing; but he must pay the costs of the motion. (Hall v. Ayer, 19 How. Pr. 92 [Sp. T. 1859].)

EXCUSE FOR NOT RETURNING — Permission.] What will amount to permission to the sheriff from plaintiff's attorney to retain an execution in his hands, beyond the return day. (Humphrey v. Haythorn, Sheriff, 24 Barb. 278 [Gen. T. 1857]. See McKinley v. Tucker, 59 Barb. 93 [Gen. T. 1870].)

—— Waiver of right of action for nonreturn.] If the plaintiff in an execution treats it as properly in the officer's hands, after the return day, he waives his existing right of action for its nonreturn. (McKinley v. Tucker, 6 Lans. 214 [Gen. T. 1872].)

—— Plaintiff in execution, when not liable for instruction to sheriff.] The plaintiff in an execution is not answerable for having made a deputy sheriff, charged with its service, his agent by giving him instructions to sell goods levied upon, upon credit, if the deputy does nothing in conformity with the instructions. (Sheldon v. Payne, 7 N. Y. 453 [1852].)

—— Fees — nonpayment of.] A sheriff is entitled to prepayment of his fees for the service of a summons and complaint, but if he serves them without prepayment, he cannot retain them, and refuse to make a return because his fees are not paid. (Wait v. Schoonmaker, 15 How. Pr. 460 [Sp. T. 1858].)

—— Stay of proceedings.] An order staying proceedings on an execution in the hands of the sheriff, exonerates him during its continuance, from the duty of returning the execution. If the plaintiff desires to bring the sheriff into contempt, he must furnish him with proof that the stay is no longer in force. (The People v. Carnley, 3 Abb. 215 [Sp. T. 1856].)

—— Submission to arbitration after judgment — sheriff cannot set it up as an excuse for not returning an execution.] Where a judgment was recovered in an action for slander, from which judgment the defendant appealed to the General Term, and afterwards the parties, by an agreement in writing and mutual bonds of submission setting forth the pendency of the action, the trial thereof and the appeal, submitted the action to the decision of certain persons named as arbitrators, held, that all the legal proceedings were discontinued and ended by the submission and the judgment could no longer be proceeded upon. The defendant having revoked the submission, and a motion being made for an attachment against the sheriff for not returning an execution on the judgment pursuant to a notice served on him, held, that the sheriff could not avail himself of the submission as an answer to the motion; that the execution was not void, but only voidable, and that the right to avoid it was personal to the defendant, whose remedy was by motion to set aside the execution, or for a perpetual stay of proceedings. (Grosvenor v. Hunt, 11 How. Pr. 355 [Sp. T. 1854].)

PRESUMPTION — That the sheriff began its execution within the lifetime of the writ.] In the execution of a writ of possession after the return day, it will be presumed that the sheriff began the execution of the process within the lifetime of the writ. (Witbeck v. Van Rensselaer, 2 Hun, 55 [Gen. T. 1874].)

RULE 7.

Books to be Kept by Clerk of Courts.

The clerk of the Appellate Division in each department shall keep:

1. A book, properly indexed, in which shall be entered the title of all actions and proceedings which are pending in that court, and all actions or special proceedings commenced in the Appellate Division, with entries under each, showing the proceedings taken therein and the final disposition thereof.

2. A minute book, showing the proceedings of the court from day to day.

3. A remittitur book, containing the final order made upon the decision of each case, a certified copy of which shall be transmitted to the proper clerk, as required by the Code of Civil Procedure.

4. A book, properly indexed, in which shall be recorded at large each bond or undertaking filed in his office, with a statement of the action or special proceedings in which it is given, and a statement of any disposition or order made of or concerning it.

5. A book, properly indexed, which shall contain the name of each attorney admitted to practice, with the date of his admission, and a book, properly indexed, which shall contain the name of each person who has been refused admission or who has been disbarred or otherwise disciplined or censured by the court. The clerk of each department shall transmit to the clerk of the Court of Appeals and to the clerks of the other departments the names of all attorneys who have been admitted to practice, the names of all applicants who have been refused admission, and the names of all attorneys who have been disbarred, disciplined or censured by the court. The clerk of each department is directed to enter in the proper book the name of each attorney who has been admitted to practice, with date of his admission, and the name of each person who has been refused admission or has been disciplined, with the date of such refusal of admission or discipline, received from the other departments of the State, together with the date when and department wherein the order was made.

The clerks of the other courts shall keep in their respective offices, in addition to the "judgment book" required to be kept by the Code of Civil Procedure:

1. A book, properly indexed, in which shall be entered the title of all civil actions and special proceedings, with proper entries under each denoting the papers filed, the orders made and the steps taken therein, with the dates of the several proceedings.

2. A book in which shall be entered at large each bond and undertaking filed in his office, with a statement showing when filed and a statement of any disposition or order made of or concerning it.

3. Such other books, properly indexed, as may be necessary to enter the minutes of the court, docket judgments, enter orders and all other necessary matters and proceedings, and such other books as the Appellate Division in each department shall direct.

Rule 9 of 1858, amended. Rule 11 of 1871, amended. Rule 11 of 1874, amended. Rule 7 of 1877. Rule 7 of 1880. Rule 7 of 1884. Rule 7 of 1888, amended. Rule 7 of 1896. Rule 7 as amended, 1910.

CODE OF CIVIL PROCEDURE.

§ 816. Bond or undertaking to be filed with clerk, except when a different disposition thereof is directed.
§ 933. Certified copies of records in office of the clerk of the court made presumptive evidence.
§ 1236. Clerk to keep judgment book and enter judgments therein.
§ 1245. Certain clerks to keep docket-book.
§ 1672. *Lis pendens* to be recorded and indexed.
See notes under Rule 8.

RULE 8.

Judgments, When to be Entered and Docketed.

Judgments shall only be entered, or docketed, in the offices of the clerks of the courts of this State, within the hours during which, by law, they are required to keep open their respective offices for the transaction of business, and at no other time.

Rule 9 of 1858, amended. Rule 12 of 1871. Rule 12 of 1874. Rule 8 of 1877. Rule 8 of 1880. Rule 8 of 1884. Rule 8 of 1888. Rule 8 of 1896.

CODE OF CIVIL PROCEDURE.

§ 1236. Duty of clerk as to making up judgment rolls and recording judgments.
§ 1237. Judgment roll to be filed — of what to consist.
§ 1238. It must be prepared and furnished to the clerk by the attorney.
§ 1239. Clerk must make a minute of the filing on the back of the judgment roll.

§ 1251. Real property bound for ten years by a docketed judgment.
§ 1255. Time not included in the ten years.
§ 1256. Lien suspended on appeal.
§ 1319 *et seq.* Enforcing affirmed or modified judgment.
§ 1321. Canceling docket of reversed or modified judgment.
§ 1322. Correction of docket of judgment reversed in part by the Court of Appeals.
§ 1323. Restitution — when awarded.
§ 1380. Continuance of lien for three years and six months in case of death.

BUSINESS HOURS — Of county clerks.] Clerks of counties, courts of record and registers of deeds, except in the counties of New York and Kings, as hereinafter provided, shall respectively keep open their offices for the transaction of business every day in the year, except Sundays and other days and half days declared by law to be holidays or half holidays, between the thirty-first day of March and the first day of October next following, from eight o'clock in the forenoon to five o'clock in the afternoon, and between the thirtieth day of September and the first day of April next following, from nine o'clock in the forenoon to five o'clock in the afternoon. In the counties of New York and Kings said offices, the sheriff's office and the offices of the commissioner of jurors, shall remain open during the months of July and August in each year from nine o'clock in the forenoon to two o'clock in the afternoon, and during the other months in the year from nine o'clock in the forenoon to four o'clock in the afternoon. (Chap. 961 of Laws of 1895. Amended by ch. 534 of Laws of 1903.)

JUDGMENT — Authority to enter judgment.] Authority to render a judgment exists only where there is an existing action, and where an order determines that no action is pending, because process has not been served, and sets aside a notice of lien and *lis pendens*, there is no authority for entering a judgment for defendant for costs. (Booth v. Kingsland Ave. Bldg. Assn., 18 App. Div. 407 [1897].)

—— Signing and recording judgments — judgment book.] Every interlocutory judgment or final judgment shall be signed by the clerk and filed in his office, and such signing and filing shall constitute the entry of the judgment. The clerk shall, in addition to the docket books required to be kept by law, keep a book, styled the "judgment book," in which he shall record all judgments entered in his office. (Code Civil Procedure, § 1236.)

—— Omission of the clerk to sign a judgment.] The omission of the clerk to sign the judgment roll on entering up a judgment does not affect the validity of the judgment. It is a clerical error and a mere question of practice and of regularity, which the Supreme Court can and will at any time allow to be amended *nunc pro tunc*. (Van Alstyne v. Cook, 25 N. Y. 490 [1862]; Goelet v. Spofford, 55 N. Y. 647 [1873]; Bank v. Treadwell, 34 Barb. 553 [Gen. T. 1861]. See, however, as to service of a copy without the attestation of the clerk being effective to limit the time to appeal, Good v. Daland, 119 N. Y. 153 [1890].)

—— Judgment can only be entered according to the decision rendered.] The clerk can only enter judgment in accordance with the decision rendered,

and where the words of the referee are that the complaint "be dismissed, without costs," the clerk cannot add the words "upon the merits." (Petrie v. Trustees of Hamilton College, 92 Hun, 81 [1895].)

—— **How far it is necessary to enroll a decree.]** The final decree of a court of equity takes effect when it is made and declared by the court; and the record, when made up, is only evidence of the decree, and simply proves it, without adding anything to its validity. It is not necessary, even to enroll it, except in those cases where it is required to be enrolled as preliminary to some further action, which the statute authorizes to be taken upon it only after enrollment. (Butler v. Lee, 33 How. Pr. 252 [Ct. of App. 1866].)

—— **What constitutes.** A paper filed, stating the trial, verdict and costs taxed and ordering that judgment be entered in favor of the plaintiff and against the defendant, is not a judgment, but simply an order for judgment, and when docketed as a judgment will be set aside. (Marsh v. Johnston, 123 App. Div. 596.)

An order modifying a judgment and expressly stated to be supplementary to the judgment and in execution thereof, is itself a judgment, and is appealable. (Saal v. South Brooklyn Ry. Co., 122 App. Div. 364.)

—— **What is not a judgment.]** The finding of a referee in proceedings by the committee of the person and estate of an habitual drunkard for leave to sell his real estate for the payment of his debts, that a claim presented is a valid and subsisting debt against the drunkard for an amount stated, is not a judgment within the meaning of section 376 of the Code of Civil Procedure. (Sheldon v. Mirick, 144 N. Y. 498 [1895].)

—— **The entry made by the clerk on receiving a verdict is not the judgment.]** The entry, made by the clerk by the direction of the court on receiving a verdict, of the judgment to be rendered thereon is not the judgment. (Lentilhon v. Mayor, 3 Sandf. 721 [Gen. T. 1851].)

—— **The record constitutes the judgment in common-law actions.]** In common-law actions no judgment is pronounced, except by the record which is made up in the clerk's office. (Butler v. Lee, 33 How. Pr. 252 [Ct. of App. 1866].)

—— **Judgment book and docket distinguished.]** The judgment book required by section 1236 of the Code of Civil Procedure is a distinct and separate book from the judgment docket or docket book. (Sheridan v. Linden, 81 N. Y. 182 [1880].)

—— **Entry of judgment on a verdict.]** It is the duty of the clerk to enter judgment in conformity with the verdict, unless the court otherwise direct. (Morrison v. N. Y. & New Haven R. R. Co., 32 Barb. 568 [Sup. Ct. 1860].)

—— **Duty of clerk as to its entry in the judgment book.]** The clerk must enter in the judgment book "the judgment" in cases where the decision of the court is given in writing and filed and must insert a copy of such judgment in the judgment-roll in making it up, and sign the same. (Plankroad Co. v. Thatcher, 6 How. Pr. 226 [Sp. T. 1851].)

—— **Judgment not perfected until entered in the judgment book.]** A judgment upon a verdict is not perfected, under the Code, until entered in the judgment book with the amount of costs (if any) recoverable, inserted therein.

Until so entered, it is not a judgment from which an appeal can be taken to the Appellate Division. (Lentilhon v. Mayor, 3 Sandf. 721 [Gen. T. 1851].)

—— **Only one decision proper on several demurrers.]** Only one decision and only one judgment are proper in an action where several demurrers are interposed. (Pritz v. Jones, 117 App. Div. 643.)

—— **Delay of the clerk in entering a decree in the judgment book does not affect its validity.]** The delay of the clerk to enter a final decree in the judgment book does not affect its validity. (Butler v. Lee, 33 How. Pr. 252; S. C., 3 Keyes, 76 [Ct. of App. 1866]; Lynch v. Gas Light Co., 42 Barb. 591 [Gen. T. 1864].)

—— **Delay of a clerk to enter a judgment of which he has given a transcript.]** When a judgment roll is filed with a county clerk, and he gives a transcript of the judgment, which is docketed in another county, the lien of the judgment in the latter county is not affected by the fact that the clerk did not enter the judgment when the roll was delivered to him. (Steuben County Bank v. Alberger, 78 N. Y. 252 [1879].)

—— **Proper judgment where plaintiff recovers less than $50 and defendant recovers costs.]** Where plaintiff recovers less than $50 and defendant becomes, therefore, entitled to costs it is improper to enter separate judgments; one judgment only should be entered for the difference between the verdict and the costs in favor of the party entitled to it. (Warden v. Frost, 35 Hun, 141 [1885].)

—— **Decree, date of.]** A decree is properly dated the day the order was made directing its entry. (Clark v. Clark, 52 St. Rep. 228 [Supm. Ct. 1893]; affirmed without opinion in 138 N. Y. 653.)

—— **Motion in arrest of judgment must be for defects appearing on the record.]** A motion for arrest of judgment in a criminal action could not, before the Code of Criminal Procedure, and cannot now be made, save for some defect that appears upon the record; it may not be based upon proof by affidavits of facts outside and constituting no part of the record. (People v. Kelly, 94 N. Y. 526 [1884].)

—— **Presumption as to lost judgment-roll.]** If a judgment-roll cannot be found in the office of the clerk the presumption is, it is lost. (Manderville v. Reynolds, 68 N. Y. 528, 164 N. Y. 211.)

—— **Judgment-roll — duty of clerk.]** (Bacon v. Grossman, 90 App. Div. 204.)

—— **Time for entry.]** Municipal Court Act, § 239, requires that judgment be entered immediately after verdict. A failure to do so, however, is a mere irregularity. (Lyons v. Gavin, 43 Misc. 659.)

—— **Entry nunc pro tunc.]** Where an infant born after application for final judgment, was a necessary party, the court had authority to direct the entry of judgment *nunc pro tunc* in order to avoid any difficulty arising from the court's retention of the case for consideration. (Jewett v. Schmidt, 108 App. Div. 322.)

DOCKET — When a decree in equity should go on the docket.] The decree of a court of equity may never go upon the docket at all. It is only when a certain sum is directed to be paid that it is proper to enter it upon the docket. (Lynch v. Gas Light Co., 42 Barb. 591 [Gen. T. 1864].)

—— **Docket sufficient to sustain an execution, though no entry is made in the judgment book.]** A docket of a judgment held sufficient to sustain an execution, although no entry was made in the judgment book until after its being issued. (Appleby v. Barry, 2 Robt. 689 [Gen. T. 1864].)

—— **Docket, in county clerk's office, of judgment of United States court.]** A judgment of a United States court, though docketed in a county clerk's office, still remains a judgment of that court. (Goodyear Vulcanite Co. v. Frisselle, 22 Hun, 174 [1880]. See Cropsey v. Crandall, 2 Blatch. C. C. 341; U. S. R. S. 967; Meyers v. Tyson, 13 Blatch. C. C. 242 [1876].)

LIEN — Docket, unnecessary except to create a lien.] The docketing of a judgment is only necessary for the purpose of creating a lien upon land. (Whitney v. Townsend, 67 N. Y. 40 [1876].)

—— **When the lien attaches.]** The lien of a judgment does not attach until docketed; and as the lien is entirely regulated by statute, equity cannot extend it. (Buchan v. Sumner, 2 Barb. Ch. 165 [Chan. 1847]; Foot v. Dillaye, 65 Barb. 521 [Gen. T. 1873].)

—— **Failure to index a judgment avoids the lien.]** A judgment which the county clerk, in docketing, omitted to index against the judgment-debtor, does not become a lien upon his real estate, and the judgment-creditor for that reason cannot issue execution upon it by leave of the court at the expiration of a year from the death of the judgment-debtor under Code of Civil Procedure, section 1380. (Lefevre v. Phillips, 81 Hun, 232 [1894].)

—— **When the judgment is filed with the clerk out of office hours.** All judgments filed and docketed by a clerk out of office hours, although some may be entered before others, take effect and become liens equally at the next office hour after such docketing. (France v. Hamilton, 26 How. Pr. 180 [Gen. T. 1862]; Wardell v. Mason, 10 Wend. 573 [1833]. See, also, Hathaway v. Howell, 54 N. Y. 97 [1873].)

—— **Lien suspended on appeal and restored.]** Where the lien of a judgment has been suspended during an appeal by an order of the court, and an order has thereafter been made vacating such order of suspension and restoring the lien *nunc pro tunc*, the lien is subordinate to that of a judgment docketed in the interval between the two orders. (Harmon v. Hope, 87 N. Y. 10 [1881].)

—— **Continuance of lien.]** Since the Code of Civil Procedure took effect (§ 1251) the lien of a judgment only continues for ten years irrespective of other rights intervening. (Floyd v. Clark, 2 Monthly L. Bull. 36 [N. Y. Com. Pl. 1880].)

—— **Duration of lien.]** An award made by a city for the taking of a judgment-debtor's real estate for a public use, is personal property, and the ten-year limitation as to liens on real estate has no application. (Fawcett v. City of New York, 112 App. Div. 155.)

—— **Judgment against executors — what is bound by.]** (See People ex rel. Higgins v. McAdam, 84 N. Y. 295 [1881].)

ERRORS — Amendment of.] An entry made by a clerk in his minutes may be amended, so as to correct an error therein. (Smith v. Coe, 7 Robt. 477 [Sp. T. 1868].)

RULE 9.

Appearance — How Entered.

Rule 9 repealed, 1910.

CODE OF CIVIL PROCEDURE.

§ 55. A party may appear in person or by attorney.
§ 60. When resident of adjoining State may appear as an attorney — service, how made upon him.
§ 66. Lien of an attorney. See Judiciary Law, §§ 474, 475.
§ 421. Appearance by defendant — how made — requisites of notice of.
§ 424. Voluntary appearance — equivalent to the personal service of a summons.
§ 479. Notice of appearance may contain demand for copy complaint.
§ 1995. Parties to a special proceeding by State writ — may appear by attorney.
§ 2528. Appearance in Surrogate's Court.
§ 2886. Appearance in Justice's Court.
§§ 3364, 3365. Appearance in a condemnation proceeding.
See notes under Rule 18.

APPEARANCE — Authority of attorney assumed.] The authority of an attorney signing a petition will be assumed unless the contrary appears. (People ex rel. Adams v. Coleman, 41 Hun, 307 [Sup. Ct. 1886]; People v. Lamb, 85 id. 17 [1895].)

—— An appearance by an attorney, without authority, gives jurisdiction.] (Ferguson v. Crawford, 7 Hun, 25 [Gen. T. 1876]; Brown v. Nichols, 42 N. Y. 26. See, also, Korman v. Grand Lodge of United States, 44 Misc. 564.)

—— No jurisdiction acquired by a notice of appearance from an unauthorized attorney.] A notice of appearance from an attorney who acts without authority confers no jurisdiction on the court. (Burton v. Sherman, 20 W. Dig. 419 [Sup. Ct. 1884].)

—— Unauthorized appearance in a Justice's Court.] (Sperry v. Reynolds, 65 N. Y. 183 [1875].)

—— Unauthorized appearance for a nonresident.] In an action brought in the Supreme Court of the State of New York to establish a lien on real estate situated in that State, the unauthorized appearance of attorneys in behalf of one of the defendants, a nonresident owner of the real estate, does not confer jurisdiction upon the court to render a judgment directing the sale of the real estate in satisfaction of the lien, and the nonresident is entitled, as a matter of right, to have the judgment vacated and the appearance set aside, although no personal judgment was demanded or recovered against such nonresident defendant. (Myers v. Prefontaine, 40 App. Div. 603 [1899]; Matter of Estate of Stephani, 75 Hun, 188 [1894].)

—— Voluntary — effect of.] Voluntary appearance is equivalent to per-

sonal service. (Schwinger v. Hickox, 46 How. Pr. 114 [Supr. Ct. Sp. T. 1873]; Code of Civil Procedure, § 424.)

—— **Notice — not signed, etc., a nullity.]** A notice in an action not signed by the attorney serving it, and in which his place of business is not mentioned, is a nullity. (Demelt v. Leonard, 19 How. Pr. 182 [Gen. T. 1860]; Yorks v. Peck, 17 id. 192 [Gen T. 1858]; Brown v. Cook, 2 id. 40 [Sp. T. 1845].)

—— **Extension of time to appear.]** The court should not grant an extension of time to appear. (Bragelman v. Berding, 15 Abb. Pr. [N. S.] 22 [N. Y. Com. Pl. Sp. T. 1873].)

—— **Appearance by executor.]** Where an executor was sued, in his capacity as executor, and also individually, he may appear in each capacity by a different attorney. (Roche v. O'Connor, 95 App. Div. 496.)

WHAT CONSTITUTES AN APPEARANCE — By notice of appearance or a copy of an answer or demurrer, only.] Under section 421 of the Code of Civil Procedure, a defendant can only appear by serving a notice of appearance or a copy of a demurrer or answer. (Valentine v. Myers Sanitary Depot, 36 Hun, 201 [1885].)

—— **When an answer verified by a defendant not a resident of the State does not constitute a general appearance.]** Where a summons is served without the State, service of an answer verified by defendant or subscribed by a person as attorney for defendant cannot be regarded as a general appearance in the action so as to confer jurisdiction of the defendant, where the answer sets up the fact that the defendant was not, at the time of the commencement of the action, a resident of the State, and that he had no property therein, and had not been served with a summons in this State. (Hamburger v. Baker, 35 Hun, 455 [1885].)

—— **Motion, by a defendant not served.]** The defendant corporation in this case, although it had not been served with a copy of the summons and complaint, moved, without serving any formal notice of appearance, to have the complaint made more definite and certain; thereupon the plaintiff procured an *ex parte* order discontinuing the action as to the corporate defendant. Held, that this was proper; that the service of the notice of motion was not equivalent to an appearance. Under section 421 of the Code of Civil Procedure, a defendant can only appear by serving a notice of appearance or a copy of a demurrer or answer. (Valentine v. Myers Sanitary Depot, 36 Hun, 201 [Gen. T. 1885].)

—— **Notice of motion.]** Service of notice of motion signed by an attorney as "att'y for def't." (Ayer v. Western R. R. Co., 48 Barb. 132 [Gen. T. 1866]; Kelsey v. Covert, 15 How. Pr. 92 [Sp. T. 1857]; S. C., 6 Abb. 336, n; McKenster v. Van Zandt, 1 Wend. 13 [Sup. Ct. 1828]; Dole v. Manly, 11 How. Pr. 138 [Sp. T. 1855]; Baxter v. Arnold, 9 id. 445 [Sp. T. 1854]; Valentine v. Myers Sanitary Depot, 36 Hun, 201 [1885]; Cohen v. Levy, 27 Misc. Rep. 330 [1899]. See, however, as to effect of such appearance, Douglas v. Haberstro, 8 Abb. N. C. 240 [1880]. Signing a paper to produce a defendant, as attorney for defendant, New Haven Web Co. v. Ferris, 115 N. Y. 641 [1889].)

—— **Notice of retainer.** It is as effectual as if the defendant had entered

his appearance with the clerk. (Francis v. Sitts, 2 Hill, 362 [Sp. T. 1842]. See, also, Reed v. Chilson, 142 N. Y. 152 [1894].)

—— **Notice of bail.]** Notice of bail imports notice of retainer as attorney. (Quick v. Merrill, 3 Caines, 132 [Sup. Ct. 1805].)

—— **Notice to vacate attachment is not a general appearance.]** A service of notice to vacate an attachment, though without qualification, does not amount to an appearance generally. (Wood v. Furtick, 17 Misc. Rep. 561 [1896].)

—— **Appearance upon a motion.]** Where a corporation appears generally upon the first hearing of a motion, and consents to a reference to take testimony, it cannot afterward object to the jurisdiction of the court over it. (Ward v. Roy, 69 N. Y. 96 [1877].)

—— **Opposing a motion for an injunction.]** It was held that defendants, by appearing in this action by counsel and opposing a motion for an injunction, and reading affidavits in opposition to such motion, and filing the same, with the names of their attorneys in the action indorsed thereon, and by moving that all proceedings in the action be stayed, had submitted themselves to the jurisdiction of the court, and appeared in the action unconditionally. (Cooley v. Lawrence, 5 Duer, 605 [Gen. T. 1855].)

—— **Appearance on motion for alimony.]** Where a wife, after obtaining from the New Jersey Court of Chancery a decree of divorce from her husband, upon the service of process upon him by publication, makes a motion to amend the decree by inserting therein a provision for alimony, the general appearance on the motion of the husband's solicitor, who contests it on jurisdictional grounds and upon the merits, operates to confer jurisdiction on that court to render a judgment for alimony which will be recognized as valid by the courts of the State of New York. (Lynde v. Lynde, 41 App. Div. 280 [1899].)

—— **Affidavit and notice of motion.]** Service of affidavits and notice of motion to set aside a judgment of foreclosure entered by default, indorsed "F. W. T., attorney for defendant L." (Martine v. Lowenstein, 6 Hun, 225 [Gen. T. 1875].)

—— **Order extending time.]** Service of an order extending the time to answer, with a copy of the affidavit upon which it was founded, which stated the name of the defendant's attorneys. (Quin v. Tilton, 2 Duer, 648 [Sp. T. 1853]; Carpenter v. The N. Y. & N. H. R. R. Co., 11 How. Pr. 481 [Sp. T. 1855]. See Brett v. Brown, 13 Abb. Pr. [N. S.] 295 [1872]; Thomas v. Jones, 3 Monthly L. Bull. 36 [1881].)

—— **Procuring an extension of time to answer not an appearance.]** The procuring of an extension of time to answer by an attorney does not constitute an appearance in the action nor prevent another attorney from putting in an answer without procuring a substitution. (Benedict v. Arnoux, 1 N. Y. Anno. Cases, 407 [1895].)

—— **Stipulation signed "defendant's attorney."]** A stipulation extending the time to answer signed by an attorney as "defendant's attorney" does not prevent the service of the answer by another attorney. (Paine Lumber Co. v. Galbraith, 38 App. Div. 68 [1899].)

—— **Cross-examination by an unauthorized person not an appearance.**] The cross-examination of witnesses in a Municipal Court, by a person not authorized, held not to constitute an appearance in the action by the party. (Campbell v. Lumley, 24 Misc. Rep. 196 [1898].)

——**As to appearance for defendant residing in other State.**] (See Prichard v. Sigafus, 103 App. Div. 525.

HOW DETERMINED — Decision as to, not appealable.] In an action pending in the Supreme Court, it is for that court to decide whether there was a sufficient appearance by an attorney therein, and its decision is not appealable to the Court of Appeals. (Martine v. Lowenstein, 15 Albany Law Journal, 124 [Court of Appeals, 1877].)

—— **An appearance in a State court, by what rules considered.**] The entry of an appearance in a State court must be interpreted by the course and practice of that court; and that what is held in such court to be a submission to its authority in the cause, whether coerced or voluntary, must be deemed an appearance, and further, when such submission has once been made it cannot be retracted. (Cooley v. Lawrence, 5 Duer, 605 [Gen. T. 1855].)

BY WHOM AND WHEN — A husband may direct an appearance to be entered for his wife.] When the separate property of the wife is not in question, service on the husband is a good service on the wife, and he is authorized to direct an appearance to be put in for her. (Lathrop v. Heacock, 4 Lans. 2 [Gen. T. 1871]. See, however, White v. Coulter, 1 Hun, 366 [Gen. T. 1874]; Nagle v. Taggart, 4 Abb. N. C. 144 [Sp. T. 1877]; Watson v. Church, 3 Hun, 80 [Gen. T. 1874]; Foote v. Lathrop, 53 Barb. 183 [Gen. T. 1869]; S. C., 41 N. Y. 358.)

—— **Effect of, by partners, where only one has been served.**] Where a notice of appearance for both defendants is served and accepted in an action against partners, one of whom only was served, such appearance gives the defendant not served all the rights of a party actually served, and the plaintiff is bound to accept an answer and notice of trial served on behalf of such defendant. (Fox v. Brooks, 7 Misc. Rep. 426 [N. Y. City Ct. 1894].)

—— **When the counsel may be regarded as the attorney.**] Where a counsel, who is to try a cause signs his name as attorney both before and after the decease of the attorney of record, he may be deemed to be the attorney by the opposite party. (Cambridge Valley National Bank v. Matthews, 1 Law Bulletin 10 [Sp. T. 1878].)

—— **When a party may appear.**] A party to a suit brought for the foreclosure of a mortgage may serve a notice of appearance at any stage of the action (*e. g.*, after entry of judgment), and is thereafter entitled to notice of all subsequent proceedings. (Martine v. Lowenstein, 6 Hun, 225 [Gen. T. 1875]; affirmed, 68 N. Y. 456.)

—— **In person — not allowed when an attorney appears.**] A party who has appeared by attorney cannot, while the retainer continues, appear on the record in person. (Halsey v. Carter, 6 Robt. 535 [Sp. T. 1866].)

—— **An attorney precluded from acting after he has given a consent for substitution to his client.**] A consent for substitution given by an attorney to his client precludes the attorney from acting subsequently in the action,

notwithstanding the fact that no order has been entered on that consent. (Quinn v. Lloyd, 5 Abb. [N. S.] 281 [N. Y. Sup. Ct. Sp. T. 1863].)

—— **Appearance in Justice's Court—effect of appearance specially in Justice's Court and when authority ends.]** (Cutting v. Jessimer, 104 App. Div. 283.)

EFFECT OF—A waiver of want of jurisdiction over the person.] A general appearance by a defendant is a waiver of any want of jurisdiction in the court over his person. (Palmer v. The Phœnix Mut. Life Ins. Co., 10 N. Y. W. Dig. 179 [Gen. T. 1880]; Wheelock v. Lee, 15 Abb. Pr. [N. S.] 24 [Gen. T. 1873]; Schwinger v. Hickox, 46 How. Pr. 114 [Sup. Ct. Sp. T. 1873]; Schmalhotz v. Polhaus, 49 id. 59 [Supr. Ct. Gen. T. 1875], and Dieckerhoff v. Alder, 12 Misc. Rep. 445 [1895].

—— **Jurisdiction over the person admitted by an appearance and answer.]** Where the court has jurisdiction of the subject-matter of an action, consent will confer jurisdiction of the person, and in case of a foreign corporation such consent may be expressed by appearing by attorney and answering generally in the action. (McCormick v. Railroad Co., 49 N. Y. 303 [1872].)

—— **Objection to jurisdiction waived by appearance and demurrer.]** Where it was claimed that an appeal should be dismissed as to a nonresident defendant, because the process was not properly served, it was held, that the defendant, by appearing and demurring, thereby waived all objections to the regularity or sufficiency of the service. (Ogdensburg & L. C. R. R. Co. v. Vermont & C. R. R. Co., 63 N. Y. 176 [1875]. See, also, Sweetzer v. Kembert, 11 Misc. Rep. 107 [1895].)

—— **Waives defects in service.]** A general appearance, only, waives defects in service of process. (Brett v. Brown, 13 Abb. Pr. [N. S.] 295 [Sp. T. 1872]; Carpentier v. Minturn, 65 Barb. 293 [Gen. T. 1873]; Mack v. American Express Co., 20 Misc. Rep. 215 [1897].)

—— **Voluntary appearance by the United States.]** By a voluntary appearance in a State court, as a claimant to a fund, the United States becomes subject to the jurisdiction and bound by the decision of the State court. (Johnston v. Stimmel, 89 N. Y. 117 [1882].)

—— **Appearance where an attachment is issued.]** A voluntary appearance is as effective as the actual service of the summons within thirty days after the service of an attachment. (Catlin v. Ricketts, 91 N. Y. 668 [1883].)

—— **Appearance of nonresident by attorney confers jurisdiction.]** In an action to recover money, brought upon a Michigan judgment, the summons was served out of the State, pursuant to an order of publication, upon defendants, who were nonresidents. A warrant of attachment was also issued, but no property was levied upon. Defendants entered a general appearance by an attorney, who served a general notice of retainer. An answer was served alleging that neither of the defendants was a resident of the State, nor had they any property therein, and that the court had no jurisdiction. Held, that the appearance and notice gave jurisdiction, and that a personal judgment was properly rendered. (Reed v. Chilson, 142 N. Y. 152 [1894].)

—— **An appearance for a corporation sustained, though it was improperly served with the summons.]** An appearance for a corporation by officers of the court will be valid and give jurisdiction, whether the service of process upon

its officers be good or not, provided the corporation is still in existence. (Murray v. Vanderbilt, 39 Barb. 141 [Sp. T. 1863].)

——When general appearance precludes raising the question whether the action might be brought under Code Civil Procedure, section 1780.] A general appearance by a foreign corporation after personal service, gives the court jurisdiction, and precludes its raising the question, on a motion to set aside the service, whether the action is one which could be brought by a nonresident, under Code Civil Procedure, section 1780, and such question should be raised by demurrer or answer. (Mabon v. Ongley Electric Co., 24 App. Div. 50 [1897].)

—— Appearance by an alien and nonresident.] Where, in an action commenced against him, a nonresident alien appears generally, the court acquires jurisdiction, and the fact that the appearance was put in, in order to protect his property, imperiled by the issuing of an attachment in the action, does not change the effect of the appearance. (Olcott v. Maclean, 73 N. Y. 223 [1878]; Reed v. Chilson, 142 N. Y. 152. See, also, Woodruff v. Austin, 16 Misc. Rep. 543 [1896].)

—— A general appearance by one sued in a local court — does not admit its jurisdiction over the subject-matter.] A general appearance by a defendant sued in a local court — as for instance, the City Court of Brooklyn — does not waive his right to object in his answer that the court has no jurisdiction of the subject-matter of the action, if the case is such that the only element of locality which can exist, and the only means by which the cause can be brought within the territorial limits of jurisdiction of the court as a local court, is the service of the summons within those limits. (Wheelock v. Lee, 5 Abb. N. C. 73 [Gen. T. City Court of Brooklyn, 1878].)

—— As to waiver objection to the jurisdiction of the court. (See Matter of Hathaway, 71 N. Y. 238 [1877].)

——Waiver, in a case where the demurrer to the jurisdiction of the court over the person of the defendant and the appearance is a qualified one. (See O. & L. C. R. R. Co. v. Vt. C. R. R. Co., 16 Abb. [N. S.] 249 [Sp. T. Sup. Ct. 1874]; 4 Hun, 712.)

BY ONE NOT SERVED — A defendant not served cannot appear.] A defendant cannot appear and plead in a cause as a matter of course, never having been served with a process. (McKnight v. Baker, 1 How. Pr. 201 [Sp. T. 1845].)

—— A defendant not served cannot move to dismiss the complaint.] One of several defendants who has not been served with a summons or complaint cannot voluntarily appear and move to dismiss the complaint under section 274 of the Code of Procedure, where his rights are not affected. He must be contented to remain quiet out of court until invited to appear there. (Tracy v. Tucker, 7 How. Pr. 327 [Sp. T. 1852]. See, also, Valentine v. Myers Sanitary Depot, 36 Hun, 201 [1885].)

—— A defendant against whom judgment is asked for has a right to appear although not served.] A defendant against whom a judgment is prayed by the complaint, although no summons has been served on him, has a right to appear and answer. (Higgins v. Freeman, 2 Duer, 650 [Sp. T. 1853]; and this,

although he has been adjudged a bankrupt. McLoughlin v. Bieber, 26 Misc. Rep. 143 [1899].)

—— **A partner not served may appear.**] In an action against partners on a joint liability, a defendant, though not served, is entitled to appear and answer. (Wellington v. Claason, 9 Abb. 175 [Chamb. 1859]; Fox v. Brooks, 7 Misc. Rep. 426 [N. Y. City Ct. 1894].)

—— **Motion by a partner not served to set aside a judgment regularly entered against the firm.**] On a motion by one partner to set aside a judgment on the ground of collusion between the plaintiff and the other partner, entered in form against the firm, in precise conformity to the statute; that is, by service of process on one only, without any appearance by the defendant not served, the court entertained the application, and it was held that the court should not sanction any act which would encourage concealment and contrivance between partners who owe each other confidence and good faith. (Griswold v. Griswold, 14 How. Pr. 446 [Sp. T. 1857].)

OBJECTION — To the right to appear, when it should be taken.] An objection to the right of plaintiff's attorney to appear and bring the suit, must be raised by a motion before trial, since it is a question of practice, not of title or jurisdiction. (People v. Lamb, 85 Hun, 171 [1895].)

PROOF OF AUTHORITY — What proof of his authority to appear required of an attorney in an action to recover real estate.] Where the authority of an attorney to bring an action for the recovery of the possession of real estate adversely held is questioned by a party whose name appears as one of the plaintiffs, the attorney must produce a "written request of such plaintiff, or his agent, to commence such action," or a "written recognition of the authority of the attorney to commence the same." (Stewart v. Bailey, 56 How. Pr. 256 [Chamb. 1878]. See Code of Civil Procedure, § 1512.)

—— **It is discretionary with the court to require an attorney to show his authority to appear.**] As a general rule when the right of an attorney to use the name of a plaintiff is questioned by the opposite party, if the attorney be a reputable member of the bar, the court will not, unless the action be one for the recovery of land, require proof of the authority to be produced; but the right of the court to require its production in all cases is undoubted, and it will be exercised when, in its judgment, the ends of justice demand it. (Stewart v. Bailey, 56 How. Pr. 256 [Chamb. 1878].)

—— **Extent of inquiry as to authority.**] On a motion to compel an attorney to produce his authority for bringing an action for a foreign corporation, the court will not go into the question whether such corporation has forfeited its charter, nor pass on the question whether its president had power to authorize such action. (Havana City R. Co. v. Ceballos, 25 Misc. 660 [1898].)

—— **Ejectment — proof of authority must be filed.**] In an action of ejectment the plaintiff's attorney may be compelled to file and serve written evidence of his authority to sue. (Stewart v. Hilton, 27 Misc. 239 [1899].)

—— **Where one appears for defendant in another State — burden of proving authority for appearance.**] (See Prichard v. Sigafus, 104 App. Div. 535.)

RELIEF FROM UNAUTHORIZED APPEARANCE — When a judgment will not be set aside because an appearance was unauthorized.] Upon a motion to

set aside a judgment entered by default, held, that as the appearance was regular in form, the court acquired jurisdiction of the person of the defendant, and that, as it was not alleged that the attorneys were insolvent, the judgment should not be set aside for the sole reason that their appearance was in fact unauthorized. (Powers v. Trenor, 3 Hun, 3 [1874].)

——Unauthorized appearance for one not a partner in a firm represented.] The unauthorized appearance by an attorney for one who claimed not to be a partner in the firm the attorney represented held not to make the judgment conclusive upon such party, no rights of third persons having intervened. (American A. & P. Paint Co. v. Smith, 90 Hun, 609 [1895].)

——Laches.] Relief from an unauthorized appearance will not be granted when the moving party has been guilty of laches. (Marston v. Johnson, 18 How. Pr. 93 [Gen. T. 1856]; Fry v. Bennett, 16 id. 385 [Sp. T. 1858]; Humphrey v. Chamberlain, 11 N. Y. 274 [1854]. See Burton v. Sherman, 20 W. Dig. 419 [Sup. Ct. 1884]; Ferguson v. Crawford, 7 Hun, 25 [1876]; Brown v. Nichols, 42 N. Y. 26.)

——Not set aside where the attorney has died and there is laches.] The court should not grant a motion to set aside the appearance of an attorney who has not authority to appear, when the attorney has died and there is laches. (Vilas v. Butler, 29 St. Rep. 664 [Sup. Ct. 1890].)

——When an unauthorized appearance works no injury it will not be stricken out.] Where it is shown that an attorney who appeared in an action was not authorized to appear therein, and that injustice will be done by allowing the appearance to stand, the court, upon the application of a party whose rights are imperiled, will take adequate measures for their protection; but where an unauthorized appearance works no injury, a motion to strike it from the record is properly denied. (Brower v. Kahn, 76 Hun, 68 [1894].)

——No remedy in a collateral proceeding.] As a general rule and unless some peculiar and extraordinary circumstances appear, where a party appears in a court of record by an attorney, the objection that he was not served with process and that the appearance was unauthorized may not be taken in a collateral proceeding or action, but the party is confined to a motion in the original action in order to obtain relief. (Washbon v. Cope, 144 N. Y. 287 [1895]; Vilas v. P. M. R. R. Co., 123 id. 440 [1890].)

——An unauthorized appearance for a nonresident.] An unauthorized appearance by attorneys for a nonresident defendant in an action to establish a lien upon real estate of such nonresident does not confer jurisdiction. (Myers v. Prefontaine, 40 App. Div. 603 [1899].)

——Appearance by person forbidden to practice.] Attorney sending one to appear for him who is not authorized to practice cannot afterwards take that objection. (Kerr v. Walter, 104 App. Div. 45.)

——May be disputed by judgment-debtor.] Where a judgment recites that the debtor appeared by a certain attorney, it is conclusive, but the question of his authority to appear may be disputed in an attempt to enforce judgment. (Korman v. Grand Lodge of U. S., 44 Misc. 564.)

PLACE OF RESIDENCE — How determined.] An attorney has the right himself to decide where he resides. (Rowell v. McCormick, 5 How. Pr. 337 [Sp. T. 1850]; S. C., 1 Code R. [N. S.] 73.)

—— **Service by mail at.**] And after such decision, service by mail can only be made by him at the place indicated, and the opposite party can only make service upon him by mail by addressing him at that place. (Hurd v. Davis, 13 How. Pr. 57 [Sp. T. 1856]; Rowell v. McCormick, *supra.*)

—— **Relates to the post office.**] The words "place of residence," relate to the post office, and not to any particular locality in a town or city. Therefore, held, that service of a copy complaint mailed at Fonda, N. Y., directed to the defendant's attorneys "New York," was good, although the latter signed their notice of appearance, "No. 52 Grove street, in the city of New York." (Oathout v. Rhinelander, 10 How. Pr. 460 [Sp. T. 1855]; Rowell v. McCormick, *supra.*)

FOREIGN JUDGMENT — Recital of appearance in the record of.] The record of a judgment of another State which recites that defendant appeared by attorney is only presumptive evidence of authority in the attorney. (Howard v. Smith, 42 How. Pr. 300 [Supr. Ct. Gen. T. 1870]; S. C., 1 J. & S. 124.)

WITHDRAWAL OF APPEARANCE — It may be withdrawn on payment of costs.] When, under misapprehension as to his authority, an attorney, instead of specially appearing in an action, appears generally, his notice of appearance may be withdrawn upon his paying the costs of motion. (Dillingham v. Barron, 26 N. Y. Supp. 1109 [N. Y. Supr. Ct. 1893]. See, also, Hunt v. Brennan, 1 Hun, 213 [1874].)

SPECIAL APPEARANCE — What demand of notice of execution of any reference or writ of inquiry entitles defendant thereto.] Where defendant does not appear generally, but only demands notice of the execution of any reference or writ of inquiry which might be granted, he is merely entitled to five days' notice of such reference, and not to notice of an application for the appointment of a referee or to notice of motion to confirm the referee's report, and he cannot upon motion attack the sufficiency of the evidence before the referee. (Arkenburgh v. Arkenburgh, 14 App. Div. 367 [1897].)

—— **An objection specially to jurisdiction is good ground for extending time to appear generally and to plead.**] Where a nonresident defendant appeared specially to object to the jurisdiction and to move to set aside an order for the publication of the summons in the action, held, that his motion to extend the time to appear generally and to plead, until the determination of the appeal taken from an order adverse to his contention, should be granted, the objection to the jurisdiction being substantial. (Everett v. Everett, 22 App. Div. 473 [1897].)

—— **Prohibition to act not avoided by.**] A new attorney prohibited, by order, from acting cannot avoid the same by a special appearance. (Sheldon v. Mott, 84 Hun, 608 [1895].)

—— **By nonresident.**] A nonresident may appear specially. (Reed v. Chilson, 142 N. Y. 152.)

REMOVAL TO U. S. COURT — Time of removal — not restricted to that of entering appearance.] The provision of subdivision 1 of section 639 of the Revised Statutes, requiring the petition of removal to be filed in the State court at the time of entering an appearance of defendants, is repealed by section 2 of the act of March 3, 1875 (Chap. 137). (La Mothe Mfg. Co. v. The

National Table Co. Works, 7 Reporter, 138 [U. S. Ct., S. D. of N. Y. 1879].)

—— **As to appearance in Surrogate's Court.]** (See Code of Civil Procedure, § 2528.)

RULE 10.

Change of Attorneys — How Made.

An attorney may be changed by consent of the party and his attorney, or upon application of the client upon cause shown and upon such terms as shall be just, by the order of the court or a judge thereof, and not otherwise.

Rule 12 of 1858. Rule 15 of 1871, amended. Rule 15 of 1874. Rule 10 of 1877. Rule 10 of 1880. Rule 10 of 1884, amended. Rule 10 of 1888. Rule 10 of 1896.

See notes under Rules 9 and 11.

SUBSTITUTION — Nature of application.] An application by a client to change his attorney is not a motion in the action but is a summary proceeding, addressed to the discretion of the court. The failure of a referee appointed to determine the compensation of an attorney, to report within sixty days, does not entitle a party to end the reference by a notice under section 1019 of the Code.

Semble, such a reference is to be deemed made under section 827 and not section 1015 of the Code. (Matter of Doyle v. Mayor, 26 Misc. 61 [1899].)

—— **Jurisdiction of the Supreme Court on motion or in special proceeding.]** The Supreme Court has jurisdiction, either upon a motion or in a special proceeding, to determine controversies arising out of the professional relations of attorneys and clients, and upon what terms attorneys shall be changed in pending actions. (Matter of Barkley, 42 App. Div. 597 [1899].)

—— **When allowed.]** A party has no right, without showing any cause except his own will, to substitute one attorney for another without payment of the costs earned. (Supervisors of Ulster County v. Brodhead, 44 How. Pr. 411 [Sp. T. 1873]; Creighton v. Ingersoll, 20 Barb. 541 [Gen. T. 1855]. See Hazlett v. Gill, 5 Robt. 611 [Sp. T. 1866]; Wolf v. Trochelman, Id. [Sp. T. 1866]; Hoffman v. Van Nostrand, 14 Abb. 336 [Chambers, 1862].)

—— **Substitution allowed — where the only service rendered by the original attorney was to make an appearance.]** (People's Bank v. Thompson, 63 N. Y. St. Repr. 165 [1894].)

—— **Payment of costs.]** A substitution of attorneys may be ordered with or without the condition of the payment of costs. (Sheldon v. Mott, 91 Hun, 637 [1895].)

—— **What the order of substitution should direct — reference to fix compensation.]** An order directing substitution should not require the attorney to give up his connection with all actions in which he is attorney for the client, without providing for the settlement of all matters between the attorney and client, fixing the amount due him and arranging for payment. The General

Term may appoint a referee to fix his compensation. (City of Philadelphia v. Postal Telegraph Cable Co., 1 App. Div. 387 [1896].)

—— **Where an attorney has been guilty of misconduct.]** Where an attorney has misconducted himself, the court will order an unconditional substitution. (Pierce v. Waters, 10 W. Dig. 432 [1880].)

—— **Improper and neglectful conduct.]** Where the attorney's conduct has been improper and neglectful, the court will deny its protection as to his fees, and will direct an unconditional substitution, leaving the attorney to his action for his fees. (Matter of Prospect Avenue, 85 Hun, 257 [1895].)

—— **Omitting necessary parties.]** Where, through an attorney's neglect, necessary parties defendant were omitted, it was held that a new attorney should be substituted without conditions, the former attorney having agreed with the plaintiff that no expense should be incurred, and his services having been valueless. (Reynolds v. Kaplan, 3 App. Div. 420 [1896].)

—— **When substitution allowed.]** Right of the plaintiff, who has brought the action under an agreement by which he represents other claims than his own, to substitute attorneys, where that will result in a discontinuance which will cause the other claims to be barred by the Statute of Limitations. (Hirshfeld v. Bopp, 5 App. Div. 202 [1896]; 157 N. Y. 166.)

—— **Right of a client to change his attorney is absolute — lien for fees.]** A client has a right to change his attorney at his own volition, whatever may be his motive, whether a mere caprice or a substantial reason. The relation requires the most unlimited confidence and perfect harmony. The attorney has no claim upon papers placed in his hands, except the lien upon them to secure costs and fees; and even this lien will be, under certain circumstances, so modified as to compel him to produce such documents upon an emergency pressing for their use. (Trust v. Repoor, 15 How. Pr. 570 [Supr. Ct. Sp. T. 1856]; Ogden v. Devlin, 13 J. & S. (45 N. Y. Supr. Ct.) 631 [1879]. See, also, Matter of Davis, 7 Daly, 1 [1897].)

—— **Consent of attorney alone not enough.]** The consent of an attorney himself is not sufficient to authorize the substitution of another attorney in his place. (Buckley v. Buckley, 45 St. Rep. 827 [Sup. Ct. 1892]; Felt v. Nichols, 21 Misc. 404 [1897].)

—— **Consent of court to.]** An attorney cannot be changed without leave of the court or an order of a judge of the court. (Krekeler v. Thaule, 49 How. Pr. 138 [Sp. T. Com. Pl. 1875].)

—— **An order of substitution is essential.]** A person cannot be substituted as an attorney in the suit merely by filing the written consent of the first attorney, but in all cases an order of the court is necessary to render the substitution valid. (Roy v Harley, 11 N. Y. Leg. Obs. 29 [Sp. T. 1852].)

—— **When it takes effect.]** Until the usual order of substitution is entered, and notice thereof served, the adverse party will be entirely justified in treating only with the attorney who first appeared in the action. (Parker v. City of Williamsburgh, 13 How. Pr. 250 [Sp. T. 1856]; Robinson v. McClellan, 1 Id. 90 [Sp. T. 1845].)

—— **Service of notice without order, sufficient.]** It is sufficient to serve notice of substitution; the order need not be served. (Bogardus v. Richtmeyer, 3 Abb. 179 [Sp. T. 1856]; Dorlon v. Lewis, 7 How. Pr. 132 [Gen. T. 1852].)

—— **Where one attorney is retained, a second can act only after being duly substituted.]** Where an attorney is retained, another attorney cannot act for the party without being regularly substituted, and the act of such second attorney will be disregarded by the court. (Jerome v. People, 1 Wend. 293 [1828].)

—— **Attorney retiring from a suit — when he loses his claim for compensation.]** An attorney retained generally to conduct a legal proceeding enters into an entire contract to conduct the proceeding to its termination, and if, before such termination, he abandons the service of his client without justifiable cause and reasonable notice, he cannot recover for the services he has rendered. The employment, however, by the client, without the consent of his attorney, of a counsel, with whom he cannot cordially co-operate, is a justifiable cause for his withdrawal from the case. (Tenney v. Berger, 93 N. Y. 524 [1883]; Picard v. Picard, 83 Hun, 338 [1894].)

—— **Attorney's withdrawal not justified by a failure to pay his fees.]** To maintain his lien, the attorney must show performance on his part, or a condition clearly justifying his withdrawal. Where he refuses to proceed in an action, on the ground that his fees are not paid, and to permit another attorney to conduct the cause, he may be compelled to submit to the substitution by order of the court. (Halbert v. Gibbs, 16 App. Div. 126 [1897].)

—— **Wrongful substitution of attorney.]** An order removing an attorney and substituting another was held erroneous, in the absence of proof of misconduct or delay, where the attorney had begun a foreclosure suit under an agreement to receive one-half of the recovery, including the costs, and where the bond and mortgage were sold by a receiver in supplementary proceedings. (Steenburgh v. Miller, 11 App. Div. 286 [1896].)

—— **When an appeal is pending in the Court of Appeals — application should be made to the court below.]** Where, after appeal to the Court of Appeals the appellant's attorneys at her request substitute another attorney in their place, a motion for an order directing the former attorney to turn over the papers in the case to the substituted attorney is not properly made in the Court of Appeals, but should be made in the court below. (People ex rel. Hoffman v. Board of Education, 141 N. Y. 86 [1894]. See, also, Henry v. Allen, 147 N. Y. 346 [1895].)

—— **A long delay justifies it.]** Where there has been a long delay in the litigation, an application by the plaintiff for a substitution of attorneys should not be denied, but the court should determine whether substitution should be granted, on payment of the attorney's fees or unconditionally, because of his misconduct. (Barkley v. N. Y. C. & H. R. R. R. Co., 35 App. Div. 167 [1898].)

—— **Opposite attorney required to permit inspection of the pleadings by a substituted attorney.]** Defendant's attorney may be ordered to allow the inspection of the pleadings and a copy thereof to be made by a lawyer who has been substituted for the plaintiff's attorney, when the plaintiff cannot learn the whereabouts of his former attorney, and does not know the position in which the action stands. (Butterfield v. Bennett, 30 St. Rep. 302 [Supm. Ct. 1890].)

—— **Conclusiveness of a determination of the Appellate Division requiring**

substitution.] The Supreme Court has jurisdiction and the Appellate Division has original jurisdiction, either upon *ex parte* or contested motion or in a special proceeding, to determine controversies arising out of the professional relations of attorneys and clients, and upon what terms attorneys shall be changed in pending actions, and such determination is conclusive upon the delinquent attorneys and their privies in the action brought by them against the client.

What delay to prosecute establishes such neglect by an attorney as will justify the granting of an order allowing the plaintiff to substitute another in his place, considered. (Matter of Barkley, 42 App. Div. 597 [1899].)

—— Attorney's rights to be protected.] Rights of attorney should be protected where no actual misconduct shown; and when attorney has rendered services and received no compensation therefor, substitution should not be granted without protecting his lien. (Anglo-Continental Chemical Works v. Dillon, 111 App. Div. 418].)

Client is ordinarily entitled to change his attorney at his own volition, by order of the court. (People v. Bank of Staten Island, 112 App. Div. 791; Johnson v. Ravitch, 113 App. Div. 810.)

An attorney under general retainer has no implied authority to bind his client by contract to sell land. (Matter of City of New York, 112 App. Div. 160.)

Where, after judgment is reversed, a party asks for a substitution of attorneys, and both the attorney and the party consent that fees be fixed by court and declared a lien on any amount recovered, it is proper for the court to make an order determining the amount. (Scheu v. Blum, 124 App. Div. 678.)

—— Court will not stipulate that bond be given.] Court cannot enter order of substitution with the condition that a bond be given to the former attorney to secure his claim for services. (Lederer v. Goldston, 63 Misc. 322.)

As to admission of attorneys, see notes under Rule 1, *supra*.

As to appearance of attorneys, see notes under Rule 9, *supra*.

As to stipulations, see notes under Rule 11, *infra*.

AUTHORITY CEASES — Attorney's authority ceases, when.] The authority of the plaintiff's attorney ceases on the entry of judgment. (Moore v. Taylor, 40 Hun, 56 [1886].)

——An attorney precluded from acting, after he has given a consent for substitution to his client.] A consent for substitution, given by an attorney to his client, precludes the attorney from acting subsequently in the action, notwithstanding the fact that no order has been entered on the consent. (Quinn v. Lloyd, 5 Abb. [N. S.] 281 [Sp. T. 1868].)

—— Rule staying proceedings for thirty days after notice in case of death or removal — not applicable after entry of judgment.] The provisions of section 65 of the Code of Civil Procedure, to the effect that where an attorney dies or is removed before judgment, no further proceeding shall be taken against his client until thirty days after notice to appoint another attorney, does not apply after judgment and preceding an appeal. (Hall v. Putnam, 23 Wkly. Dig. 513 [Sup. Ct. 1885].)

—— It ceases with the entry of judgment.] The authority of an attorney

ceases with the entry of judgment, and the defendant may lawfully employ another attorney to open a default without substitution. (Davis v. Solomon, 25 Misc. 695 [1899]; Magnolia Metal Co. v. Sterlingworth R. Supply Co., 37 App. Div. 366 [1899].)

As to Justice's Court see Cutting v. Jessmer, 101 App. Div. 283.

—— **After entry of judgment, a new attorney without substitution may sign notice of appeal.]** By the entry of judgment an action is ended and the function of the attorney ceases, and a new attorney thereafter employed by the defeated party may sign a notice of appeal without entry of an order of substitution. (Webb v. Milne, 10 Civ. Proc. Rep. 27 [N. Y. Supr. Ct. Sp. T. 1886].)

—— **Substitution for the purposes of an appeal without an order.]** Under Rule 3 of the Court of Appeals, a new attorney may be substituted by a party who contemplates an appeal to that court without an order of the court. (Magnolia Metal Co. v. Sterlingworth R. Supply Co., 37 App. Div. 366 [1899].)

—— **Appeal cannot be taken by a new attorney unless substituted.]** An appeal from a judgment cannot be taken by a new attorney for the party appealing until such attorney has been properly substituted in the place of the former attorney. (Shuler v. Maxwell, 38 Hun, 240 [Sup. Ct. 1885]. See 101 N. Y. 657; *contra*, Webb v. Milne, 10 Civ. Proc. Rep. [Browne] 27 [Supr. Ct. Sp. T. 1886].)

—— **Notice of appeal not signed by the attorney of record — objection, how to be taken.]** Where a notice of appeal is signed by an attorney other than the attorney of record, the objection should be raised by a motion to dismiss the appeal. (Thierry v. Crawford, 33 Hun, 366 [1884].)

—— **Notice must come from the prevailing party.]** Notice of entry of judgment, in order to limit the time to appeal therefrom, must come from the prevailing party or his attorney; no other party, nor the attorney representing another party, has the power to set running the time which will bar the appeal. (Kilmer v. Hathorn, 78 N. Y. 228.)

—— **When relation exists.]** In order to establish relation of attorney and client it is not necessary to show that attorney acted for the client in a legal proceeding. (Sheehan v. Erbe, 103 App. Div. 7.)

—— **Acceptance of service of notice of appeal, compelled.]** While the authority of an attorney ceases at judgment, except that he may take the necessary steps to collect it, the attorney of record may be compelled to accept service of a notice of appeal. (Magnolia Metal Co. v. Sterlingworth R. Supply Co., 26 Misc. 63 [1899].)

—— **The satisfaction of a judgment by the original attorney of record, for whom another has been substituted after judgment was recovered, is invalid.]** The substitution of another attorney operates as a revocation of the authority of the original attorney of record to satisfy a judgment upon its payment, and a satisfaction executed by such attorney is not conclusive against the substituted attorney where the judgment-debtor had notice of the substitution before payment was made. (Mitchell v. Piqua Club Assn., 15 Misc. 366 [1895].)

—— **Liability of attorney after relation ceases.]** Where attorney acts for client after the settlement of a claim, unless specially understood, the relation of attorney and client continues. (Bingham v. Sheldon, 101 App. Div. 48.)

—— **When party entitled to order without payment of additional fees.**] Where attorney refused "for reasons satisfactory to himself" to further act as attorney for a client, she is entitled to an order of restitution without payment of additional fees. (Cary v. Cary, 97 App. Div. 471.)

——**Applies to surrogates' courts.**] Rule 10 held applicable to the Surrogate's Court in Matter of Smith, 111 App. Div. 23.

—— **Delegation of authority.**] In an action by a client against his attorney, it is error to instruct the jury that as a matter of law the attorney could delegate his power and authority to another without the concurrence of the client. (Lacher v. Gordon, 127 App. Div. 140.)

LIEN OF AN ATTORNEY — Extent of it.] As to the extent of an attorney's lien, see Richardson v. Brooklyn City & Newtown R. R. Co., 24 How. Pr. 322 [Gen. T. 1872]. (See Code of Civil Procedure, § 66.)

—— **What it does not embrace.**] An attorney's lien does not include a referee's fees, nor does it extend to all the real and personal property of the client involved in the suit. (Hinman v. Devlin, 40 App. Div. 234.)

—— **General indebtedness.**] It does not cover any general indebtedness of the client to his attorney. (West v. Bacon, 13 App. Div. 371.)

—— **Lien where a judgment is for costs only.**] Section 66 of the Code of Civil Procedure was intended to enlarge the lien of an attorney, not to limit it, by making the lien attach from the commencement of the action; and where the judgment is for costs only, the attorney is regarded in equity as the owner of the judgment until he is paid for his services. (Matter of Lazelle, 16 Misc. 515 [1896].)

—— **Continuing an action by an attorney for the costs.**] An attorney, under the Buffalo charter, may not continue an action in the Municipal Court of Buffalo for the wages of an unskilled laborer after a settlement by his client, with a view to recovering the statutory costs. (Drago v. Smith, 92 Hun, 536 [1895].)

—— **Where compensation is to be paid from proceeds of judgment.**] When an attorney renders services in an action under an agreement that he shall receive his compensation out of the proceeds thereof, he has an equitable lien upon or ownership, as equitable assignee, in such proceeds. (Harwood v. La Grange, 137 N. Y. 538 [1892].)

—— **To what it attaches.**] An attorney's lien for compensation attaches to the judgment in the hands of an assignee for value without actual notice; *a fortiori* if there be such notice. (Guliano v. Whitenack, 9 Misc. Rep. 562 [N. Y. Com. Pl. 1894].)

The lien attaches to the judgment recovered. (Bevins v. Alvro, 86 Hun, 590 [1895].)

—— **To what papers the lien attaches.**] Attorneys employed by contractors to procure a clear title to a right of way for a railroad have a lien on the muniments of title of the railroad. (Hilton Bridge Construction Co. v. N. Y. Central Railroad, 84 Hun, 225 [1895]; S. C., 145 N. Y. 390.)

—— **Upon what property.**] An attorney has a lien upon all deeds and papers in his hands belonging to his client, and until he is paid the court will not order them to be given up. (The Bowling Green Savings Bank v. Todd, 64 Barb. 146 [Gen. T. 1872]. See Code of Civil Procedure, § 66.)

—— **Lien on property in a receiver's hand.**] When attorney's lien attaches to property in a receiver's hands. (Whitehead v. O'Sullivan, 12 Misc. 577 [1895].)

—— **Attorney's lien superior to a judgment-creditor's.**] The lien of an attorney for his costs and compensation on a judgment prevails over the lien of a judgment-creditor in supplementary proceedings instituted against the party who recovered the judgment, and notice of the lien to such judgment-creditor is not essential to make it effective. (Dienst v. McCaffrey, 66 N. Y. St. Repr. 200 [1895].)

—— **Satisfaction set aside.**] A satisfaction piece of a judgment set aside to the extent of the costs where a settlement of the action was made without the knowledge of the attorney. (Roberts v. Union Elevated Railroad Co., 84 Hun, 437 [1895].)

—— **The judgment cannot be impeached for lack of authority.**] In a proceeding to enforce an attorney's lien on a judgment, neither the judgment-debtor nor an assignee of the judgment can impeach it for lack of authority to prosecute the action in which the judgment issued. (Guliano v. Whitenack, 9 Misc. Rep. 562 [N. Y. Com. Pl. 1894].)

—— **Measured by taxable costs.**] The lien given to an attorney by section 66 of the Code of Civil Procedure is presumptively measured by the amount of the taxable costs, and where more is claimed, such claim must be protected by notice. Such a lien cannot attach to a cause of action which, in its nature, is not assignable. (Keane v. Keane, 86 Hun, 159 [1895].)

—— **Taxable costs the extent of the attorney's recovery.**] Plaintiff's attorney can recover only to the extent of the taxable costs, when in such an action he notifies the defendant that under a contract with his client he is entitled to a share in the recovery. (Oliwell v. Verdenhalven, 17 Civ. Proc. R. 362 [N. Y. City Ct. 1889].)

—— **Entitled to taxable costs as of right — disbursements.**] An attorney is entitled to the taxable costs for his services as a matter of right, but not to disbursements, unless he proves that they were actually made. (Kult v. Nelson, 25 Misc. 238 [1898].)

—— **The lien extends to all provisional remedies.**] A plaintiff, by executing a release, cannot discharge a defendant who is imprisoned by the direction of an order when plaintiff's attorney opposes such discharge, as the attorney's lien extends to all provisional remedies which have been granted. (Crouch v. Hoyt, 30 N. Y. Supp. 406 [Supm. Ct. 1894].)

—— **Not limited to services in the particular action.**] An attorney has a lien upon a fund, to be paid his client on the settlement of an action by the parties thereto, to the extent of the general balance due him, and is not confined to the value of his services in the particular action. (Canary v. Russell, 10 Misc. Rep. 597 [1895].)

—— **No lien for general services on proceeds of a judgment paid to the receiver of his client.**] An attorney has no lien for his general services upon the proceeds of a judgment which never came into his hands, but were paid to the receiver of his client; but only for services rendered in the action in

which the judgment was recovered. (Anderson v. E. de Braekeleer, 25 Misc. 345 [1898].)

—— **A lien does not apply to a special proceeding.**] (Matter of Lexington Ave., No. 1, 30 App. Div. 602 [1898].)

—— **Does not embrace alimony.**] In an action for separation, an attorney is not entitled to fees from alimony awarded his client, and has no lien thereon. (Weill v. Weill, 18 Civ. Proc. R. 241 [Sup. Ct. Sp. T. 1890].)

—— **Lien restricted in case of substitution.**] In a proceeding for the substitution of an attorney in two pending suits, held, that the attorney's lien should be restricted to the papers in his hands in the two cases. (Hinman v. Devlin, 40 App. Div. 234 [1899].)

—— **The attorney of record.**] The attorney of record alone is entitled to a lien on a judgment. (Kennedy v. Carrick, 18 Misc. 38 [1896].)

—— **Counsel has not a lien.**] A counsel cannot retain papers until his fees are paid. (Brown v. Mayor, 9 Hun, 587 [1877]; Estate of Michael Sichling, 2 Law Bulletin, 98 [1880].)

—— **An attorney cannot claim as assignee of a cause of action for personal injury.**] An attorney cannot become the assignee of his client's cause of action for personal injuries, and prosecute an action in his own behalf, after the settlement of the controversy between the parties, the plaintiff not having had any right to assign his cause of action. (Oliwell v. Verdenhalven, 17 Civ. Proc. R. 362 [N. Y. City Ct. 1889].)

—— **Lien not assignable.**] When an attorney transfers papers of a client to a third party, on making an assignment to such party of his claim against the client for services, the third party cannot retain possession of the papers from the client as security for the assigned claim, but must deliver them up, and be remitted to an action for any claim he may have against the client. (Sullivan v. Mayor, etc., of New York, 68 Hun, 544 [1893].)

—— **Enforced against his client's assignee.**] In the case of the assignment of a judgment rendered in favor of his client, an attorney may enforce his claim for compensation from the proceeds of an execution in the possession of the sheriff, even if notice of such claim has not been given the assignee, and the assertion by said assignee that the judgment was recovered upon a false demand does not affect the claim of the attorney. (Marvin v. Marvin, 46 St. Rep. 259 [N. Y. City Ct. 1892].)

—— **Assignment of judgment — lien no answer to summary proceedings.**] Where a transfer of the claim in suit was proposed and accepted during the pendency of the action, but by advice of the attorney no formal assignment was made until after judgment, the attorney will be held to have prosecuted the action for the benefit of the assignee, and the latter may maintain summary proceedings against the attorney to compel the payment of the moneys collected by him upon the judgment.

The assertion of a lien by the attorney is not an answer to summary proceedings, but it is discretionary with the court to proceed in the matter.

In such a case the court may order a reference to ascertain the amount of the attorney's lien. (Gillespie v. Mulholland, 12 Misc. Rep. 40 [N. Y. Com. Pl. G. T. 1895].)

—— **An attorney's lien authorizes entry of judgment after his client's death.**] The defendant in an action died about 10 a. m. the same day that the General Term of this court handed down and filed a decision affirming an order denying a motion to vacate the judgment rendered in the action on appeal from the order of affirmance.

Held, that it appearing that defendant's attorney had a lien on the judgment for costs, he was entitled as an equitable assignee to enter the judgment and issue execution thereon. (Peetsch v. Quinn, 6 Misc. Rep. 52 [N. Y. City Ct. 1893].)

—— **Proof of the extent of the attorney's lien.**] Where a client, after issue has been joined, settles the action, his attorney, upon prosecuting the action for the protection of his lien to recover a certain portion of the amount received by the client upon the settlement, is not entitled to judgment unless he is able to establish the cause of action in issue under the pleadings. The statement by the attorney that under an agreement with his client he was to receive that amount for compensation, does not in itself authorize the court to direct judgment in his favor. (Casucci v. Allegany and Kinzua R. R. Co., 29 Abb. N. C. 252 [Supm. Ct. 1892].)

—— **How determined.**] The court has power to determine the amount of the attorney's lien by reference. (Gillespie v. Mulholland, 12 Misc. Rep. 43 [N. Y. Com. Pleas, G. T. 1895].)

—— **Attorney may follow proceeds into hands of third parties.**] The provisions of the Code of Civil Procedure (§ 66) create a loan in favor of the attorney on his client's cause of action, and enable him to follow the proceeds into the hands of third parties, without regard to any settlement before or after judgment. (Peri v. N. Y. Central R. R. Co., 152 N. Y. 521 [1897].)

—— **When a lien of attorney cannot be defeated by a setoff between the parties to the action.**] Where an attorney has a lien on an undertaking given on appeal from an order vacating an attachment, for compensation for his services in vacating the attachment, held that this lien could not be defeated by a setoff between the parties to the action. (Bamberger v. Oshinsky, 21 Misc. Rep. 716 [1897].)

—— **Does not prevent the settlement of the action by the parties.**] The provision of the Code of Civil Procedure (§ 66) giving to an attorney, who appears for a party in an action, "a lien upon his client's cause of action, or counterclaim, which attaches to a * * * judgment in his client's favor," does not prevent the parties to the action from settling the same, or the client from releasing a judgment in his favor.

While the lien cannot be affected by a release of the judgment, and while, it seems, if a release has the effect to defraud the attorney, the court may and should set it aside in order to protect the lien, the judgment will not be kept alive after the release unless necessary for the protection of the attorney. Until the lien is asserted in some way, the judgment remains the property of the client.

In order, therefore, to warrant the court in disregarding a settlement and release made between the parties in an action, it must be shown that to give

full effect to them will operate as a fraud upon the attorney, or to his prejudice by depriving him of his costs, or turning him over to an irresponsible client. (Poole v. Belcha, 131 N. Y. 200 [1892].)

——**A settlement with a destitute client set aside.**] A settlement with a destitute plaintiff after judgment, without notice to her attorney will be set aside at his instance, to enable him to enforce his lien, although he has not given notice of such lien. (Vrooman v. Pickering, 25 Misc. 277 [1898].)

——**Entry of judgment after settlement.**] A judgment entered by plaintiff's attorney, after a settlement by the parties, though in ignorance thereof, is irregular, and will be set aside in the absence of proof that such settlement was collusive, or that the plaintiff was irresponsible. (Publishers' Printing Co. v. Gillin Printing Co., 16 Misc. 558 [1896].)

The lien does not prevent a settlement.] The existence of an attorney's lien does not affect the validity of a settlement by the parties as between themselves. (Williams v. Wilson, 18 Misc. 42 [1896].)

——**The lien is superior to a right to set off a judgment.**] *Semble*, that the attorney for a defendant in whose favor a judgment for costs has been entered upon the dismissal of the complaint, acquires a lien thereon for his compensation, which is superior to the right of the plaintiff to set off a prior judgment in his favor, whether he seeks to enforce such right upon a motion or by an action. (Ennis v. Curry, 22 Hun, 584 [1880]. See, however, Sanders v. Gillet, 8 Daly, 183 [1878].)

——**The settlement of an action to defeat an attorney's lien is ineffectual.**] A settlement by the client of a pending action, in order to defeat the lien of his attorney, for the agreed compensation of one-third of the recovery, is ineffectual, and the attorney will be allowed to continue and prosecute the action to establish his lien. (Astrand v. Brooklyn Heights R. R. Co., 24 Misc. 92 [1898].)

——**Defendant may settle action, despite attorney's lien.**] The defendant may settle the litigation without regard to his attorney, unless he has interposed a counterclaim or there is fraud and collusion. (Longyear v. Carter, 85 Hun, 513 [1895].)

——**Protection against compromise — what constitutes a good cause of action.**] An attorney commenced an action in consideration of an agreement under which he was to receive a percentage of the recovery, and the client and the defendant settled the action between themselves. The attorney set forth this agreement in the complaint in an action against said client and defendant, and that a collusive settlement had been made between them, in order to defeat the plaintiff of his just compensation. Held, that such complaint alleged a good cause of action, and should not have been dismissed. (Murphy v. Davis, 19 App. Div. 615 [1897].)

——**Satisfaction of a judgment without notice to the attorney, where the creditor is insolvent.**] A satisfaction of a judgment given by the judgment-creditor, without the knowledge of his attorney, will be set aside on motion of the attorney where the creditor is insolvent. (Mitchell v. Piqua Club Assn., 15 Misc. 366 [1895].)

——**Control of attorney by court.**] If an attorney seeks to take unfair

advantage of the desire of parties to settle, he will be confined in his lien to his taxable costs, and such additional amount as he may be able to establish by agreement, express or implied. (Peri v. N. Y. Central R. R. Co., 152 N. Y. 521 [1897].)

—— **Excessive charges — retaining money for.]** An attorney should not be allowed to retain moneys of his client for what seem to be excessive charges, where the only evidence to support them is his opinion that they were fair, but he should be required to produce legal experts upon the question of the value and necessity of the services. (Matter of Raby, 25 Misc. 240 [1898].)

—— **Lien restored when an attorney is compelled to repay an allowance.]** Where an attorney has consented to a substitution and thus lost his lien, relying on his right to an extra allowance granted to him, an order compelling a return of a portion of such allowance should be conditioned on terms which, in effect, will restore his lien on his client's distributive share for his services. (Cooper v. Cooper, 27 Misc. 595 [1899].)

—— **Lien of attorney not affected by a conveyance to himself.]** An attorney for one of the parties to an action to set aside a conveyance, after judgment directing the grantee to convey to a trustee for that party, received a conveyance of the property to himself, and at the same time executed a declaration of trust "for the purposes expressed in said judgment, and in no other way." Held, that this did not affect his lien on the premises for services he had rendered in the action. (West v. Bacon, 13 App. Div. 371 [1897].)

—— **Continues though the claim is barred by Statute of Limitations.]** An attorney's lien on moneys of his client in his possession, for the amount of a general balance due him for professional services, continues to exist after and notwithstanding his remedy by action, for the debt has become barred by the Statute of Limitations; and the attorney has a right to retain such money until his account is adjusted and to have it set off and applied upon his account, in an action brought against him by the client to recover the money in his hands. (Maxwell v. Cottle, 72 Hun, 529 [1893].)

—— **Municipal Court of Buffalo — no lien in.]** Section 66 of the Code of Civil Procedure, giving an attorney a lien on his client's cause of action, does not apply to the Municipal Court of Buffalo. (Drago v. Smith, 92 Hun, 536 [1895].)

—— **Where there is no counterclaim in the answer, the lien of the defendant's attorney cannot attach.]** Where the defense pleaded does not purport to be a counterclaim, and the answer does not set up facts showing a counterclaim, there is nothing to which the lien of defendant's attorney may attach, and he cannot have the action, which he alleges to have been settled in defraud of his rights, continued in order to enable him to enforce them. (White v. Sumner, 16 App. Div. 70 [1897].)

—— **Notice by attorney of his interest in the recovery — necessary.]** An attorney must have given notice of the assignment of a part of the recovery to him, in order to justify his moving to set aside a settlement entered into between the parties. (Jenkins v. Adams, 22 Hun, 600 [1880].)

—— **Notice to the defendant's attorney is not notice to the defendant.]** Notice to the defendant's attorney of the existence of the lien of the plain

tiff's attorney is not notice to the defendant, and will not protect the plaintiff's attorney from a settlement made by the defendant. (Wright v. Wright, 7 Daly, 62 [1877]; Peri v. N. Y. Central R. R. Co., 152 N. Y. 521 [1897].)

—— **Notice is not necessary.]** An attorney has a lien upon his client's cause of action and upon the judgment recovered therein, to the extent of the compensation agreed upon, and no notice thereof is reqnisite. (Lewis v. Day, 10 W. Dig. 49 [Sp. T. 1866, City Ct. of Brooklyn, 1880].)

—— **When the attorney is regarded as an equitable assignee of a judgment.]** Where a firm of attorneys has rendered services and paid out money in an action (which resulted in a jndgment in favor of their client), and in other actions relating to the subject-matter of the first action (snch services and disbnrsements equaling in value the amount of the jndgment), such attorneys may be regarded as the equitable assignees of the judgment, and they have the right to satisfy their lien by process of execution. (Van Camp v. Searle, 79 Hun, 136 [1894]. See, also, Peetch v. Quinn, 9 Misc. Rep. 52 [N. Y. City Ct. 1893].)

—— **Settlement by client — effect of.]** Where defendant settles after cause is on calendar court may impose costs to the attorney. (Nat. Ex. Co. v. Crane, 167 N. Y. 500.)

—— **Attorneys' lien may be established although they may not be entitled to vacate a satisfaction of a judgment.]** (Corbit v. Watson, 88 App. Div. 467. See, also, Serwer v. Sarasohn, 91 App. Div. 538.)

ENFORCEMENT OF LIEN — A special proceeding — appealable.] An application by an attorney of record of the plaintiff to vacate a satisfaction of judgment, executed by his client to enforce the judgment by execution to the extent of the attorney's lien thereon, based upon facts distinct from those passed upon at the trial, is a special proceeding and not a motion in the action. Hence, an order of the Appellate Division, confirming an order granting the application, is appealable to the Court of Appeals, as an order finally determining a special proceeding. (Peri v. N. Y. Central R. R. Co., 152 N. Y. 521 [1897].)

—— **Collusive satisfaction of judgment, when set aside.]** A collusive satisfaction of judgment will be set aside in favor of the attorney's lien, and, *semble*, even though the satisfaction be without intent to defraud the attorney.

On a motion to set aside such satisfaction, the conrt, upon evidence, may determine the extent of the attorney's lien and set aside the satisfaction to that amount. (*Ib.*)

—— **Settlement of an action in fraud of attorney's rights, how vacated.]** It can only be vacated on his application made in his own name. (Murray v. Jibson, 22 Hun, 386 [1880].)

—— **How enforced.]** Such lien may be enforced by motion in the action itself. (Canary v. Russell, 10 Misc. Rep. 597 [Sup. Ct. Sp. T. 1894].)

—— **Compensation and lien of attorney.]** Whether agreement that attorney shall have fifty per cent. of recovery for prosecuting action depends upon the circumstances of each case. (Morehouse v. Brooklyn Heights R. Co., 185 N. Y. 520.)

An attorney's lien cannot be affected by settlement between client and

defendant without the attorney's knowledge and consent. (Oishei v. Penn. Ry. Co., 117 App. Div. 110. See, also, Matter of Speranza, 186 N. Y. 280; Oishei v. Met. St. Ry. Co., 110 App. Div. 709; Matter of Smith, 111 id. 23; Ransom v. Cutting, 112 id. 150; Agricultural Ins. Co. v. Smith, 112 id. 840; Sullivan v. McCann, 124 id. 126; Matter of Brackett, 114 id. 257; Van Der Beek v. Thomason, 50 Misc. 524; Horn v. Horn, 100 N. Y. Supp. 790; Horn v. Horn, 115 App. Div. 292; Baxter v. Conner, 119 id. 450; Heyward v. Maynard, 119 id. 66; Crossman v. Smith, 116 id. 791; Rose v. Whiteman, 52 Misc. 210; Kneeland v. Pennell, 54 id. 43; Matter of Williams, 187 N. Y. 286; Matter of Goodale, 58 Misc. 182; Haire v. Hughes, 127 App. Div. 530; Knickerbocker Invest. Co. v. Voorhees, 121 id. 690; Leosk v. Hoagland, 64 Misc. 156; Bloch v. Bloch, 131 App. Div. 859; Matter of Bergstrom & Co., 131 id. 791; Matter of Mahar, 131 id. 420; Webb v. Parker, 130 id. 92.)

As to rights of attorney in respect of lien after he has become insane, see Matter of Stanton, 53 Misc. 515.

Lien not affected by removal of case to United States courts. (Oishei v. Penn. Ry. Co., 111 App. Div. 110.)

Attorney may have a lien upon his client's cause of action even though the client be an executor or administrator. (Matter of Ross, 123 App. Div. 74.)

Attorney issuing execution to enforce his lien on a judgment should restrict the execution to the amount of the lien. (Bloch v. Bloch, 136 App. Div. 770.)

Attorney who had successfully resisted claim of next of kin upon property of his client, an administratrix, held to have no lien on the property. (Matter of Robinson, 125 App. Div. 424.)

When attorney can be compelled to surrender property in his hands on which he claims a lien. (Matter of Edward Ney Co., 114 App. Div. 467; People ex rel. White v. Feenaughty, 51 Misc. 468.)

In action by client to recover moneys collected by an attorney, burden on defendant to prove he was justified in having made settlement for less sum than agreed upon between himself and client. (Harkavy v. Zisman, 96 N. Y. Supp. 214.)

RULE 11.

Agreements between Parties or Attorneys to be in an Order or in Writing.

No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

Rule 13 of 1858. Rule 16 of 1871. Rule 16 of 1874. Rule 11 of 1877. Rule 11 of 1880. Rule 11 of 1884. Rule 11 of 1888. Rule 11 of 1896.

VERBAL STIPULATION — In court.] Verbal stipulations made by counsel in open court, upon the argument of a cause, will be enforced by the court,

especially if acted on before revocation, or entered in the minutes. [Jewett v. The Albany City Bank [1840], Clarke's Chan. [Moak ed.] 247; and see cases collected in note, p. 254; Banks v. The American Tract Society, 4 Sandf. Ch. 438 [1847]; Staples v. Parker, 41 Barb. 648 [Gen. T. 1864].)

—— **Before referee.]** So also agreements, relating to the proceedings on a reference, made in the presence of the referee. (Ballou v. Parsons, 55 N. Y. 673 [1874]; Corning v. Cooper, 7 Paige, 587 [1839]; Livingston v. Gidney, 25 How. Pr. 1 [Sp. T. 1863].)

—— **Out of court — void.]** Agreements made out of court and not in writing, as required by this rule, cannot be enforced. (Broome v. Wellington, 1 Sandf. 664 [1847]; Leese v. Schermerhorn, 3 How. Pr. 63 [Sp. T. 1847]; Bradford v. Downs, 25 App. Div. 581 [1898].)

—— **Agreement to settle.]** An agreement in settlement of an action need not be in writing. (Smith v. Bach, 82 App. Div. 608 [1903].)

—— **Agreement to waive irregularities.]** A stipulation to waive irregularities in the issuing of a commission must be in writing. (Mason & Hamlin Organ Co. v. Pugsley, 19 Hun, 282 [1879].)

—— **To postpone a trial or notify counsel for a criminal.]** (People v. Haggerty, 5 Daly, 535 [1875].)

—— **As to matters collateral to the action.]** To what cases the rule applies. (First Nat. Bank v. Tamajo, 77 N. Y. 476 [1879].)

—— **As to disbursements.]** (See Rust v. Hauselt, 8 Abb. N. C. 148 [1880].)

—— **Effectual by estoppel.— When party has been misled.]** The rule has no application where a party has been led to rely on the stipulation to his disadvantage. (Mutual Life Ins. Co. v. O'Donnell, 146 N. Y. 275 [1895]; Montgomery v. Ellis, 6 How. Pr. 326 [Sp. T. 1851]; People v. Stephens, 52 N. Y. 306 [1873]; Wager v. Stickles, 3 Paige, 407 [1832]; Stinnard v. N. Y. Fire Ins. Co., 1 How. Pr. 169 [Sp. T. 1845]; Griswold v. Lawrence, 1 Johns. 507 [1806]. To the contrary, Connell v. Stalker, 21 Misc. 609 [1897]; Patterson v. Knapp, 83 Hun, 492 [1895].)

AVOIDANCE OF STIPULATION — Party seeking to avoid a stipulation on the ground of fraud.] Where a party or attorney, in disregard of a stipulation entered into by him in the case — *e. g.*, to change the venue — proceeds in the cause on the alleged ground that the stipulation was obtained by fraud and has no binding force, he assumes the peril, in case the question of fraud is decided against him, of having all the proceedings set aside as irregular, with costs. (Fitch v. Hall, 18 How. Pr. 314 [Sp. T. 1859].)

—— **Stipulations — when relieved against by the court.]** The court, in the exercise of its discretion, may relieve litigants from stipulations signed by counsel when either unadvisedly or inadvertently signed, or when, under the circumstances revealed, the stipulations should not be allowed to stand. (Mayor, etc., of N. Y. v. Union Ferry Co., 9 N. Y. W. Dig. 558 [Gen. T. April, 1880].)

—— **When the court may set it aside.]** Where parties can be restored to the same position in which they would have been if no stipulation had been made, the court may, in its discretion, set aside the stipulation. (Barry v. Mut. Life Ins. Co., 53 N. Y. 536 [1873]; Seaver v. Moore, 1 Hun, 305 [1874].)

—— **A party stipulating that certain allegations of a pleading are true cannot thereafter claim the contrary.]** (Driscoll v. Brooklyn U. El. R. Co., 95 App. Div. 146.)

EFFICIENCY OF — Enforcement of stipulation that a decision shall be final.] The Court of Appeals has the power to enforce a mutual stipulation made between the parties in the court from which the appeal is taken, by which they agreed that the decision in such case should be final, and that no appeal should be taken. (Townsend v. Stone Company, 15 N. Y. 587 [1857].)

—— **Stipulation as a cause of action.]** An action brought upon a stipulation is brought upon a new contract, and when supported by a new consideration it is enforcible. (Davidson v. Davidson, 29 App. Div. 629 [1898].)

—— **Judgment modified under a stipulation — effect of an appeal and reversal of the judgment.]** Power of the court on appeal to modify a judgment upon a stipulation of the parties, and to affirm it as modified. Effect upon such stipulation of an appeal to the Court of Appeals by the unsuccessful party, and his obtaining there a general judgment of reversal and a new trial. (Crim v. Starkweather, 32 Hun, 350 [1884].)

—— **Use of stipulation upon second trial.]** A stipulation by an elevated railroad company, whereby it waives certain objections, is not affected by a reversal of the original judgment, and it will control the court upon a second trial. (Hine v. N. Y. Elevated R. R. Co., 149 N. Y. 154 [1896]. See, also, Clason v. Baldwin, 152 id. 204 [1897]; Converse v. Sickles, 16 App. Div. 49 [1897].) And upon appeal from the judgment rendered thereon. (Ryan v. Mayor, 154 N. Y. 328 [1897].)

—— **Power of the Attorney-General to waive right to appeal.]** The Attorney-General has power to waive his right to appeal or to discontinue an action brought by him under the provisions of the act authorizing him to institute suits for the purpose of annulling certain contracts for canal repairs. (People v. Stephens, 52 N. Y. 306 [1873].)

—— **Stipulation not to appeal.]** A stipulation not to appeal is a proceeding in the cause, and a waiver in consideration thereof of the right to move to dismiss an appeal is a waiver of a substantial right. (People ex rel. Burby v. Common Council of Auburn, 85 Hun, 601 [1895].)

—— **Violation of stipulation — effect of.]** Where a stipulation was made upon the entry of a judgment, that execution should not issue until the amount of a certain claim in favor of the debtor against the plaintiff had been adjusted, and in violation thereof a transcript of the judgment was filed and execution was issued, and an order obtained to examine the judgment debtor, held, that the execution should be set aside and the order vacated. (Eames v. Bagg, 8 App. Div 541 [1896].)

—— **Abandonment of stipulation.]** Where a stipulation contemplates a speedy trial, which the party evades, his opponent may regard it as abandoned. (Crowell v. Crowell, 91 Hun, 638 [1895].)

RULE 12.

Consents to Payment of Money Out of Court to be Acknowledged.

All consents providing for the payment of money out of court shall be acknowledged before an officer authorized to take the acknowledgment of deeds, accompanied with proof of the identity of the applicant from some person other than the applicant, before any order is granted thereon.

Rule 17 of 1871. Rule 17 of 1874, amended. Rule 12 of 1877. Rule 12 of 1880, amended. Rule 12 of 1884. Rule 12 of 1888. Rule 12 of 1896.

CODE OF CIVIL PROCEDURE.

§ 614. Money paid into court on injunction staying proceedings after verdict, report or decision — paid to the party stayed on his giving an undertaking.

§ 744a *et seq.* Regulations concerning the payment of money into court and the disposition thereof.

§ 751. Money paid into court to be paid out only on a certified order of court, countersigned by the presiding judge.

§ 1563. Partition sale — when proceeds paid into court.

§ 1633. Mortgage foreclosure by action — disposition of surplus.

§ 2361. Sale of real estate of infant, etc.— disposition of proceeds.

§ 2404. Mortgage foreclosure under statute — disposition of surplus.

§ 2786. Surrogate's sale, mortgage, etc.— proceeds to be paid into court.

See Rule 69; Ch. 750 of 1904.

RULE 13.

Arrest — Injunction — Attachment — Recital of the Grounds Thereof in the Order.

Every order of arrest, as well as every injunction or attachment, shall briefly state the grounds on which it is granted.

Rule 13 of 1877. Rule 13 of 1880. Rule 13 of 1884. Rule 13 of 1888. Rule 13 of 1896.

CODE OF CIVIL PROCEDURE.

§ 561. Contents of an order of arrest.

§ 610. The injunction order — must briefly recite the grounds therefor.

§ 641. The warrant must briefly recite the ground of the attachment.

STATEMENT OF GROUNDS — Failure of order to state the grounds of injunction — an irregularity.] When the order refers to the complaint and an affidavit on which an injunction is granted, copies of which containing the

grounds on which the order was made are served on the defendant, the lack of the statement of the grounds in the order is a mere irregularity. (Church v. Haeger, 66 St. Rep. 681 [1895].)

—— **Failure to correctly state the grounds of attachment in the warrant — how amended.**] A failure to state in the warrant the ground for the attachment does not necessarily make it void, and if the affidavit on which it is issued is sufficient, a defect in the warrant, by reason of the recital in the disjunctive, may be amended within Code Civil Procedure, section 723, to make it correspond to the affidavit. (Stone v. Pratt, 90 Hun, 39 [1895].)

—— **What is a sufficient statement of the "grounds of the attachment."**] A recital in a warrant that defendant "has assigned, disposed of or secreted his property" refers to one class only of the grounds set forth in Code Civil Procedure, section 636, and is a sufficient compliance with section 641. (Sturz v. Fischer, 15 Misc. 410 [1896].)

—— **Use in the alternative of equivalent terms in defining an offense is not a ground for vacating an order of arrest.**] An order of arrest which, in stating the grounds thereof as required by Rule 13, states that the ground "is the conversion of money embezzled or fraudulently misapplied by said defendant in the course of his employment as attorney for the aforesaid James T. Quail, deceased," is not fatally defective because framed in the alternative, as the court, in using the words "embezzled or fraudulently misapplied," merely defined, by the use of equivalent terms, the offense which justified the issuing of the order. (Quail v. Nelson, 39 App. Div. 18 [1899]. See, also, Rogers v. Ingersoll, 103 App. Div. 490.)

—— **Warrant of attachment.**] Reciting in the alternative is stating neither fact, and a warrant so stating is fatally defective. (Cronin v. Crooke, 143 N. Y. 352; Brandley v. Am. Butter Co., 60 Misc. 547.)

—— **Improper attachment.**] An attachment based on statements to a mercantile agency, without affidavit of any officer or agent of the same, vacated. (Philip Becker & Co. v. Bevins, 102 N. Y. Supp. 144.)

When court has power to amend warrant of attachment, 59 App. Div. 128 (King v. King).

See notes under Rule 3.

RULE 14.

Discovery of Books, Papers and Documents, When Compelled.

Application may be made in the manner provided by law to compel the production and discovery or inspection with copy of books, papers and documents relating to the merits of any civil action pending in court or of any defense of such action, in the following cases:

(1) By the plaintiff, to compel the discovery of books, papers or documents in the possession, or under the control, of the defendant, which may be necessary to enable the plaintiff to frame his complaint or to answer any pleading of the defendant.

(2) By the defendant, to compel the like discovery of books, papers or documents in the possession, or under the control, of the plaintiff, which may be necessary to enable the defendant to answer any pleading of the plaintiff.

(3) Either party may be compelled to make any discovery of book, document, record, article or property in his possession or under his control or in the possession of his agent or attorney, upon its appearing to the satisfaction of the court that such book, document, record, article or property is material to the decision of the action or special proceeding, or some motion or application therein, or is competent evidence in the case, or an inspection thereof is necessary to enable a party to prepare for trial.

Rule 14 of 1858. Rule 18 of 1871. Rule of 1874, amended. Rule 14 of 1877. Rule 14 of 1880. Rule 14 of 1884. Rule 14 of 1888, amended. Rule 14 of 1896.

CODE OF CIVIL PROCEDURE.

§ 803. A court of record may direct discovery or an inspection and copy of books, etc.
§ 804. The General Rules of Practice to prescribe the cases in which it may be had and the modes of procedure.
§ 805. Petition for discovery and order thereon directing the party to allow it or show cause.
§ 806. Order granting discovery, when and by whom it may be vacated.
§ 807. Proceedings upon the return of the order to show cause — referee may be appointed to superintend the discovery.
§ 808. Penalty for disobedience of order.
§ 809. Effect as to books, etc., the same as if they were produced upon notice.
§ 866. Records not to be removed by virtue of *subpœna duces tecum*, when.
§ 867. Production of books under order of *subpœna duces tecum* which must be served five days before — relief allowable.
§ 868. Production of books and papers of a corporation compelled in the same manner as if in the hands of a natural person.
§ 869. When personal attendance not required by *subpœna duces tecum* — public office and officer of corporation.
§ 873. Physical examination of the plaintiff in an action for personal injuries.
§ 929. Books of a foreign corporation, when evidence.
§ 930. When a copy thereof is evidence.
§ 931. How such copy must be verified.
§ 1878. Discovery in judgment-creditor's action — how compelled.

§ 1914. Subsidiary action for discovery abolished.
§ 2538. Provisions as to discovery, applicable to Surrogate's Court.

POWER OF COURT — Code of Civil Procedure, §§ 803–808, is a virtual re-enactment of the Revised Statutes.] An application for an inspection and copy of books and papers must now be had under sections 803–808 of the Code of Civil Procedure, which are a virtual re-enactment of the provisions of the Revised Statutes upon this subject. (Cutter v. Pool, 54 How. Pr. 311 [N. Y. Com. Pl. Sp. T. 1877].)

—— To annex document to commission to examine witness.] The court has no power in an action upon a draft to order it to be annexed to a commission issued to take the examination of witnesses residing out of the State. (Butler v. Lee, 32 Barb. 75 [Gen. T. 1860]; S. C., 19 How. Pr. 383.)

—— A discovery can only be had under section 803, etc., of the Code.] The only mode by which a discovery of books and papers can be obtained before trial is under sections 803, 804, 805, etc. (Martin v. Spofford, 3 Abb. N. C. 125 [Chamb. 1877].)

—— The examination of parties or production of their books cannot be compelled under the provisions of the Revised Statutes as to perpetuating testimony.] The examination of parties as witnesses, or the production of their books, cannot be compelled under the provisions of the Revised Statutes to perpetuate testimony. (Keeler v. Dusenbury, 1 Duer, 600 [Sp. T. 1853].)

—— The rules of the Supreme Court do not unite the remedies for discovery under the Code and the Revised Statutes.] The rules of the Supreme Court (14–17) regulate the proceedings for the discovery of books, papers and documents, both under the Revised Statutes and under the Code, but do not and cannot unite or confound the two remedies. (Pindar v. Seaman, 33 Barb. 140 [Gen. T. 1860].)

—— An examination of the adverse party and a discovery of his books cannot both be had in one proceeding.] It seems, that an examination of the adverse party and a discovery and inspection of his books and papers cannot be had in one proceeding, and the provisions of section 388 of the Code of Procedure relating to the latter object, cannot be invoked to sustain an order for the former object. (Havemeyer v. Ingersoll, 12 Abb. [N. S.] 301 [Sp. T. 1871].)

—— Discovery of books and papers is a proceeding independent of the right to their production on the trial, or by a party examined before the trial.] The right to inspection of books and papers with a view to the discovery of evidence is distinctly recognized by statute, and is not to be confounded with the production of them as evidence upon the trial, or on the examination of a party as a witness before trial. (Lefferts v. Brampton, 24 How. Pr. 257 [N. Y. Com. P. Gen. T. 1862].)

—— Order for inspection granted when contract provides for it.] Where contract provided that plaintiff was to have a certain share of profits, which were to be adjusted every three months, in an action to recover for these profits, it was held that plaintiff was entitled to an order allowing him to

inspect the books, although he had not served his complaint. (Ballenburg v. Wahn, 103 App. Div. 34.)

—— Action in equity will not lie.] Action in equity will not lie for the sole purpose of procuring discovery and inspection of books. Code remedy was intended to be exclusive. Rice v. Peters, 58 Misc. 381.

—— Of deed.] In an action to set aside a deed on the ground of fraud, plaintiff may be permitted inspection of the deed in question, although summons only has been served. Peck v. Peck, 57 Misc. 95.

NOT A RIGHT — Given only in extreme cases.] It is not a matter of right to inspect books and papers, and the privilege is not given except in extreme cases, where the refusal may involve the loss of a claim or defense. (Harbison v. Van Volkenburgh, 5 Hun, 454 [Gen. T. 1875].)

—— Examination of books denied where it would be a hardship to the defendant.] There is no absolute right upon the part of a plaintiff to have an examination of the defendant's books, in order that he may frame a complaint with more particularity than he would be able to do without such inspection.

When it is apparent that such an inspection would be a great hardship if it should be finally determined that the plaintiff had no right of recovery, an order of that description should not be granted unless the same is absolutely necessary to enable the plaintiff to frame his complaint. (Ward v. New York Life Ins. Co., 78 Hun, 363 [1894].)

—— The manner is discretionary with court.] The court has power to order a contract to be deposited with the clerk for inspection or to leave the party to an examination before trial or a *subpœna duces tecum*. (Stillwell v. Priest, 85 N. Y. 649 [1881].)

—— Where inspection is in the discretion of the Special Term.] (O'Gorman v. O'Gorman, 92 Hun, 605 [1895].)

SURROGATE — Powers of.] Equitable powers of a surrogate to compel the books and papers of an estate to be opened to the inspection of a litigant. (Matter of Stokes, 28 Hun, 564 [1883].)

May direct issuance of commission to examine party before trial. (Matter of Plumb, 135 N. Y. 661.)

PROCEDURE — Proper procedure to obtain inspection.] The mode of making applications for discovery, etc., under the Revised Statutes and the Code, stated. (Hoyt v. Exch. Bank, 1 Duer, 652 [Gen. T. 1853]; see Code of Civil Procedure, § 805.)

—— Discovery of corporate books — compelled by mandamus.] The Supreme Court has power, by mandamus, on petition of a stockholder, to compel the corporation to exhibit its books for his inspection. (Matter of Steinway, 159 N. Y. 250, affg. 31 App. Div. 70 [1899].)

—— Practice in proceedings for production of books and papers.] Under the present Code of Civil Procedure a party cannot be compelled to produce his books and papers, for the examination and inspection of his adversary before trial, except in the mode pointed out in article 4 of chapter 8 of the Code. The proceeding must be begun by a verified petition praying for the discovery or inspection sought, and the only order that can be made in the first instance is

the one directing the party against whom the discovery or inspection is asked to allow it, or in default thereof to show cause why it should not be done. (Dick v. Phillips, 41 Hun, 603 [1886].)

—— **Requisites of petition for discovery.]** A petition for the discovery of a copy book of a firm, alleged to have been the undisclosed principals in the buying of certain goods, to recover the price of which the action was brought, is defective if its statements in regard to some of the material facts alleged are made upon information and belief, and are unsupported by the affidavit of the plaintiff's informant.

The petition in such a proceeding is in the nature of a pleading, and although, when duly verified, its allegations, made on the personal knowledge of the petitioner, are to be accepted as proofs, yet its statements, made on information and belief, are mere allegations, and do not partake of the nature of proofs.

Among the things most essential to be shown to the court, in proceedings of such a character, are the facts from which the court may determine that the book or paper, of which discovery is sought, contains some matter material to the issue in the action, the discovery of which would be to the advantage of the party seeking the discovery. (Goodyear Rubber Company v. Gorham, 83 Hun, 342 [1894].)

—— **Service of motion papers.]** All papers to be used upon a motion for discovery should be served before the motion is made, and the court should reverse an order granting such a motion when it has been made upon a petition on information and belief, and on writings which were not attached to the petition as served. (Smith v. Seattle, Lake Shore, etc., Ry. Co., 47 St. Rep. 283 [Sup. Ct. 1892].)

—— **If the discovery is insufficient or defective, an order to show cause is proper.]** On the return being made to the first order, the petitioner, if he deems it insufficient, should apply for an order that the opposite party show cause at a certain time why the particular deficiencies or omissions alleged should not be supplied. (Hoyt v. Exch. Bank, 1 Duer, 652 [Gen. T. 1853].)

—— **For what purpose an inspection can be had.]** Discovery and inspection cannot be granted, except for the purpose of preparation of pleadings or for trial, and after plaintiff has pleaded he cannot need discovery before the cause is at issue. (Thompson v. Railway Co., 9 Abb. [N. S.] 230 [Gen. T. 1870].)

—— **To frame a complaint — granted.]** Discovery granted to enable plaintiff to frame his complaint, despite a yearly rendering of account by defendant. (Churchill v. Loeser, 69 St. Rep. 754 [1895].)

—— Inspection granted to enable plaintiff to amend complaint. (Bloomberg v. Lindeman, 19 App. Div. 370 [1897].)

—— **When not granted.** An examination of a defendant, to enable the plaintiff to frame a complaint based upon business dealings between such defendant and a corporation, in which the plaintiff is a stockholder, should not be granted before the plaintiff has exhausted the ordinary avenues of information by inspecting, or attempting to inspect, the books of account of the corporation. (Nathan v. Whitehill, 67 Hun, 398 [1893].)

—— **To frame an answer, denied.]** Inspection of notes to assist in framing answer denied. (Earle v. Beman, 1 App. Div. 136 [1896].)

—— **Not allowed after service of an amended complaint and before joining a new issue.]** Though issue was joined after service of the original complaint, an order for discovery cannot be obtained if an amended complaint is served until after a new issue is joined thereon. (Fleet v. Cronin, 5 App. Div. 48 [1896].)

—— **Must be after suit brought.]** There must be a suit pending when the petition is presented. (Code Civil Procedure, § 803.)

—— **When discovery not ordered before complaint filed.]** When no complaint has been filed and the nature of the relief sought by the action is not shown by the affidavit, the merits of the case cannot appear, and the court in its discretion should not compel the production of books. (Keeler v. Dusenbury, 1 Duer, 660 [1853].)

—— **What the petition must show.]** Before serving complaint, petition for order of discovery must show that plaintiff does not possess the facts for which inspection is sought. (Daunenburg v. Heller, 88 App. Div. 548; Sutter v. City of New York, 89 App. Div. 494.)

SUBPŒNA DUCES TECUM — Subpœna duces tecum insufficient.] In such a case a *subpœna duces tecum* would not meet the exigencies of the case, for without the books no adequate preparation for the trial could be made. (Allen v. Allen, 33 St. Rep. 876 [Sup. Ct. 1890]; appeal dismissed, see 125 N. Y. 724.)

—— **A party under examination before trial — not required to produce papers on subpœna duces tecum.]** In the Supreme Court a party to an action will not be compelled to produce his books and papers by *subpœna duces tecum* while under examination as a witness before trial under section 873 of the Code of Civil Procedure. (Martin v. Spofford, 3 Abb. N. C. 125 [Chambers, 1877]; De Bary v. Stanley, 5 Daly, 412 [N. Y. Com. Pl. Gen. T. 1874].) See next paragraph.

—— **A party examined before trial may be required by subpœna duces tecum to produce books, etc.]** A party examined before trial under sections 390 and 391 of the Code of Civil Procedure may be required by *subpœna duces tecum* to produce books and papers, but they will be used upon the examination in the same way only, as if so produced upon his examination as a witness at the trial. (Smith v. McDonald, 1 Abb. N. C. 350 [N. Y. Sup. Ct. Chamb. 1876].)

—— **No discovery where a subpœna duces tecum will suffice.]** Whether an action be denominated one in equity for an accounting, or at common law for a breach, the damages recoverable are substantially the same, and the taking and stating of an account is necessary to reach a proper result. In either event plaintiff may enforce the production of defendant's books by *subpœna duces tecum* in ample time for all his purposes, and when that can be relied on with safety there is no necessity for an inspection or discovery upon a motion like the present. (Dalzell v. Fahys Watch Case Co., 5 Misc. Rep. 493 [N. Y. Supr. Ct. Gen. T. 1893].)

—— Discovery not allowed where *subpœna duces tecum* would effect the same results. (Holtz v. Schmidt, 2 Jones & Spencer, 28 [Supr. Ct. 1871].)

—— **Remedy by subpœna duces tecum.]** The plaintiff cannot obtain an order for the discovery of defendant's books and papers, but must resort to a

subpœna duces tecum, when in an action to recover his commissions [illegible] it appears that he kept an account of his transactions, and that defendant had offered to give him all the information he might desire in regard to every policy he should procure, the name of the insured therein being furnished by him to defendant. (Perls v. Met. Life Ins. Co., 32 St. Rep. 44 [N. Y. Com. Pl. 1890].)

—— **When subpœna duces tecum insufficient.]** When a *subpœna duces tecum* will not meet the exigencies of the case. (Allen v. Allen, 33 St. Rep. 876 [Sup. Ct. 1890]. Appeal dismissed, see 125 N. Y. 724.)

—— **That a paper may be produced on the trial by subpœna duces tecum is not conclusive.]** The fact that papers, sought to be discovered preparatory to trial, may be procured by *subpœna duces tecum* served upon the adverse party, is not a conclusive answer to an application for an order for their discovery. But if the court sees that obtaining the proof in that way is as practicable as by a discovery, the motion will be denied. (Low v. Graydon, 14 Abb. 443 [Chamb. 1862].)

See Harburgh v. Middlesex Securities Co., 110 App. Div. 633.

NAMES — Not allowed to ascertain.] The court cannot grant a discovery to ascertain the names of persons proper to be made parties to the action, but only to help the plaintiff in stating his cause of action. (Opdyke v. Marble, 18 Abb. 266 [Sp. T. 1864]; affirmed, 44 Barb. 64 [Gen. T. 1864].)

—— **Books — examination of, with ulterior purpose.]** An application for an inspection of books of account of plaintiff's intestate should not be granted, where the real purpose of the discovery is to obtain information whether an allegation of the answer is true. (McInnes v. Gardiner, 27 Misc. Rep. 124 [1899].)

LACHES.] An order will not be granted where there is a want of due diligence on the part of the applicant, or gross negligence, if not bad faith. (Hooker v. Matthews, 3 How. Pr. 329 [Gen. T. 1848]; S. C., 1 Code R. 108; Sivins v. Mooney, 54 Misc. Rep. 66.)

—— **Delay in moving.]** A party desiring an inspection of an instrument, for the purpose of preparing for trial, should not wait until the cause is upon the day calendar before applying therefor. (Moran v. Vreeland, 29 App. Div. 243 [1898].)

REFEREE — Power will not be delegated to.] The court will not, in a common law action, in and by an order of reference, give the referee power to compel the production of books and papers. (North v. Platt, 7 Robt. 207 [Sp. T. 1867]; Hoyt v. Exchange Bank, 1 Duer, 652 [Gen. T. 1863].)

—— **Certificate of a referee.]** A certificate of a referee that the production of the papers, etc., is necessary on a trial pending before him, presumptively sufficient to warrant the making of the order. (Frazer v. Phelps, 3 Sandf. 741 [Gen. T. 1865]; S. C., 1 Code R. [N. S.] 214.)

AFFIDAVIT OR PETITION — Application not denied, because made by motion instead of on petition.] An application for discovery of books and papers in possession of a party, though made under the provisions of the Code of Procedure, is not to be denied on the ground that it should have been by petition instead of on motion. (Johnson v. Mining Co., 2 Abb. [N. S.] 413

[Sp. T. 1867].) See, however, Code of Civil Procedure, § 805, and Dole v. Fellows (5 How. Pr. 451 [Sp. T. 1851].)

—— **Verification by attorney and not by party — no affidavit of merits — insufficient.**] An application was made before answer, by a defendant, for the inspection of a paper material to his defense. The petition was verified by his attorney, and not by defendant, no reason therefor being assigned, except a statement that the defendant did not reside in the attorney's county. The petition did not contain an affidavit of merits. Held, that the application was defective in both of these particulars, and should be denied. (Fromme v. Lisner, 63 Hun, 290 [1892].)

—— **Application by affidavit — it need not be made by the party — contents.**] It seems that if a proper case for discovery should be made by affidavit instead of a petition (which is required by the Revised Statutes) an order should be granted; and that it is not necessary that the facts should be made to appear by the oath of the party. They may be shown by the oath of any other person. Nor is it necessary for the party to swear that the books, etc., are not in his posesssion or under his control. It is enough for him to show that they are in the possession of the adverse party. (Exchange Bank v. Monteath, 4 How. Pr. 280 [Chamb. 1849]. See, however, Code Civil Procedure, § 805.) Not denied because not made on petition. (Johnson v. Mining Co., 2 Abb. [N. S.] 413 [Sp. T. 1867].)

—— **Where the facts are peculiarly within the attorney's knowledge.**] Unless the facts on which a motion is founded are peculiarly within the knowledge of the attorney, the affidavit must be made by the party. (Phelan v. Rycroft, 27 Misc. Rep. 48 [1899].)

—— **The allegations must be definite and positive.**] An affidavit on which a motion for a discovery of books and papers is made, which merely alleges that there are in the possession of the defendants various letters, receipts and accounts, in the handwriting of the moving party, "containing evidence in relation to the subject of the action," and "to the merits of the action," is not sufficient to enable the court to pass upon the question whether the contents of such books and documents are at all material as evidence in regard to any issue in the action. The plaintiff is not entitled to the inspection of all of such books merely to obtain information how or in reference to what matters to get other evidence. Nor is it sufficient that such books may possibly furnish such evidence. The documents must be set forth with sufficient precision to enable the court to determine for itself whether they ought to be produced as containing material evidence. (Merguelle v. Note Company, 7 Robt. 77 [1868].)

—— **The affidavit to obtain a discovery must be specific and positive.**] An affidavit to support an order for the discovery of books and papers must state specifically what information is wanted, and that the books and papers referred to contain such entries; and must state this positively, not on information and belief, and the absence of a party will not excuse the want of such positive affirmation, unless the affidavit at least sets forth the sources and grounds of such information and belief. (Walker v. Granite Bank, 19 Abb. 111 [Gen. T. 1865]; Low v. Graydon, 14 Abb. 443 [Chamb. 1862];

Speyers v. Torstrich, 5 Robt. 606 [Sp. T. 1866]; Jackling v. Edmonds, 3 E. D. Smith, 539 [Gen. T. Com. Pl. 1854]; People v. Rector Trinity Church, 6 Abb. 177 [Sp. T. 1858]; Cassard v. Hinman, 6 Duer, 695 [Sp. T. 1857].)

—— **Petition not sufficiently explicit — for examination of defendant before trial and production of books.**] Where the petition did not specify the accounts in the books, as to which an inspection was sought, and it was not alleged, nor did it appear, that an inspection of the books would disclose material evidence to be used upon the trial, it was held that an inspection was inadvisably granted. It seems that the proper course in such a case is to examine the defendant before trial and to produce his books at the examination. (Keilty v. Traynor, 31 App. Div. 115 [1898].)

—— **Inspection refused because petition was not explicit.**] Petition for a discovery of documents denied where it did not point to the places where the information sought for existed, nor describe the entries except by stating their supposed effect as evidence rather than their intrinsic character. (New England Iron Co. v. N. Y. Loan & Improvement Co., 55 How. Pr. 351 [N. Y. Sup. Ct. Sp. T. 1878].)

—— **On what application to establish a partnership, the motion will be denied because of the indefinite nature of the affidavit.**] Where the necessity of an examination is alleged to be that such books will show that the defendants are partners; that they contain entries of moneys received and paid by one of the defendants, and a statement of his account; but the affidavits do not allege the character of a single entry which the court can determine to be material, a motion for a discovery will be denied. (Kaupe v. Isdell, 3 Robt. 699 [Sp. T. 1865].)

—— **An affidavit, on information and belief, is not a sufficient ground for an inspection.**] An affidavit, on information and belief, that the books of a corporation or individuals will show the names of the proper defendants, is not sufficient foundation for an order for the discovery of such books. (Opdyke v. Marble, 18 Abb. 266 [Sp. T. 1864].)

—— **Mere information and belief as to entries being in existence is insufficient.**] In an action against a bank to recover money received by it from the sale of securities deposited with it, the court will not order a discovery of entries in its books merely on an affidavit of the plaintiff, alleging that he is informed and believes that there are entries relating thereto. (Walker v. Granite Bank, 19 Abb. 111 [Gen. T. 1865].)

—— **Advice and belief.**] Advice of counsel and belief of deponent are not sufficient. (Strong v. Strong, 3 Robt. 675 [Gen. T. 1865]; S. C., 1 Abb. [N. S.] 233; Wilkie v. Moore, 17 How. Pr. 480.)

—— **The facts must be stated to the court.**] On a motion for an inspection of papers, the moving affidavits alleging the nature of the action, the fact that several letters had been written by the plaintiff, that they constituted the agreement set up in the answer, that they were material and necessary to the defense, and contained evidence relating to the merits, and that without them defendant could not safely proceed to trial, were held insufficient, as facts should be given which would enable the court to determine for itself

whether the evidence was material. (Brooklyn Life Ins. Co. v. Pierce, 7 Hun, 236 [1876]; McAllister v. Pond, 15 How. Pr. 299.)

—— **Affidavit, on information and belief, when sufficient.]** Although some of the statements in an affidavit are made upon information and belief, a petition for the inspection of books may be based thereon, if such affidavit contains positive material averments which are supported by the affidavit of an accountant who, in another action, has made an examination of such books. (Kings Co. Bank v. Dougherty, 40 St. Rep. 811 [Sup. Ct. 1892].)

—— **The papers should be specifically set forth in the petition.]** The petition for a discovery should set forth specifically the papers and documents required. (Jacklin v. Edmonds, 3 E. D. Smith, 539 [N. Y. Com. Pl. Gen. T. 1854].)

—— **Requirements as to the verification to the petition.]** The rule requiring the petition to be verified by affidavit, stating that the books and papers whereof discovery is sought, are not in the possession nor under the control of the party applying therefor, and that he is advised by his counsel, and verily believes, that such discovery is necessary to enable him to plead or prepare for trial must be observed. (Jackling v. Edmonds, 3 E. D. Smith, 539 [N. Y. Com. Pl. Gen. T. 1854].)

IT MUST BE NECESSARY — When the necessity does not exist.] A party cannot compel the production of books, etc., unless it appears that such production is indispensably necessary, and not simply a precautionary measure. Such necessity does not exist when the party applying may have in his possession, or under his control, the means of acquiring all the information which he seeks to obtain. (Campbell v. Hoge, 2 Hun, 308 [Gen. T. 1874]; Woods v. De Figaniere, 25 How. Pr. 522 [Gen. T. 1863]; S. C., 1 Robt. 681; McAllister v. Pond, 15 How. Pr. 299 [Sp. T. 1858]. See Whitwarth v. Erie R. R. Co., 5 Jones & Spencer, 437 [Supr. Ct. 1874].)

—— **When the witness can be required to produce books.]** It is only when necessary for the examination of a witness that he can be compelled to produce books and papers; he cannot be made to do so before trial and independent of his examination. (Bloom v. Pond's Extract Co., 27 Abb. N. C. 366 [N. Y. Supr. Ct. 1891].)

—— **Necessity therefor, must be shown.]** To entitle a party to a discovery of a paper before trial the party applying must show, to the satisfaction of the court, that it is in writing; that some necessity exists for its inspection, and that its production is essential in the defense of the action. (Bien v. Hellman, 2 Misc. Rep. 168 [N. Y. Supr. Ct. 1893].)

—— **Not allowed when other relief exists.]** A discovery will not be granted where the petitioner can have all the relief the nature of his case requires by pursuing the ordinary practice. (McKeon v. Lane, 2 Hall, 520 (N. Y. Super. Ct. 1829].)

—— **An application, when the papers could be produced on the examination of a party before trial, denied.]** The application for a discovery of documents before trial should be denied, where it is clear that they may be produced on an examination, before trial, of an adverse party under a *subpœna duces tecum* when the object only is to prove circumstances as the foundation of relevant

inferences rather than a fact proximately probative of an issue. (Iron Company v. Loan Company, 55 How. Pr. 35 [Sp. T. 1878].)

—— **The applicant must show that he cannot obtain the information elsewhere.]** The statute has pointed out the only mode by which a discovery of books and papers can be obtained before trial. To do so the party applying must not only show what he wants, but also prove that he cannot obtain the information elsewhere. (Hauseman v. Sterling, 61 Barb. 347 [Gen. T. 1872].)

—— **By evidence of witness.]** Not allowed where the evidence can be obtained by the examination of a third person, or of a party, as a witness. (Stalker v. Gaunt, 12 Leg. Obs. 132; Holtz v. Schmidt, 2 J. & S. 28 [Gen. T. 1871]; Low v. Graydon, 14 Abb. 443 [Sp. T. 1862]; Com. Bank v. Dunham, 13 How. Pr. 541 [Sp. T. 1856]; Brevoort v. Warner, 8 id. 321 [Sp. T. 1853].)

—— **If the only object of the examination be to see if there exist any defense it will be denied.]** An application on the part of the defendant after answer, for an order for the inspection of plaintiff's books and papers relating to the matter, will be denied, if it appears that the whole object of the examination is to see if there be a defense. (Herbert v. Spring, 1 N. Y. Monthly Law Bulletin, 21 [N. Y. Supr. Ct. Sp. T. 1879].)

—— **When defendant's right not defeated.]** A defendant's right to a copy of a document under sections 803 and 804 of the Code of Civil Procedure will not be defeated by the affidavit of plaintiff's officer that the plaintiff believes it is only a scheme to devise technical defenses to avoid a fair and honest liability. (Title G. & S. Co. v. Culgin Pace Contg. Co., 66 Misc. Rep. 157.)

—— **Inspection, when denied, to establish payment.]** Where no such necessity is shown in the moving papers, but the plaintiff who admits that the claim in suit grows out of a mistake made in an account settled some years ago, "verily believes that defendant's check book" will show such mistake, and asks inspection thereof, and the defendant pleads payment and an account stated, held, that the Code of Civil Procedure does not authorize an application of this kind to enable a party to prepare for trial, and if it did the defense of payment is a fact to be established by the defendant, and not by the party applying for the inspection. (Cutter v. Pool, 54 How. Pr. 311 [N. Y. Com. Pl. Sp. T. 1877].)

—— **The evidence must be material.]** The court must be satisfied that the books or papers contain evidence relating to the merits of the action. It is not enough that the party believes or is advised that the paper contains material evidence. Facts must be shown to support such belief. The paper itself must contain the evidence; it is not enough that it will furnish information from which material evidence may be obtained. (Morrison v. Sturges, 26 How. Pr. 177 [Sp. T. 1863]; Thompson v. Erie R. R. Co., 9 Abb. [N. S.] 212 [Gen. T. 1870]; Kaupe v. Isdell, 3 Robt. 609 [Sp. T. 1865]; Walker v. Granite Bank, 44 Barb. 39 [Gen. T. 1865]; S. C., 19 Abb. 111; Pegram v. Carson, 10 id. 340 and note [Gen. T. 1860]; S. C., 18 How. Pr. 519; Davis v. Dunham, 13 id. 425 [Gen. T. 1855]; Wilkie v. Moore, 17 id. 480 [Sp. T. 1858].)

SEALING UP IMMATERIAL MATTER — Right of a party producing books, etc., to seal up portions thereof.] It is the right of a party when he is

required to produce books for inspection upon reference, if such books contain accounts and transactions which in no way relate to the subject of examination, to seal up such parts of the books so that they shall not be exposed to the observation of those who have no right to examine them. (Titus v. Cortelyou, 1 Barb. 444 [Sp. T. 1847].)

—— **An affidavit that certain sealed portions of a book do not relate to the case is sufficient to protect them from examinations.]** Where books are produced by a party upon a reference with portions thereof sealed up, his affidavit stating that those portions do not relate to the matters of the reference is to be taken in the first instance, as sufficient to protect them from examination. But if the adverse party can show any fair grounds for supposing the parts sealed up to be material, the court may order them to be opened. (Titus v. Cortelyou, 1 Barb. 444 [Sp. T. 1847].)

—— **Proper procedure to cause sealed portions of the books to be opened.]** But before coming to the court for an order directing the opening of those parts of the books which have been sealed up, the adverse party should first apply to the referee for such an order. (Titus v. Cortelyou, 1 Barb. 444 [Sp. T. 1847].)

WHAT DOCUMENTS — What documents parties will be compelled to produce.] The remedy extends to all evidence of a documentary nature, relating to the merits of the action, whether on the part of the prosecution or defense. (Townsend v. Lawrence, 9 Wend. 458 [1832].)

—— **Of a plan, in an action for breach of contract.]** The discovery of a plan to enable a plaintiff to frame his complaint for breach of contract in stopping work is properly refused where it appears that the plaintiff had made a written contract to excavate rock according to a plan, the contract not providing that he should do all the work the plan called for, and where it appears that he had been paid for all he had done. (Marrone v. N. Y. Jockey Club, 37 St. Rep. 936 [Sup. Ct. 1891].)

—— **Of a duplicate contract.]** Where it appears that plaintiff has no copy of a contract in possession of defendant, an order for the discovery of a duplicate copy may be granted. (Smith v. Seattle, Lake Shore & Eastern R. R. Co., 41 St. Rep. 672 [Sup. Ct. 1891].)

—— **A defendant in an action to foreclose a mortgage entitled to inspect it and have it photographed.]** A defendant in an action to foreclose a mortgage, purporting to have been executed by her and her deceased husband upon her real property, setting up the defense of forgery, is properly allowed an inspection of the bond and mortgage, and permission to take photographic copies of the signatures, to enable her to prepare for trial. (Holmes v. Cornell, 7 N. Y. W. Dig. 375 [Gen. T. 1878].)

—— **Inspection of instrument sought to be set aside as a forgery allowed.]** In an action to set aside as forgeries and void a bond and mortgage, the plaintiff was allowed an inspection. (Cornell v. Woolsey, 19 Alb. Law J. 242 [Gen. T. 1879].)

—— **Letters — production of, compelled.]** Plaintiff will be compelled to produce a letter, in his possession, written by him to the defendant, and his answer thereto, written on the same paper, when it is shown that they contain evi-

dence that plaintiff has no legal demand. (Livermore v. St. John, 4 Robt. 12 [Gen. T. 1866].)

—— **Letters and letter-press copies are papers and documents.**] Letters and letter-press copies in the possession of one of two defendants, necessary as evidence to prove knowledge of a contract between the plaintiff and the other defendant, were held to be papers and documents, and material to the decision of the action, and clearly within subdivision 3 of Rule 14. (New York Bank Note Co. v. Hamilton Co., 5 App. Div. 126 [1896].)

—— **Letter in an executor's hands.**] The court may allow a letter in the possession of an executor, who is a defendant in an action, to be inspected where it is apparent that no harm could come from its production. (Travers v. Satterlee, 51 St. Rep. 458 [Sup. Ct. 1893].)

—— **Original letters received by plaintiff's intestate.**] An order may be granted allowing the discovery and inspection of original letters received by plaintiff's intestate from defendant, and copies, in case originals have been lost, of letters sent to defendant by plaintiff's intestate. (Harding v. Field, 46 St. Rep. 628 [Sup. Ct. 1893].)

—— **Examination of a machine imposed as a condition.**] The court cannot compel the defendant, who asks to examine the plaintiff before trial, to allow the attorney for the plaintiff to examine a machine upon which the plaintiff was injured. (Cooke v. Lalance Grojean Mfg. Co., 29 Hun, 641 [1883].)

—— **Books and documents — to enable defendant to prepare a counterclaim.**] A defendant who has a claim against the plaintiff for commissions upon sales, the particulars as to which are contained in books or documents in the exclusive possession of the plaintiff, is entitled to an inspection of such books and documents in order to obtain the necessary information to enable him to state the amount of his counterclaim with accuracy. (The Albany Brass & Iron Co. v. Hoffman, 12 Misc. Rep. 167 [Sup. Ct. Sp. T. 1895].)

—— **That books contain false entries is no answer to an application.**] It is no answer that the books contain entries which the corporation claims have been falsely and deceptively made by one of its officers (who is a defaulter in respect to the transactions evidenced by said entries, and who has absconded), which entries, if unexplained, would exonerate the applicant for discovery from liability, and which can only be explained by the testimony of such officer, and that the discovery sought was of such false and deceptive entries, when the applicant had in his dealings with the officer a right to assume that he was acting under the authority of the corporation. (Central National Bank v. White, 5 Jones & S. 297 [Supr. Ct. 1874].)

—— **Compelling production of accounts.**] A motion to compel defendant to produce his accounts should not be denied merely because the plaintiff cannot require an accounting from him in an action to recover a percentage or commissions. (Vieller v. Oppenheim, 75 Hun, 21 [1894].)

—— **Books of a domestic corporation.**] An order for the inspection of the defendant's books of account is proper, in an action brought against a domestic corporation to obtain the specific performance of its contract to pay dividends on its preferred stock and for an accounting, pending before a referee, where the treasurer of the defendant, having produced some of its books before

the referee under a *subpœna duces tecum*, issued by the plaintiffs, refuses to permit a bookkeeper designated by the plaintiffs to examine the same, although repeatedly requested so to do by the referee and by the plaintiffs' attorney. (Rutter v. Germicide Co. 70 Hun, 403 [1893].)

—— **Of boundary line and monument.]** *Quære*, as to whether a terminal line tree on which certain marks and symbols have been placed which tell the true line of a lot of land may be deemed a document within the meaning of section 803 of the Code of Civil Procedure. (Hayden v. Van Cortlandt, 84 Hun, 150 [1895].)

—— **In an action to set aside a preferential assignment.]** In an action to set aside a preferential assignment and chattel mortgage the court should allow the inspection of papers and books. (Bundschu v. Simon, 23 Civ. Proc. R. 80 [Sup. Ct. 1893].)

—— **Assessment-roll and warrant, when they must be deposited for plaintiff's inspection.]** In an action upon an official bond of a tax collector the court may direct the latter to deposit for plaintiff's inspection the assessment-roll and warrant held by him to enable plaintiff to prepare the complaint. (Board of Education of Olean v. King, 7 Civ. Proc. R. 64 [Sup. Ct. 1885].)

—— **Deposit of a note.]** The defense in an action to recover on a promissory note, claimed to have been made by defendant's testator, was based upon an allegation that such note was forged, and the court, refusing to grant the application of defendant for discovery of letters written to plaintiff by deceased in regard to the note, directed the note itself to be deposited with the clerk. (Dryer v. Brown, 24 Abb. N. C. 59 [Sup. Ct. 1889], modified and affirmed in 24 Abb. N. C. 144.]

—— **Deposit of bank books, etc.]** Deposit of notes and copies of book entries when ordered of a national bank. (Continental Natl. Bank v. Myerle, 29 App. Div. 282 [1898].)

—— **Inspection of goods replevined.]** When goods which have been replevined are reclaimed by defendant an order should not be granted allowing plaintiff to inspect such goods. (Downer v. McAleenan, 42 St. Rep. 672 [N. Y. City Ct. 1891].)

WHEN DENIED — Inspection of letters denied.] A motion for an order allowing the inspection of letters in plaintiff's hands should be denied, unless the application states that they will be put in evidence, or it is certain that defendant's case will be benefited by such evidence. (Halsted v. Halsted, 3 Misc. Rep. 618 [N. Y. Supr. Ct. 1893].)

—— **Proof as to the existence of the books.]** An application for the discovery of the books of a party residing in a foreign country should not be granted simply upon the statement of the petitioner that such books exist, when it is apparent that he can have no knowledge in regard to the keeping of such books or their entries. He must prove satisfactorily that such books exist, and that material evidence will be furnished by certain entries therein. (Frowein v. Lindheim, 25 Abb. N. C. 87 [Sup. Ct. 1890].)

—— **Denial of possession of books.]** Whether an order to produce and make discovery of books should be vacated depends upon the circumstances of the particular case, and the order will not necessarily be vacated because the party

required to produce the books makes affidavit that he has neither possession nor control of the books in question. (Holly Manfacturing Company v. Venner, 86 Hun, 42 [1895].)

—— **Order denying an attachment when a part only of the books are produced — not appealable — proper remedy.**] Where a defendant, on being required to produce his books and vouchers and to render an account, produced certain account books but declined to render any further or other account, and the plaintiff obtained a general order to show cause why he should not be attached for contempt for not producing the required account, held, that an order denying the attachment was not appealable.

It seems that the application for an attachment is properly denied in such a case, and that the plaintiff, to enforce his demand for the account, should move for an order instructing the defendant that he had not complied with the requirements, and directing him to render a further account. (Ackroyd v. Ackroyd, 2 Abb. [N. S.] 380 [Gen. T. 1866].)

—— **Inspection not allowed, where the books could be produced on the trial by subpœna duces tecum.**] Discovery not allowed where the defendants were competent witnesses and could be compelled by *subpœna duces tecum* to bring their books, etc., into court. (Commercial Bank of Albany v. Dunham, 13 How. Prac. 541 [Chamb. 1856]; Van Zandt v. Cobb, 12 How. Prac. 544 [Sp. T. 1855].)

—— **Where the books of a physician contain confidential statements of his patients.**] (Lowenthal v. Leonard, 20 App. Div. 330 [1897].)

—— **Fishing excursion — discovery of books.**] Petition, when insufficient as being merely a fishing excursion. (Brownell v. Nat. Bk. of Gloversville, 10 N. Y. Wkly. Dig. 17 [Gen. T. April, 1880].)

—— **Articles, when not submitted to the inspection of experts.**] A party cannot be compelled to submit articles which are the subject of the action, and are neither books, documents nor papers, nor evidence of themselves, to be inspected by third persons in order to enable them thereby to qualify themselves to testify as experts as to the quality of such articles. (Ansen v. Tuska, 1 Rob. 663 [Gen. T. 1863]; S. C., 19 Abb. 391.)

—— **Inspection to determine value of bookkeeper's services.**] In an action brought to recover for services rendered as bookkeeper, an inspection of the books of the defendants should not be ordered to enable plaintiff to have them examined by an expert, so that he may testify from their appearance as to the value of services rendered in keeping them. (Miner v. Gardiner, 4 Hun, 132 [1875].)

—— **When discovery not allowed where there is a denial of possession of papers.**] If, in answer to an order for discovery and inspection, or for sworn copies of books, etc., the opposite party denies, fully and explicitly, that there are any such entries, books or papers under his control, that is an end to the application. (Hoyt v. Amer. Exchange Bank, 1 Duer, 562 [Gen. T. 1853]; S. C., 8 How. Prac. 89; Woods v. De Figaniere, 25 id. 522 [Gen. T. 1863]; S. C., 1 Rob. 659; Ahoyke v. Wolcott, 4 Abb. 41 [Sp. T. 1856].)

—— **Denial of possession of books — when defendants should explain lost control or possession.**] Where the existence of the books is not denied, it is

incumbent upon the defendants to satisfy the court how and in what manner they had lost control or possession of them. Mere allegations that the books were no longer in their possession or under their control are insufficient. (McCreery v. Ghormley, 6 App. Div. 170 [1896].)

—— **Discovery denied because papers were not in defendant's possession.]** Upon an application for discovery of papers alleged to be in the possession of defendant, the latter denied such possession, but admitted that some of the papers had been given to his attorneys by a third person and were in their hands. Held, that the motion for discovery was properly denied on the ground that the papers were not in the possession of or under the control of the defendant. (Douglass v. Delano, 20 Wkly. Dig. 85 [Sup. Ct. 1884].)

—— **Not granted pending motion for reargument of an appeal from an order denying it.]** Pending the decision of a motion for reargument of an appeal from an order which denied the inspection of books and papers an order should not be granted allowing such inspection. (Smith v. Seattle, Lake Shore, etc., Ry. Co., 49 St. Rep. 805 [Sup. Ct. 1892].)

—— **Suspicious applications — denied.]** Applications of this nature will be scrutinized by the court, and will be denied when indefinite and made under circumstances of suspicion. (Jackling v. Edmonds, 3 E. D. Smith, 539 [N. Y. Com. Pl. Gen. T. 1854].)

—— **Reference ordered after denial of discovery, improper.]** Upon a proceeding taken under the provisions of section 803 *et seq.* of the Code of Civil Procedure for the discovery of certain books and papers, the court made an order directing the filing with the clerk of a certain assignment but otherwise denied the motion, with costs, with leave to the plaintiff to renew his application for inspection. The order contained a further provision directing a reference to take proof of what books and papers the defendant had the power to produce for inspection, and also gave the plaintiff the right to cross-examine the defendant in relation to such production. The defendant appealed from that portion of the order which directed a reference and permitted the plaintiff to cross-examine the defendant. Held, that after the motion had been decided by denying the plaintiff's application for a discovery, there was no motion or proceeding before the court, and it had no power to order a reference; that the portion of the order appealed from affected a substantial right of the defendant and was reviewable upon its merits under the Code of Civil Procedure (§ 1347, subd. 4). (Francis v. Porter, 88 Hun, 325 [1895].)

—— **Denied after an examination of a party before trial.]** After the defendant had been examined as a party before trial in an action brought by an assignee of one who claimed to be a partner in the firm which had been dissolved by the death of a partner, and had denied that the plaintiff's assignor was a partner of his, a motion was made by the plaintiff for a discovery and inspection of defendant's books and papers. Held, that such inspection was properly denied, as no competent evidence had been adduced that the books contained entries establishing a partnership. (Knoch v. Funke, 39 St. Rep. 139 [N. Y. Supr. Ct. 1891].)

—— **Order made subject to the party's right to apply to be relieved therefrom.]** An application granted, but providing that in case it was shown that

the papers were not in the possession of the corporation, nor within its control, nor that of its officers or employees, it could apply to be relieved from the terms of the order requiring it to file the same for inspection, and that it could then be determined whether a reference should be ordered to ascertain the whereabouts of the same. (Sibley v. N. Y. Times Pub'g Co., 80 Hun, 561 [1894].)

—— **Discovery and inspection not allowed in an action for libel.]** The Revised Statutes authorize the court to compel discovery and inspection of books and papers only in cases where it would have been allowed by the principles or practice of the former Court of Chancery, and, therefore, it is not allowable in an action for libel. (Opdyke v. Marble, 18 Abb. 266 [Sp. T. 1864].)

—— **Discovery not granted for the purpose of ascertaining the names of proper parties.]** The court cannot grant a discovery to ascertain the names of persons proper to be made parties to the action, but only to help the plaintiff in stating his cause of action. (Opdyke v. Marble, 18 Abb. 266 [Sp. T. 1864]; affd., 44 Barb. 64.)

—— **First Department — practice in.]** It is the uniform practice in the First Department to deny applications to compel the production of books and papers on the examination of a party before trial. (Hauseman v. Sterling, 61 Barb. 347 [Gen. T. 1872]; De Bary v. Stanley, 5 Daly, 412 [Com. Pl. Gen. T. 1874]; S. C., 48 How. Prac. 349.)

—— **Production of books and papers only required to aid the party in presenting his own case.]** An order compelling the production of books and papers for inspection will not be granted unless it is needed to aid the party seeking it to present his own case. (Sanger v. Seymour, 42 Hun, 641 [1886].)

—— **Motion by one defendant to compel another defendant to produce documents.]** A motion by one defendant to compel another defendant to produce documents for the support of the cause of action set up in the answer as against the latter is not allowable in a case in which the cause of action is new and independent of the one alleged in the complaint. (Rafferty v. Williams, 34 Hun, 544 [1885].)

—— **Discovery of papers not proper to enable the plaintiff to ascertain the defendant's defense.]** An order for the discovery of papers is not proper to enable the plaintiff to ascertain what evidence defendant may be able to produce on the trial to prove his alleged defense. (Douglass v. Delano, 20 Wkly. Dig. 85 [Sup. Ct. 1884].)

—— **Suit in equity for an accounting.]** A plaintiff suing in equity for an accounting under an agreement to divide the profits of stocks sold by the defendant is not entitled to discovery and inspection of the defendant's books and papers prior to an interlocutory judgment directing an accounting. (Moore v. Reinhardt, 132 App. Div. 707.)

DESCRIPTION OF DOCUMENT — Documents must be described.] The documents must be specifically stated. (Speyers v. Torstrich, 5 Rob. 606 [Sp. T. 1866]; Jackling v. Edmonds, 3 E. D. Smith, 539 [Gen. T. Com. Pl. 1854]; People v. Rector Trinity Church, 6 Abb. 177 [Sp. T. 1858].)

—— **What description of the document is required.]** On motion for discovery the applicant is not required or expected to give an accurate description of the document sought. The description need only be sufficiently precise to enable the party who is called on to produce to know what is required. (Low v. Graydon, 14 Abb. 443 [Chamb. 1862].)

—— **The particular books and papers must be specified and their materiality shown.]** A petition by one party for an order directing the other party to make a discovery of books and papers in his possession will not be granted when it prays for discovery generally of all the books, papers and correspondence of the adverse party, containing entries during a period of several years, relating to purchases of a specified commodity. The petition must show that entries affecting or throwing some light on the matters in controversy exist, or enough to call upon the adverse party to answer whether they do or not, that they are material and state enough, if not denied, so that the court can see they are material, in addition to stating the other matters prescribed by the rules regulating such applications. (Cassard v. Hinman, 6 Duer, 695 [Sp. T. 1857].)

WHEN GRANTED — That a discovery might criminate defendant is no answer.] The fact that the discovery might establish misconduct on the part of the defendants and thus criminate them is no answer to the application. (Duff v. Hutchinson, 19 Wkly. Dig. 20 [Sup. Ct. 1884].)

—— The excuse is a personal one — bar of the Statute of Limitations. (McCreery v. Ghormley, 9 App. Div. 221 [1896].)

—— To frame pleadings. (Churchill v. Loeser, 69 N. Y. St. Rep. 754 [1895]; Earle v. Beman, 1 App. Div. 136 [1896]; Bloomberg v. Lindeman, 19 id. 370 [1897]; Board of Education of Olean v. King, 7 Civ. Proc. R. 64 [Sup. Ct. 1865].)

—— **Examination of the books by an expert.]** The motion of the plaintiff to compel the defendant to produce his books in order that they may be examined by an expert should not be denied merely because plaintiff, himself, might previously have made such examination. (Vieller v. Oppenheim, 75 Hun, 21 [1894]; Lord v. Spielman, 13 Misc. Rep. 48 [1895].)

—— **When inspection allowed in doubtful cases.]** If there be reason to believe, upon the case as laid before the court, that the evidence in reality exists and is material to the matter in controversy; if the other party admits the possession of the books or documents alleged to contain it; if he also impliedly admits the probability of its existence by not denying it, and no great practical inconvenience will follow from allowing the other party to inspect it, the privilege ought to be granted. (Lefferts v. Brampton, 24 How. Prac. 257 [N. Y. Com. Pl. Gen. T. [1862].)

—— **Existence of cause of action, not determined on affidavits.]** Books and papers may be examined where a *prima facie* case is made out. The existence of a cause of action cannot be determined upon affidavits. (Frowein v. Lindheim, 35 St. Rep. 604 [Sup. Ct. 1890]; appeal dismissed without opinion, 126 N. Y. 654.)

—— **Defect in moving papers supplied by the answering affidavits.]** A defect in the moving papers, on an application for the inspection of the defendant

company's books, in that they did not show that any right or interest of plaintiff has been injuriously affected, held to be supplied by the answering affidavits. (Fitchett v. Murphy, 30 App. Div. 304 [1898].)

—— **Facts requiring the granting of an order.]** Thomas J. Learey, the husband of one Jessie Learey, bought certain premises which were, at the time, subject to mortgages thereon held by a bank. These mortgages were assigned by the bank to one Howe, who, upon the next day, began an action for their foreclosure. Upon an application made in such action by Jessie Learey to examine, before answer, the plaintiff and her husband, her affidavit alleged that she was on bad terms with her husband; that he treated her cruelly and had endeavored to get her to sign a mortgage which would have cut off her right of dower; that the plaintiff was a friend of her husband; that the husband's money had paid for the said assignments, and that the plaintiff and her husband were conspiring to assert the validity of said mortgages, which in equity were satisfied, and thus cut off her inchoate right of dower. Held, that the orders to examine the plaintiff and the husband were properly granted. (Howe v. Learey, 62 Hun, 240 [1892].)

—— **Material evidence in documents in possession of adversary.]** Where there is reason to believe that evidence material to the matter in controversy exists in documents admitted by the other party to be in his possession, and no great practical inconvenience will follow from allowing the applicant to inspect them, a discovery will be allowed. (Lefferts v. Brampton, 24 How. Prac. 257 [Gen. T. 1862]; Union Paper Collar Co. v. Metropolitan Collar Co., 3 Daly, 171 [Sp. T. 1869]; Case v. Banta, 9 Bosw. 595 [Gen. T. 1862]; Ruberry v. Benus, 5 Bosw. 685 [1860].)

—— **When it may be had in cases not provided for in rule.]** A discovery may be had in other cases than those provided for in the rules. (Gould v. McCarty, 11 N. Y. 575 [1854]; Davis v. Dunham, 13 How. Prac. 425 [Gen. T. 1855]; Exchange Bank v. Monteath, 4 id. 280 [Sp. T. 1849]. See, however, Code of Civil Procedure, § 804.)

—— **Libelous paper.]** Inspection of alleged libelous paper will not be permitted, in order to frame complaint for libel, when answers of defendant might subject him to criminal prosecution. (Riddle v. Blackburne, 125 App. Div. 893.)

—— Section 804 of the Code does not give authority for the adoption of a rule compelling the production and inspection of other articles than books, documents and other papers. (Pina Maya-Sisal Co. v. Squire Mfg. Co., 55 Misc. Rep. 325.)

—— Right not affected by the fact that the plaintiff, an employee of the corporation he was suing for amount of percentage alleged to be due him, had become a business competitor of his former employee. Thomas v. Guy B. Waite Co., 113 App. Div. 494.)

FORM OF ORDER — Direction to deposit a paper for thirty days, or that all defenses be precluded, and that the party be punished for contempt, is erroneous.] It is erroneous to direct defendants to deposit a paper with the clerk for thirty days, and in default thereof that they may be precluded from

all defense in the action, and be adjudged guilty of a contempt and be liable to be punished therefor. (Pindar v. Seaman, 33 Barb. 140 [Gen. T. 1860].)

—— **When an order is improper as being too general.]** An order directing the deposit of certain papers and all other books which contain any accounts or entries showing or tending to show certain matters is improper and unwarranted, it being an attempt to use the power of the court for the mere purpose of hunting for evidence. (Walker v. Granite Bank, 19 Abb. 111 [Gen. T. 1865].)

—— When an order is improper as being too limited. (Gould Roofing Co. v. Gilldea, 4 App. Div. 107 [1896].)

—— **Books particularized in the order.]** Too great generality in an application for inspection of books is cured by particularizing the books in the order. (Hofmar v. Seixas, 12 Misc. Rep. 3 [N. Y. Com. Pl. Gen. T. 1895].)

—— **Order made by the court and not by a judge.]** It is not a valid objection to an order adjudging the witness to be guilty of contempt in refusing to produce books before a referee that the order was made by the court and not by a judge, where it appears that the order was not issued *ex parte*, but after a hearing of which the witness had notice and after which he was given an opportunity to comply with the direction of the court. (Press Publishing Co. v. Associated Press, 41 App. Div. 493 [1899].)

—— Where inspection is not limited to the particular entry set forth in the moving papers. (York & Haven Paper Co. v. Place, 13 App. Div. 227 [1897].)

—— **Expense of copies, by whom paid.]** The expense of copies should be paid by the party requiring them. (Brevoort v. Warner, 8 How. Prac. 421 [Chamb. 1853].)

—— **Proper order in such a case.]** What is the proper order in such a case. (Pindar v. Seaman, 33 Barb. 140 [Gen. T. 1860].)

—— Order to produce a deed at a photographer's for the purpose of having it photographed is error; the order should direct that the deed be deposited with county clerk, with permission to photograph it. (Beck v. Bohm, 95 App. Div. 273.)

—— **Form of order.]** In a case where a party shows that he is entitled to a discovery of his adversary's books, it is error to issue an order for a sworn statement and balance sheet therefrom only, against objection. (Pfaelzer v. Gassner, 54 Misc. Rep. 579.)

—— **Inspection of picture not permitted.]** Court is without authority to require defendant to permit inspection of picture by experts for the purpose of determining its genuineness, in an action to recover damages for alleged fraud in the sale. (Wilson v. Collins, 57 Misc. Rep. 363.)

SERVICE OF ORDER — Order of discovery to be served on the attorney, and not the party.] When an order is made for the discovery of books and papers, it is properly served on the attorney for the party against whom the discovery is sought, and need not be served on the party. (Rossner v. New York Museum Association, 9 N. Y. Wkly. Dig. 563 [Gen. T. February, 1880].)

SHERIFF — Not directed to break open a safe, but party ordered to open it.] In an action in which an *ex parte* order was made which allowed plaintiff to examine defendant's books of account, and to be taken possession of by a

sheriff under an attachment, it appeared that the sheriff did not know the combination of the safe in which such books were locked, and it was held that the direction in the order allowing sheriff to take possession of the books should be stricken therefrom, the intention of the court not being to direct the sheriff to break open the safe, but that an order might be obtained by the plaintiff which would direct the sheriff to allow the plaintiff, in order to ascertain upon what property an attachment could be levied, to examine any books in the sheriff's possession or which might come into his possession under the attachment. (Krooks v. L. & C. Wise Co., 31 Abb. N. C. 46 [Sup. Ct. 1893].)

PARTIES — The representatives of a party can have no greater rights than the deceased had.] The mere death of a party can give his representative no superior right, in respect to a discovery of books and papers, to that which he would have had if living. (Merguelle v. Note Co., 7 Rob. 77 [Sp. T. 1868].)

—— A discovery from an administrator of the papers of his intestate — when allowed.] And the court will act with great caution when the suit is brought by administrators and a discovery of papers of their intestate is sought. (Jackling v. Edmonds, 3 E. D. Smith, 539 [Gen. T. 1854].)

—— To what accounts, rendered by her deceased, an administratrix is entitled.] A plaintiff suing as administratrix is, however, it seems, entitled to copies of any accounts rendered by her intestate as agent, and to sworn copies of any entries made by the defendants in their books to his credit. Other papers must be obtained by *subpœna duces tecum*. (Merguelle v. Note Co., 7 Rob. 77 [Sp. T. 1868].)

—— A guardian ad litem may petition for discovery.] Where a motion has not been made by an executor, in a suit brought by him for an accounting in partnership transactions, to compel the defendants sought to be charged to produce their books and papers, the guardian *ad litem* for testator's children, who have joined as defendants, may petition the court for such discovery. (Applebee v. Duke, 50 St. Rep. 92 (Sup. Ct. 1893].)

CORPORATION — Books of — since remedy by subpœna under Code of Civil Procedure, inspection not allowed.] Under the Code of Remedial Justice (Code of Civil Procedure), an inspection of the books and papers of a corporation will not be allowed before trial, as the corporation may be compelled to produce them on the trial. (Central Crosstown Railroad Company v. Twenty-third Street Railroad Company, 4 N. Y. Wkly. Dig. 324 [N. Y. Supr. Ct. 1877].)

—— Agents of corporation will not be compelled to discover its books.] The agents of a corporation cannot, in their individual capacities, be compelled to discover the books of the corporation; and on a motion to require them to do so, the court will not enter into the question whether the incorporation is fictitious. (Opdyke v. Marble, 18 Abb. 266 [Sp. T. 1864]. See Code of Civil Procedure, § 868.)

—— Corporate books — directors.] A director of a corporation cannot be required to produce for inspection the books of the corporation under section 803 of the Code of Civil Procedure. (Boorman v. Atlantic & Pacific R. R. Co., 78 N. Y. 599 [1879]. See Code of Civil Procedure, § 872, subd. 7.)

—— **Examination of officers and agents of a corporation — distinction.]** Under section 872 of the Code of Civil Procedure, as amended by chapter 536 of 1880, the officers and directors, but not the servants or agents, of a corporation can be examined. (Reichmann v. Manhattan Company, 26 Hun, 433 [1882].)

—— **Examination of the president of a joint-stock association before trial.]** Right to examine the president of a joint-stock association in an action brought against the association in his name as president. (Wayne County Savings Bank v. Brackett, 31 Hun, 434 [1884].)

—— **Production of corporate books and papers required.]** In an action against a corporation and its officers, production of the corporate books and papers may be required for the purpose of enabling plaintiff to frame his complaint. (Frothingham v. Broadway Railroad Co., 9 Civ. Proc. R. 304 [Sup. Ct. Sp. T. 1886].)

—— **Corporate books and papers — how far subject to inspection.]** To what extent a corporation may be required to submit its books and documents to inspection. (Johnson v. Mining Company, 2 Abb. [N. S.] 413 [Sp. T. 1867].)

—— **Transfer books of corporation — 1 Edm. Stat. 558.]** The court has power to compel, by mandamus, the exhibition of the transfer books of a domestic corporation, containing the names of the stockholders, at any time when the exercise of such power is shown to be necessary to preserve and protect the interests of the stockholders therein. (Matter of Steinway, 159 N. Y. 250 [1899]; People ex rel. Hatch v. L. S. & M. S. R. R. Co., 11 Hun, 1 [Gen. T. 1877]; Matter of Sage, 70 N. Y. 220 [1877]. See Code of Civil Procedure, § 868.)

—— Demand on corporation for a copy of records and papers not a condition precedent to plaintiff's right to an examination of the defendant before trial. (Jacobs v. Mexican Sugar Ref. Co., 112 App. Div. 655.)

FOREIGN CORPORATION — Order for the inspection of its books — what it should require.] An order for the inspection of the books and papers of a foreign corporation should not require it to produce the books kept in constant use in its office in a distant State before a referee in this State, but should direct it to produce and deliver to the plaintiff sworn copies of so much of their contents as relates to the subject-matter mentioned in the order, within a reasonable time, to be designated by the order. (Ervin v. Oregon R. & N. Co., 22 Hun, 566 [1880].)

—— **Transfer agents of — chapter 165 of 1842 — application of, to]** (Matter of Sage, 70 N. Y. 220 [1877].)

—— **Sworn copies of books of a foreign corporation.]** An order may be granted allowing the examination of books of a foreign corporation, but sworn copies will be sufficient if the originals are in a distant State and constantly in use. (Sims v. Bonner, 42 St. Rep. 14 [N. Y. Supr. Ct. 1891].)

PARTNERSHIP BOOKS — An absolute right to inspection of partnership books.] It is a matter of right to compel a party to make a disclosure of partnership books. (Kelly v. Eckford, 5 Paige, 548 [1836].)

—— **Administrator of a deceased partner is entitled to an inspection of partnership books and papers.]** An administrator of a deceased partner is

entitled to a discovery and inspection of partnership books and papers for the purpose of framing a complaint for an accounting, notwithstanding the provision in the copartnership articles that the survivor should carry on the business until the expiration of the time limited for the existence of the partnership. (Newman v. Newman, 20 Wkly. Dig. 283 [Sup. Ct. 1884].)

—— **When a partner is not entitled to a general inspection of the books.]** In an action to set aside a sale of partnership assets by one partner to the other, and to have the plaintiff's rights as a partner declared to be still subsisting, the plaintiff is not, before judgment, entitled as a partner to a general inspection of the books of the firm. (Platt v. Platt, 11 Abb. [N. S.] 110 [Gen. T. 1870].)

—— **Inspection of books by one sharing in the profits.]** Where a person has a direct interest in the profits and losses of the business, whether such relation constitutes him a partner or principal bringing business to the firm, or an employee entitled to a share of the profits, or a co-worker with a partnership in the general business, a *prima facie* case is presented, entitling him to an inspection and discovery of the books, unless it appears that the application is made in bad faith. (Lord v. Speilman, 13 Misc. Rep. 48 [1895].)

—— **Examination by an expert.]** The mere fact that the party has an opportunity to examine the books does not prohibit him from his right to an inspection and examination by an expert to enable him to prepare for trial. (*Ib.*)

—— **Remedy by subpœna duces tecum does not forbid.]** Nor is the fact that the books can be produced on the trial by a *subpœna duces tecum* a reason why an order for discovery should not be granted. (*Ib.*)

—— **Of firm account books — when allowed.]** The plaintiff's testator, shortly before his death, and while in feeble health, had a settlement of his partnership affairs with the defendant. Subsequently he told plaintiff that one important credit, at the least, had been omitted. After his death plaintiff applied to defendant for but was denied permission to examine the books. Subsequently she applied for a discovery of the books, in order to enable her to frame her complaint in this action, brought to correct the accounts. Held, that the application should be granted. (Platt v. Platt, 11 Abb. Prac. [N. S.] 110; reversed, Livingston v. Curtis, 12 Hun, 121 [1877].)

—— **Partner's application to inspect books.]** A partner has the right, notwithstanding the dissolution of the partnership, to examine the books of the firm at any reasonable time and place. (Bearns v. Burras, 86 Hun, 258 [1895].)

—— **Books of record of a common venture.]** Upon application, the books of record of a common venture may be examined by a plaintiff who has, in any way, an interest in the proceeds of such business, unless it is apparent that the application has not been made in good faith. (Vieller v. Oppenheim, 75 Hun, 21 [1894].)

—— **Inspection of firm books.]** When an inspection of the books and papers of a firm will be allowed in an action against one of the partners. (Martine v. Albro, 26 Hun, 560 [1882]. See, also, Cohen v. Hessel, 95 App. Div. 548.)

AGENCY — A principal entitled to an inspection of his broker's books.] In an action by a principal against his brokers for an accounting, held, that the

books of the latter being kept in the course of the agency, the principal was entitled, whenever occasion required, to consult them, and as they contained the only reliable evidence of the transactions in suit an order for their inspection was proper. (Duff v. Hutchinson, 19 Wkly. Dig. 20 [Sup. Ct. 1884].)

—— **Inspection of books to establish an agency.]** In an action to recover money alleged to have been realized from certain transactions, the defendant should be allowed to inspect all books and papers in relation to an agency which existed between the plaintiff's intestate, as agent, and defendant, on the allegation of which agency a counterclaim is based. (Harding v. Field, 46 N. Y. St. Rep. 628 [Sup. Ct. 1893].)

CONVERSION — Allowed to establish a conversion.] In an action brought by the executors of a deceased person to recover damages resulting from the alleged conversion of securities purchased by the defendants as the agents of the testatrix and intrusted to their possession, an order was obtained for the examination of the books of account kept in the business of the defendants during the term of their agency. Held, that in order to present the rights of the estate in the premises the executors were entitled to obtain information from the books in question; that the order should, however, be restricted to such books as contained entries relating to the agents' dealings with the testatrix and the disposition made of the securities received by them from any source for her. (Allen v. Allen, 33 N. Y. St. Rep. 876 [Sup. Ct. 1890]. Appeal dismissed, see 125 N. Y. 724.)

PENALTY — For a refusal to obey the order, should not be contained in it.] Where an order requiring a discovery is granted by a judge instead of by the court, it should not declare the penalty for an omission to comply with the order. The 16th (20th) Rule is, in this respect, invalid. (Broderick v. Shelton, 18 Abb. 213 [Gen. T. 1864]; Rice v. Ehele, 55 N. Y. 518 [1874].)

DISOBEDIENCE — Recital of the penalty for.] The insertion in the order of a statement of the consequences of not obeying it, although not authorized by the statute, does not vitiate the order. (Rice v. Ehele, 65 Barb. 185 [Gen. T. 1873]; S. C., 55 N. Y. 518; Beckwith v. N. Y. C. R. R., 64 id. 299 [Gen. T. 1865]; Winston v. English, 14 Abb. Prac. [N. S.] 119 [Gen. T. 1873]; S. C., 44 How. Prac. 398; Morgan v. Whittaker, 14 Abb. Prac. [N. S.] 127 [Gen. T. 1873].)

—— **How punished.]** The refusal of a witness to obey the order of a referee to produce certain books upon an examination before him is not punishable by the imposition of a fine, but the action of the court in such case is governed by section 856 of the Code. (Press Publishing Co. v. Associated Press, 41 App. Div. 493 [1899].)

—— **Applies to a contumacious refusal only.]** Section 808 applies only to a contumacious refusal to comply with order for discovery and inspection, and not to a case where party has produced the documents and their genuineness is attacked. (Banes v. Rainey, 130 App. Div. 465].)

NOTICE — Must be given.] In so far as the former rule authorized the granting of a rule absolute without notice, giving effect to an order imposing, as a penalty for noncompliance with it, the striking out of defendant's answer, it is unauthorized and void. Nor was it validated by the provision of chapter

408, Laws of 1870, legalizing certain rules of the court. (Rice v. Ehele, 55 N. Y. 518 [1874], reversing S. C., 65 Barb. 185.)

APPEAL — The order affects a substantial right.] An order for the discovery of books and papers is one affecting a substantial right and is appealable. (Thompson v. Erie R. R. Co., 9 Abb. [N. S.] 212 [Gen. T. 1870]; Same v. Same, Id. 230; Julio v. Ingalls, 17 Abb. 448, n. [Gen. T. 1863]; Woods v. De Figaniere, 1 Rob. 681 [Gen. T. 1863]; S. C., 25 How. Prac. 522.)

—— **Not reviewable in the Court of Appeals.]** Whether or not a *subpœna duces tecum* shall be set aside and whether a defendant shall be granted permission to inspect and copy plaintiff's books rests in the discretion of the court below and is not reviewable in the Court of Appeals. (Clyde v. Rogers, 87 N. Y. 625 [1881]; Finlay v. Chapman, 119 id. 404 [1890].)

—— When an order denying an attachment against a party refusing to make a discovery as ordered is not appealable. (Ackroyd v. Ackroyd, 2 Abb. [N. S.] 380.)

—— **Oppressive order — remedy.]** If the order for discovery is oppressive the remedy is by motion, and not by appeal. (Matter of Kelly, 11 N. Y. Wkly. Dig. 308 [Gen. T. 1880].)

—— **When an order for discovery will not be reversed on appeal.]** While the General Term has power to review the exercise by the Special Term of its discretionary powers on an application for a discovery of books and papers under the Code of Civil Procedure (chap. 8, tit. 6, art. 4, § 803 *et seq.*), it will not reverse the action of the Special Term unless it quite clearly appears that upon the merits of the motion the Special Term has erroneously exercised its discretion. (Hart v. Ogdensburgh & L. C. R. R. Co., 69 Hun, 497 [1893].)

—— Order refusing a discovery of partnership books reversed. (Livingston v. Curtis, 12 Hun, 121 [1877].)

—— **Physical examination of plaintiff in action for personal injuries.]** A mere physical examination, distinct and apart from any other examination, is not allowed. (Lyon v. M. R. Co., 142 N. Y. 303.)

(See, also, Snyder v. DeForest Wireless Tel. Co., 113 App. Div. 840; Wood v. J. L. Mott Iron Works, 114 id. 108; Memphis Trotting Assn. v. Smathers, 114 id. 376; Caldwell v. Mutual Reserve Life Ins. Co., 114 id. 377; Ferguson v. Bien, 49 Misc. Rep. 50; Hirschfield v. I. Rosenthal & Co., 99 N. Y. Supp. 912; Brewster v. Brewster, 127 App. Div. 729; Iroquois Hotel, etc., Co. v. Iroquois Realty Co., 126 id. 814.)

RULE 15.

Form of Application for Discovery of Books.

The moving papers upon the application for such discovery or inspection shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit stating that the books, papers, articles, property and documents whereof discovery or inspection is sought are not in the possession nor under the control of the party applying therefor, but are in the possession or under the control of the party against whom discovery is sought or

his agent or attorney. The party applying shall show to the satisfaction of the court or judge the materiality and necessity of the discovery or inspection sought, the particular information which he requires, and in the case of books and papers, that there are entries therein as to the matter of which he seeks a discovery or inspection.

Rule 20 of 1858, amended. Rule 19 of 1871. Rule 19 of 1871, amended. Rule 15 of 1877. Rule 15 of 1880. Rule 15 of 1884. Rule 15 of 1888, amended. Rule 15 of 1896.

See notes to Rule 14.

RULE 16.

Order, What to Contain — Order for Discovery to Operate as a Stay of Proceedings.

The order for granting the application shall specify the mode in which the discovery or inspection is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or to allow an inspection with copy, or by requiring him to produce and deposit the same with the clerk, unless otherwise directed in the order. The order shall also specify the time within which the discovery or inspection is to be made, and when papers, articles or property are required to be deposited or inspected the order shall specify the time the deposit or the opportunity for inspection shall continue.

The court or judge may direct that the order directing the discovery or inspection shall operate as a stay of all other proceedings in the cause, either in whole or in part, until such order shall have been complied with or vacated.

The first paragraph is Rule 16 of 1858, amended. Rule 20 of 1871, amended. Rule 20 of 1874, amended. Rule 16 of 1877. Rule 16 of 1880. Rule 16 of 1884. Rule 16 of 1888, amended. Rule 16 of 1896, amended.

The second paragraph is Rule 17 of 1858, amended. Rule 22 of 1871. Rule 22 of 1874, amended. Rule 17 of 1877. Rule 17 of 1880. Rule 17 of 1884. Rule 17 of 1888, amended. Rule 17 of 1896 added to Rule 16 of 1896.

See notes under Rule 14.

CODE OF CIVIL PROCEDURE.

§ 914. In what cases deposition may be taken.

§ 915. Subpœna to witness.

§ 919. Taking and return of deposition.

A witness cannot question sufficiency of proof upon which a subpœna is issued. (Matter of Heller, 41 App. Div. 595.)

RULE 17.

Application for a Subpœna to Compel the Attendance of a Witness to Obtain Testimony under Depositions Taken within the State for Use without the State, and Proceedings Thereon.

The petition prescribed by section 915 of the Code of Civil Procedure must state generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of a witness is material to the issues presented in such action or proceeding, and shall set forth the substance of or have annexed thereto a copy of the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpœna to compel the production of books or papers, the petition shall specify the particular books or papers the production of which is sought, and show that such books or papers are in the possession of or under the control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken. Unless the court or judge is satisfied that the application is made in good faith to obtain testimony within sections 914 and 915 of the Code of Civil Procedure, he shall deny the application. Where the subpœna directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner, or to produce the original thereof and deposit the same with the commissioner. This subpœna must be served upon the witness at least two days, or, in case of a subpœna requiring the production of books or papers, at least five days before the day on which the witness shall be commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpœnaed to attend and give his deposition, may apply to the court to vacate or modify such subpœna.

Upon proof by affidavit that a person to whom a subpœna was issued has failed or refused to obey such subpœna; to be duly sworn or affirmed; to testify or answer a question or questions propounded to him; to produce a book or paper which he has been subpœnaed to produce; or to subscribe to his deposition when correctly taken down, a justice of the Supreme Court or a county

judge shall grant an order requiring such person to show cause before the Supreme Court, at a time and place specified, why he should not appear; be sworn or affirmed; testify; answer a question or questions propounded; produce a book or paper; or subscribe to his deposition, as the case may be. Such affidavit shall also set forth the nature of the action or special proceeding in which the testimony is sought to be taken and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the fact to be proved therein. Upon the return of such order to show cause, the Supreme Court shall upon such affidavit and upon the original petition, and upon such other facts as shall appear, determine whether such person should be required to appear; be sworn or affirmed; testify; answer the question or questions propounded; produce the book or paper; or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the court or judge shall make an order requiring such person to show cause before it or him at a time and place therein specified, why such person should not be punished for the offense as for a contempt. Upon the return of the order to show cause the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the court or judge before whom the order to show cause is made returnable, the court or judge shall enforce the order and prescribe the punishment as in the case of a recalcitrant witness in the Supreme Court.

CODE OF CIVIL PROCEDURE.

§ 775. Stay of proceedings, except on notice, when not to exceed twenty days.

§ 805. The order to show cause in proceedings for a discovery may contain a stay of proceedings.

See Matter of Searles, 155 N. Y. 333 (1898); People ex rel. MacDonald v. Leubischer, 34 App. Div. 577 (1898).

——**Subpœna issued under section 915, Code of Civil Procedure.]** Witness cannot question sufficiency of proof upon which subpœna issued. (Matter of Heller, 41 App. Div. 595. See, also, Matter of Dittman, 65 id. 343.)

Section 775 not applicable to stay for purpose of motion for reargument. (F. B. N. Co. v. Mackey, 158 N. Y. 683; Condon v. Ch. of St. Augustine, 14 Misc. Rep. 181.)

When books and papers are to be used as an incident to the oral testimony of the witness, it is not necessary to proceed under sections 803–809. (Matter of Thompson, 95 App. Div. 542.)

RULE 18.

Service of Summons by a Person Other than the Sheriff — Affidavit of, What to Contain in Divorce Cases.

Where personal service of the summons and of the complaint, or notice, if any, accompany the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service his age, or that he is more than twenty-one years of age; when, and at what particular place, and in what manner he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein, and also to state in his affidavit that he left with defendant such copy, as well as delivered it to him. No such service shall be made by any person who is less than eighteen years of age.

In actions for divorce, or to annul a marriage, or for separate maintenance, the affidavit, in addition to the above requirements, shall state what knowledge the affiant had of the person served being the defendant and proper person to be served, and how he acquired such knowledge. The court may require the affiant to appear in court and be examined in respect thereto, and when service has been made by the sheriff, the court must require the officer who made the service to appear and be examined in like manner, unless there shall be presented with the certificate of service the affidavit of such officer, that he knew the person served to be the same person named as defendant in the summons, and shall also state the source of his knowledge.

Rule 18 of 1858, amended. Rule 23 of 1871, amended. Rule 32 of 1874, amended. Rule 24 of 1871, amended. Rule 24 of 1874, amended. Rule 18 of 1877. Rule 18 of 1880. Rule 18 of 1884. Rule 18 of 1888, amended. Rule 18 of 1896.

CODE OF CIVIL PROCEDURE.

§ 398. An action is commenced when summons is served.
§ 399. An attempt to commence an action in a court of record is equivalent to the commencement thereof, with reference to the Statute of Limitations.
§ 400. The delivery of a summons to the proper officer is a commencement — for the like purpose in a court not of record.
§ 416. An action is commenced by a summons — jurisdiction acquired conditionally from granting of provisional remedy.
§ 417. The requisites of summons.
§ 418. The form of summons.
§ 419. Service of a copy complaint or notice with summons — otherwise judgment by default cannot be taken without application to the court.
§ 424. A voluntary general appearance is equivalent to personal service.
§ 425. Service of summons — when and by whom made.
§ 426. Personal service of summons — how made upon a natural person.
§§ 427, 428. Service in cases of infancy, lunacy, habitual drunkenness, etc.
§ 429. When delivery of a copy to a lunatic dispensed with.
§ 430. Designation by resident of person upon whom service may be made for him during absence.
§ 431. Personal service — how made on domestic corporation.
§ 432. Personal service — how made on foreign corporation.
§ 433. Provisions as to service apply to special proceedings.
§ 434. Proof of service of summons — how made.
§§ 435, 436. Service — how made — when defendant avoids service.
§ 437. Papers to be filed — proof of service.
§ 438 *et seq.* Service by publication — may be ordered — when.
§ 451. When defendant or his name is unknown — how designated.
§ 453. Supplemental summons — to issue to parties brought in — its service.
§ 473. Service — on guardian *ad litem* for absent infant.
§ 638. Service — after issuing warrant of attachment.
§ 760. Supplemental summons — may issue on bringing in successor of deceased party.
§ 802. The general rules as to the service of papers do not apply to.
§ 824. The summons to be filed within ten days after service.
§ 1541. What notice must be subjoined to a copy summons, when an unknown party is made a defendant in an action for partition.
§ 1588. Supplemental summons — to bring in a new defendant — after the death of a party in an action for partition.
§ 1594. In actions for partition — where the people are a party — service to be made on Attorney-General.
§ 1657. To bring in new parties in an action for waste, where judgment of partition is granted.
§ 1670. Service must be made within sixty days after filing *lis pendens*.

§ 1774. Requisites of summons — for judgment by default in matrimonial actions.
§ 1895. Service, filing, etc., in action for penalty.
§§ 1897, 1964. Indorsement upon in an action for a statutory penalty.
§ 1929. Summons in certain cases to contain a designation of the officer by, or against whom suit is brought.
§ 2876 *et seq.* Summons — contents and service of, in courts of justices of the peace.
§ 3126. Copy of complaint may be served with summons, in Justice's Court in Brooklyn.
§ 3165. Summons — in New York Marine Court (now City Court of New York).
§ 3170. Service of summons in New York Marine Court (now City Court of New York) without the city or by publication.
§ 3205. In City Court of Yonkers.
§ 3207. Summons, served with copy complaint, in New York District Courts, and Justices' Courts of Albany (now City Court of Albany) and Troy.
§ 3208. Proof of service in such courts.
§ 3209. Action in such courts must be commenced by summons.
§ 3218. Returnable immediately in New York District Courts — where order of arrest is made.

PROOF OF SERVICE — Sheriff's certificate of service, out of his county.] The certificate of a sheriff out of the State, and of any sheriff out of his own county, is not sufficient proof of service; his affidavit should be presented. (Morrell v. Kimball, 4 Abb. 352 [Sp. T. 1857]. See Farmers' Loan & Trust Co. v. Dickson, 9 id. 61 [Sp. T. 1859].)

—— When a sheriff's certificate is insufficient evidence of service.] The service of a summons to be used as evidence against defendants who have not appeared, is defective where the sheriff's certificate is produced, which states "that he served on them a copy of a summons and complaint," without mentioning any cause in which it was served. (Litchfield v. Burwell, 5 How. Prac. 342 [Sp. T. 1850].)

—— Return of sheriff — conclusive, though service was made by one not a deputy.] A summons and complaint and order of arrest were delivered to the sheriff, and he verbally deputed a person, not his deputy, to serve them, who did so, and the sheriff made a return that he (the sheriff) had served them and had taken an undertaking for the defendant's appearance; the return is conclusive in that suit. (The Col. Ins. Co. v. Force, 8 How. Prac. 353 [Gen. T. 1853].)

—— Clerical error in sheriff's certificate — disregarded.] A mere clerical error in defendant's name in a sheriff's certificate may be disregarded. The use of the words "said defendant," on the certificate, will support the conclusion that the real defendants were intended. (Miller v. Brenham, 68 N. Y. 33 [1877].)

—— **Positive affidavit of service — when it prevails over defendant's denial.]** Where doubt is thrown upon a defendant's denial of the service of a summons upon him, a positive affidavit on file of the service must prevail. (Moulton v. de MaCarty, 6 Rob. 470 [Gen. T. 1866]; Dutton v. Smith, 23 App. Div. 188 [1897]. See, also, Smith v. Hickey, 25 id. 105 [1898].)

—— **Service presumptively established by the judgment record.]** The creditors of a firm filed a bill in equity in the Circuit Court of the United States making the necessary persons parties, and including among them two children of a deceased partner, aged respectively two and three years. On the same day a subpœna was issued, but there was no entry in the docket of the clerk (which contained all other proper and necessary entries) of a return of the subpœna, nor did the papers in the case on file in the clerk's office contain the subpœna or any return of its service. Held, that, assuming the service of the subpœna to be jurisdictional, the fact of the service thereof was presumptively established by the judgment record. (Sloane v. Martin, 77 Hun, 249 [1894].)

—— **Plaintiff — how concluded as to the date of service of a summons.]** Where the plaintiff files, with the papers composing the judgment-roll (as he is required to do), the proof of service of the summons and complaint, he is concluded by such proof as to the time when the action was commenced. Burroughs v. Reiger, 12 How. Prac. 171 [Sp. T. 1856].)

—— **Defendant may controvert the certificate, or affidavit of service.]** The return of a sheriff, or an affidavit of a person acting in his place, of the service of a summons, is not conclusive upon the defendant. He may be allowed to disprove it on a motion to set the proceedings aside. (Van Rensselaer v. Chadwick, 7 How. Prac. 297 [N. Y. Supr. Ct. Gen. T. 1852].)

—— **Omission to state affiant's age in affidavit of service, where affiant is an attorney-at-law.]** An affidavit of service is not defective in omitting to state the age of the affiant, where it states that he is the plaintiff's attorney, as the court will take judicial notice of the fact that he is of full age. (Booth v. Kingsland Ave. Bldg. Assn., 18 App. Div. 407 [1897].)

—— **Judicial notice of attorney's age — irregularities not fatal.]** The court will take judicial cognizance of the fact that its attorneys are at least twenty-one years of age.

An affidavit of service of a summons and complaint from which the residence and age of the affiant is entirely missing, but in which it was stated that he was the plaintiff's attorney, and which was annexed to the summons which contained his office and post-office address, is sufficient in its formal character to resist a motion to cancel the summons and complaint and the notice of lien and the *lis pendens* in an action to foreclose the mechanic's lien. (Booth et al. v. Kingsland Ave. Bldg. Assn., 18 App. Div. 407 [1897].)

—— **Must show that person serving knew defendant.]** The affidavit of service must show that the person making it had some personal knowledge that the person served is the defendant in the action. (O'Connell v. Gallagher, 104 App. Div. 492.)

Affiant required to state facts from which the court may say that he knows the person served to be the husband or the wife of the plaintiff. (Freeman v. Freeman, 57 Misc. Rep. 400.)

HOW MADE — A constable may serve a process in his own favor.] A plaintiff who is a constable, may serve a process in his own favor, issued by a justice of the peace. (Putnam v. Man, 3 Wend. 202 [1829]; Smith v. Burliss, 23 Misc. Rep. 544 [1898].)

—— A sheriff may serve his own process.] It seems that a sheriff who is plaintiff may serve his own writ. (Bennett v. Fuller, 4 Johns. 486 [1809].)

—— In Justice's Court a plaintiff may not serve his own summons.] In a Justice's Court, plaintiff cannot serve his own summons, though he have written authority to do so from the justice. (Warring v. Keeler, 11 Misc. Rep. 451 [1895].)

—— Service by a party is a mere irregularity.] The service of a summons by a party is a mere irregularity. (Hunter v. Rester, 10 Abb. Prac. 260 [Sp. T. 1860].) How avoided. (Myers v. Overton, 2 Abb. Prac. 345 [N. Y. Com. Pl. Gen. T. 1855]; Sebring v. Stryker, 10 Misc. Rep. 289 [1894].)

—— In a special proceeding.] Service of papers by party in a special proceeding is a mere irregularity. (Losey v. Stanley, 83 Hun, 420 [1894].)

—— Plaintiff may prove an admission of service.] The fact that the plaintiff is forbidden to serve the summons does not preclude him from proving an admission of service. (White v. Bogart, 73 N. Y. 256 [1878].)

—— Service must be directly to the party.] A summons must be served personally on the party. Where a summons was handed to the father, proof that it afterwards came into the hands of the son, held, insufficient to sustain a judgment against the son. (Williams v. Van Valkenburgh, 16 How. Prac. 144 [Gen. T. 1858]. See, also, O'Connell v. Gallagher, 104 App. Div. 492.)

—— Receiving back a summons makes the delivery insufficient.] Where the defendant, upon being served with the summons and complaint, voluntarily hands them back, it is the duty of the person making service to offer to leave copies or to acquaint the defendant with his rights. (Beekman v. Cutler, 2 Code Rep. 51 [Sp. T. 1849].)

—— Service on a corporation at common law.] At common law, a process against a corporation must be served on its head or principal officer, within the jurisdiction of the sovereignty where the artificial body exists. (Barnett v. Chi. & L. H. R. R. Co., 4 Hun, 114 [1875].)

—— Service of a summons upon one with whom a lunatic resides is insufficient.] Service of a summons upon one with whom a person of unsound mind resides is not good service. It should be upon the defendant himself, and if he has a committee, also upon the committee. (Heller v. Heller, 6 How. Prac. 194 [Sp. T. 1851].)

—— Service on a convict in State's prison is good.] Service of legal process upon a convict in the State prison is regular and valid to confer jurisdiction. The statute which "suspends all civil rights of the person" sentenced to the State prison does not suspend the rights of others against him; he may be sued and the suit against him be prosecuted to judgment. (Davis v. Duffie, 3 Keyes, 606 [1867]; Slade v. Joseph, 5 Daly, 187 [1874].)

—— In action against a sheriff for an escape it may be served on the under sheriff.] In an action commenced against a sheriff for an escape from the jail limits the summons may be properly served on the under-sheriff, and the addi-

tion of his official title to the name of the sheriff in such an action is only by way of description, and is a superfluous addition. (Didsbury v. Van Tassell, 56 Hun, 423 [1890].)

—— **Service in an action under chapter 185 of 1857.]** The service of the summons in an action brought under chapter 185 of the Laws of 1857 is not governed by section 1895 of the Code of Civil Procedure. (Quade v. N. Y., N. H. & Hart. R. R. Co., 39 N. Y. St. Rep. 157 [N. Y. Supr. Ct. 1891].)

—— **Placing the summons on defendant's shoulder, sufficient.]** In an action to set aside the service of the summons it was held that sufficient service had been made by a person who laid the summons upon defendant's shoulder, said defendant having previously refused to accept service thereof. (Martin v. Raffin, 2 Misc. Rep. 588 [N. Y. City Ct. 1893].)

—— **Throwing the paper near the defendant.]** Where a defendant, with intent to evade service of a paper, will not allow the servor to enter his room, service may be made by throwing the paper near the defendant and calling his attention to the same, and the application by plaintiff for an order for substituted service is not a conclusive election on his part that the service was ineffectual. (Wright v. Bennett, 30 Abb. N. C. 65, note [Ct. App. 1889].)

—— **As to what constitutes "leaving" process in the hands of the person served.]** (See Johnson v. Mutual L. Ins. Co., 104 App. Div. 550.)

—— Depositing papers in a chair, without delivery into defendant's hands, not a good service. (Correll v. Granget, 12 Misc. Rep. 209 [1895].)

—— **Service by violence bad — how made on a party who refuses to receive the papers.]** Where the service of process or papers upon a person is made by violently thrusting them upon his person, the service will be held void, although the person or officer making the service may have stated the nature of the papers, and the person upon whom they were intended to be served refused to receive them. In other words, a person or an officer has no right to commit an assault and battery upon an individual in trying to serve the papers upon him. Where a person upon whom service of process is desired to be made refuses to receive them, the person or officer making the service should inform him of the nature of the papers and of his purpose to make service of them, and lay them down at any appropriate place in his presence. (Davidson v. Baker, 24 How. Prac. 39 [Sp. T. 1862].)

—— When made by a private person, who wrongfully enters the house of the person served. (Mason v. Libby, 1 Abb. N. C. 354 [1876].)

—— **Serving a summons concealed in an envelope — not good.]** Putting the defendant in the unknown possession of a summons disguised or enveloped, so as to conceal from him the knowledge which it was the intent of the law should be communicated, is not a good service, and the subsequent discovery by the defendant, upon whom such an attempted service is made, of the contents of the summons is not to be deemed a good service, if the defendant is beyond the limits of the State when he makes such discovery. (Bulkley v. Bulkley, 6 Abb. Prac. 307 [Sp. T. 1858].)

—— That a summons served otherwise than as required by statute reached the party to be served does not render the service valid. (Eisenhofer v. N. Y. Zeitung Pub. & Ptg. Co., 91 App. Div. 94.)

JURISDICTION — Court has no jurisdiction where a summons is not legally served.] When the summons in an action is not legally served the court has no jurisdiction of the defendant, and in such case all proceedings based on pretended service are void. (Bulkley v. Bulkley, 6 Abb. Prac. 307 [Sp. T. 1858].)

—— Service of summons the only way of bringing a party into court against his will.] There is no way of bringing a party into court and within its jurisdiction against his will but by service of process. (Akin v. Albany Northern R. R. Co., 14 How. Prac. 337 [Sp. T. 1856]. See Treadwell v. Lawlor, 15 id. 8 [Gen. T. 1875].)

—— Service of summons on holidays mentioned in chapter 30 of 1881.] The provisions of chapter 30 of the Laws of 1881 do not prohibit the commencement of actions or the transaction of legal business upon the holidays mentioned in said act. (Didsbury v. Van Tassell, 56 Hun, 423 [1890].

—— Service of a summons on an election day is void.] Service of summons, with or without an order of arrest, on an election day, and all proceedings under it, are void. (Weeks v. Noxon, 11 How. Prac. 189 [Sp. T. 1855].)

—— As to charter elections. (See Wheeler v. Bartlett, 1 Edw. Ch. 323 [1832]; Matter of Election Law, 7 Hill, 194 [1845].)

See notes on *dies non juridicus*, 29 Abb. N. C. 179.

—— Admission of service by a party out of the State will not sustain proceedings in personam.] The admission of service of summons by parties defendant residing out of the State is ineffectual as the basis of any judicial proceeding *in personam* in this State. (Litchfield v. Burwell, 5 How. Prac. 342 [Sp. T. 1850].

—— Personal service out of the State — effect of.] Whether personal service of a copy of the summons and complaint out of this State (under Code of Civil Procedure, § 135) confers on the court any jurisdiction whatever in any case, *quære*. (Morrell v. Kimball, 4 Abb. 352 [Sp. T. 1857].)

—— Joint debtors — one not within the jurisdiction of the court.] The jurisdiction of a local court cannot be extended to persons and subjects beyond its territorial jurisdiction by the fact that one of several joint debtors sued is served and resides within its jurisdictional limits. (Hoag v. Lamont, 60 N. Y. 96.)

ADMISSION — An admission of service signed by a party (not an attorney) must be acknowledged or proved.] Service is defective where an admission of service, purporting to be signed by some of the parties defendant, is produced without some evidence of their signatures being genuine, or that they were written to the admission with their assent. The court takes judicial notice of the signatures of its officers, but is not presumed to know the signature of a party defendant who has not appeared. (Litchfield v. Burwell, 5 How. Prac. 341 [Sp. T. 1850].)

APPEARANCE — Voluntary appearance and appointment of a guardian for an infant, good.] Jurisdiction over the person is as fully acquired by the voluntary appearance of the defendant as by service of a summons. (Code of Procedure, § 139.) When upon the petition of infants, over the age of fourteen, a guardian *ad litem* has been appointed in a partition suit, the order is

valid although no summons had been previously served upon the infants. (Varian v. Stevens, 2 Duer, 635 [Gen. T. 1853].)

—— **What answer waives a defect of jurisdiction over the person.]** A defendant who voluntarily appears and answers, although the answer in terms reserves the right to object to the jurisdiction of the court, is precluded thereby from objecting that the court has not acquired jurisdiction of his person. A voluntary appearance is equivalent to the personal service of the summons. (Mahaney v. Penman, 4 Duer, 603 [Sp. T. 1854].)

—— **Service of process upon a non-resident voluntarily submitting himself to the jurisdiction of the court — when set aside.]** Where a defendant has voluntarily submitted himself to the jurisdiction of the court, upon an agreement which was not carried out, that there should be immediate trial without a jury, held, that the service of the summons and an order of arrest upon him were properly vacated and set aside. (Graves v. Graham, 19 Misc. Rep. 618 [1897].)

—— **What answer is not a waiver of a want of jurisdiction over the person.]** An appearance, by putting in an answer protesting against the exercise of jurisdiction, is not such an appearance as waives the objection to the jurisdiction of the court. Nor is the mere subscription of an answer, with the name of an attorney, such an appearance as to waive any objection to the jurisdiction. (Sullivan v. Frazle, 4 Rob. 616 [N. Y. Supr. Ct. Gen. T. 1865].)

—— **What is not a voluntary appearance.]** Personal attendance, in compliance with a *subpœna duces tecum*, cannot be deemed a voluntary appearance, although another might have been sent with the books. (Sebring v. Stryker, 10 Misc. Rep. 289 [1894].)

See *ante*, notes under Rule 9.

IRREGULARITY — A summons cannot issue for an infant plaintiff until the appointment of a guardian ad litem.] A guardian for an infant plaintiff must be appointed before the issuing of a summons and complaint. (2 R. S. 446.) The Code of Procedure has not abrogated the former practice. (Hill v. Thatcher, 3 How. Prac. 407 [Sp. T. 1848].)

—— **Otherwise the service of the summons will be irregular.]** Where such guardian was not appointed until the day of service of the summons and complaint, which were dated and sworn to one day previous, held, that the summons was irregular. (See 12 Wend. 191 [1834]; Hill v. Thatcher, 3 How. Prac. 407 [Sp. T. 1848].)

—— **Service by a party a mere irregularity.]** Service of a summons by a party is a mere irregularity, which cannot be taken advantage of after judgment. (Hunter v. Rester, 10 Abb. Prac. 260 [Sp. T. 1860].)

—— **If the defendant is served by the plaintiff, he must take advantage of the irregularity by motion.]** Where a defendant is served with process by the plaintiff personally, he must take advantage of the irregularity by moving to set aside the proceedings before judgment, otherwise his motion will be too late. (Myers v. Overton, 2 Abb. Prac. 345 [N. Y. Com. Pl. Gen. T. 1855].)

—— **Privilege of witness must be asserted at the first opportunity.]** The privilege of a witness in attendance upon the court to be relieved from service of a summons must be asserted at the first opportunity, or it is waived;

and if not claimed at the trial, is not available for the first time on appeal. (Sebring v. Stryker, 10 Misc. Rep. 289 [1894].)

—— **Objection that a sheriff did not make service — when to be taken.]** The objection that a summons was not served by the sheriff, pursuant to section 1895 of the Code of Civil Procedure, in an action brought under chapter 185 of the Laws of 1857, must be taken before the service of the answer, to be effectual. (Ahner v. N. Y., N. H. & Hart. R. R. Co., 39 St. Rep. 196 [N. Y. City Ct. 1891].)

—— **Suit not regularly commenced — the remedy is by motion.]** If a suit has not been regularly commenced, the defendant must relieve himself from such irregularity by motion. (Nones v. The Hope Mut. Life Ins. Co., 8 Barb. 541 [Gen. T. 1850]; Wallis v. Lott, 15 How. Prac. 567.)

—— **A pretended service, avoided by motion.]** A pretended service of process on a defendant may be disproved by affidavit upon motion. (Wallis v. Lott, 15 How. Prac. 567.)

—— **Objection to service of summons cannot be taken by answer or demurrer.]** The objection that a summons, as the commencement of a suit, was not properly served, is not available in an answer or demurrer, but only on motion to set the proceedings aside. (Nones v. The Hope Mut. Life Ins. Co., 8 Barb. 541 [Gen. T. 1850].)

—— **Irregular service cannot be set up in the pleadings.]** The meaning of the section of the Code of Procedure allowing it to be set up as a defense, that "the court has no jurisdiction of the person," is, that the person is not subject to the jurisdiction of the court; not that the suit has not been regularly commenced. (Nones v. The Hope Mut. Life Ins. Co., 8 Barb. 541 [Gen. T. 1850].)

—— **Where defendant has attempted to evade service, what evidence of nonservice will be required before the judgment will be vacated.]** Where it appears that a defendant has endeavored to avoid the service of a summons, the court, on a motion to vacate the judgment for nonservice of the summons, will require the defendant to furnish satisfactory evidence that he was not served. (Southwell v. Maryatt, 1 Abb. Prac. 218 [Sp. T. 1855].)

—— **Service set aside where the defendant was induced to come into the State by a trick.]** Where a defendant residing in Canada was inveigled into this State by a trick, for the purpose of effecting the service of a summons upon him, the service of the summons and all proceedings dependent thereon were set aside and a warrant of attachment vacated. (Metcalf v. Clark, 41 Barb. 45 [Gen. T. 1864]; to same effect, Benninghoff v. Oswell, 37 How. Prac. 234 [Sp. T. 1868]; Carpenter v. Spooner, 2 Code R. 140; affirmed, 3 C. R. 20 [Gen. T. 1850]; Goupel v. Simonson, 3 Abb. Pr. 474 [Sp. T. 1856]; Baker v. Wales, 14 Abb. Pr. [N. S.] 331 [1873].)

—— **Service on one inveigled into the State set aside — order of arrest not.]** The service of a summons and order of arrest may be set aside where the defendant has been inveigled into coming within the jurisdiction, for the purpose of making such service, but the order of arrest need not be vacated in consequence thereof. (Higgins v. Dewey, 27 Abb. N. C. 8 [N. Y. Com. Pl. 1891], affirming 13 id. 570.)

—— **Set aside when the defendant was induced to come into the State for the purpose of procuring his arrest — action not dismissed.]** Upon the appeal from an order setting aside the service of a summons, complaint and order of arrest in an action, and dismissing the action, with costs, and from the judgment entered thereon, the papers showed that the defendant, a nonresident of the State of New York, was enticed into the State for the purpose of procuring his arrest, and serving the summons and complaint upon him. Held, that such order properly vacated and set aside the service of the summons as well as the service of the order of arrest; that it should not have dismissed the action, with costs, when the summons was properly issued to the sheriff and the order of arrest obtained upon sufficient papers and properly delivered to the sheriff. (Beacon v. Rogers, 79 Hun, 220 [1894].)

—— **What acts, inducing one to come within the jurisdiction of the court, constitute deceit.]** Service of process effected by the plaintiff, requesting a debtor to come to his office for the purpose of settling a claim, but with the undisclosed intent that, if he does not come to terms, he shall be served with process, is effected with deceit, and will be set aside on motion. So held, where the debtor was induced to come within the jurisdiction by such request. (Baker v. Wales, 14 Abb. [N. S.] 331 [Gen. T. 1873].)

—— **Witness invited to attend a settlement, protected.]** Where it appears that a defendant was invited to come within the State of New York to effect the settlement of a suit, and that the party who extended the invitation intended, if negotiations for a settlement failed, to commence an action against such party, the service of a summons upon him will be considered a breach of confidence and will be set aside. (Allen v. Wharton, 36 St. Rep. 558 [Sup. Ct. 1891].)

—— **The witness must have come into the State voluntarily.]** In the absence of evidence that a defendant came into the State voluntarily to stand trial on a criminal charge, the service upon him of a summons in an action will not be set aside. (Sander v. Harris, 37 St. Rep. 594 [Sup. Ct. 1891].)

—— **It must appear where the witness came from.]** A person claiming exemption from civil process of the State of New York must have come from without the jurisdiction of the courts of said State as a party to or witness upon the occasion of the judicial proceeding which he is attending; an affidavit which does not state where the defendant came from is insufficient. (Day v. Harris, 37 St. Rep. 322 [Sup. Ct. 1891].)

—— **Service on a witness before a legislative committee, set aside.]** Service of the summons upon a defendant must be set aside where the defendant was served when attending as a witness before a legislative investigating committee, and had come for such purpose from another State and intended to return thereto, irrespective of whether or not his domicile was within the State of New York.

A motion to set aside such service may properly be made at any time before the time to answer has expired. (Thorp v. Adams, 33 St. Rep. 797 [Sup. Ct. 1890].)

—— **Service on a nonresident witness claiming to be a citizen of New York.]** The service of a summons will be set aside where it appears that the defend-

ant had gone to Cuba thirty-seven years before, had remained in business there and in other foreign States, but claimed still to be a citizen of the State of New York, and had come to the State of New York as a witness in a suit, intending to depart, as he did, after giving his testimony. (Hollender v. Hall, 33 St. Rep. 348 [Sup. Ct. 1890].)

—— **Service on nonresident attending as a witness in this State is bad.]** Where a summons was served upon a resident of another State, while attending in this State, in good faith, as a witness, the service was set aside. (Person v. Grier, 66 N. Y. 124 [1876].)

—— **Attending trial at a Circuit out of his county.]** A party attending an action on trial at a Circuit in a county other than that in which he resides is exempt from the service of a summons in a civil action in a Justice's Court of such county. (People ex rel. Hess v. Inman, 74 Hun, 130 [1893].)

—— When made upon a witness in a cause in the United States court. (Grafton v. Weeks, 7 Daly, 523 [1878].)

—— **The court has inherent power to prevent service on its officers, etc.]** The court has power, independently of the statute, to protect its officers, suitors and witnesses from molestation by means of process of the court. (Lamkin v. Starkey, 7 Hun, 479, 479 [1876].) Effect of a general notice of appearance in such a case. (Chadwick v. Chase, 5 Wkly. Dig. 589 [Sp. T. 1878].)

—— Where summons was subscribed with the name of the attorney, after which appeared the words "New York city," it was held an irregularity merely. (Sullivan v. Harney, 53 Misc. Rep. 549.)

LACHES — What laches precludes the defendant from moving to set aside a judgment for nonservice.] The court will not set aside a judgment for nonservice of the summons when it appears that, although the defendant had notice of an attempt to effect service upon him, he delayed to move until supplementary proceedings were instituted. (Hilton v. Thurston, 1 Abb. Prac. 318 [Sp. T. 1855]. See, also, Sebring v. Stryker, 10 Misc. Rep. 289 [1894]; Ahner v. N. Y., N. H. & Hart. R. R. Co., 38 N. Y. St. Rep. 196 [N. Y. City Ct. 1891]; Myers v. Overton, 2 Abb. Prac. 345 [N. Y. Com. Pl. Gen. T. 1855].)

SUBSTITUTED SERVICE — An order for substituted service is not an order granting a provisional remedy.] An order for substituted service is not an order granting a provisional remedy within the meaning of section 772 of the Code of Civil Procedure. A judge who grants such an order has jurisdiction to entertain a motion to vacate or modify it. (McCarthy v. McCarthy, 6 N. Y. Wkly. Dig. 272 [Gen. T. 1878].)

—— **Act regarding substituted service applies to infants.]** The provision of the act for substituted service upon defendants evading service applies to infants where their parent refuses to permit the infants to be served. (Steinhardt v. Baker, 20 Misc. Rep. 470 [1897]; S. C., 25 App. Div. 197 [1898].

—— **Order for substituted service.]** The order for substituted service of the summons should require the deposit of a copy in the post-office only in the event of the inability to leave a copy with a person of suitable age at defendant's residence. (Overton v. Barclay, 69 N. Y. St. Rep. 716 [1895].)

—— Sufficiency of an affidavit to obtain an order for substituted service,

under section 435 of Code of Civil Procedure, considered. (Nagle v. Taggart, 4 Abb. N. C. 144 [Sp. T. 1877]. See, also, Steinhardt v. Baker, 20 Misc. Rep. 470 [1879]; Evans v. Weinstein, 124 App. Div. 316; Sunswick Land Co. v. Murdock, 129 id. 579.)

—— Fact that plaintiff merely knew defendant was somewhere in Canada, not sufficient to warrant vacation of order for substituted service under section 435 of the Code. (Hess v. Felt, 112 N. Y. Supp. 470.)

ON HUSBAND FOR WIFE — When service in foreclosure on a husband is good service on his wife.] In the foreclosure of a mortgage made by a husband and wife on the husband's land, to secure a husband's debt, service upon the husband is good service on both him and his wife. (Nagle v. Taggart, 4 Abb. N. C. 144 [Sp. T. 1877]. See Lathrop v. Heacock, 4 Lans. 2 [Gen. T. 1871]; White v. Coulter, 1 Hun, 366 [1874]. See, also, Foote v. Lathrop, 53 Barb. 183 [Gen. T. 1869]; S. C., 41 N. Y. 358; Code of Civil Procedure, § 450.)

—— **In foreclosure suits service on the husband when good service on the wife.]** Where, in an action to foreclose a mortgage, a summons, directed to the wife, is served upon the husband, the mortgagor, it is his duty to appear and answer jointly for himself and his wife. Service of the summons upon the wife is only necessary when the proceedings are against her separate estate. (Watson v. Church, 3 Hun, 80 [1874].)

—— **Service of subpœna in 1838 upon a husband to give to his infant wife constituted good service upon the wife.]** Plaintiff, in 1836, joined with her husband in a mortgage upon his land. In 1838 they were both made parties to a suit for the foreclosure of the mortgage. No copy of the writ of subpœna was served upon her; one was served upon the husband, and one delivered to him with the request to hand it to her; she was at the time under age. A judgment of foreclosure and sale was entered, under which the premises were sold. The husband died in 1882. In an action to recover dower,

Held, that under the rule and practice in chancery proceedings in force at the time of foreclosure, personal service of the writ upon plaintiff was not necessary, but service on the husband was a good service on both, and this was so, although she was at the time under age, and that, therefore, the action was not maintainable. (Feitner v. Lewis, 119 N. Y. 131 [1890]; Feitner v. Hoeger, 121 id. 660.)

ON CORPORATIONS — On a domestic corporation.] Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the State, as follows:

1. If the action be against the mayor, aldermen and commonalty of the city of New York, to the mayor, comptroller or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent. (Code Civil Procedure, § 431.)

—— **Service on managing agent.]** Papers may be served upon a domestic corporation by delivering the same to its managing agent, although the entire

business of the corporation may not be under his control or in his charge. Service is also legal when made upon the general superintendent of the corporation. (Barrett v. American Telephone & Telegraph Co., 18 Civ. Proc. R. 363 [Sup. Ct. 1890].)

—— **Who is a managing agent.]** To authorize the legal service of summons and complaint upon a foreign corporation, where it is made upon its managing agent in this State (under section 134 of the Code of Procedure), the managing agent must be one whose agency extends to all the transactions of the corporation; one who has, or is engaged in, the management of the corporation in distinction from the management of a particular branch or department of its business. (Brewster v. Mich. C. R. R. Co., 5 How. Prac. 183 [Sp. T. 1850]. See Reddington v. Mariposa L. & M. Co., 19 Hun, 405 [1879]; Sterrell v. Denver, Rio Grande, etc., Ry. Co., 17 Hun, 316 [1879]; Palmer v. Chicago Evening Post Co., 85 Hun, 403 [1895]; Faltiska v. N. Y. Lake Erie, etc., R. R. Co., 12 Misc. Rep. 478 [1895].)

—— **A general agent is a "managing agent" of a foreign corporation.]** Where a foreign railroad corporation has an office in this State, in which a substantial portion of its business is transacted by a person designated by itself as a general agent, although followed by words indicating his agency to be confined to some one department, such agent is a "managing agent" within the meaning of the provision of the Code of Civil Procedure as to the service of summons upon a foreign corporation defendant (§ 432), and a service upon him is valid and binding upon the corporation. (Tuchband v. C. & A. R. R. Co., 115 N. Y. 437 [1889].)

—— **A general superintendent is a managing agent.]** On motion to set aside the service of a summons on a domestic telegraph company it appeared that the summons was served on the general superintendent of the work of operating the lines of the company.

Held, that the person served was the "managing agent" of the company within the meaning of the provision of the Code of Civil Procedure (§ 431) in reference to service on domestic corporations, and so that the service was good. (Barrett v. A. T. & T. Co., 138 N. Y. 491 [1893].)

—— **A general superintendent of the corporation is a managing agent.]** Personal service of a summons in an action against a corporation upon the general superintendent of the company, who has charge of one of the departments of the corporation, is sufficient. (Barrett v. American Telephone, etc., Co., 56 Hun, 430 [1890].)

—— **Who is a managing agent of an insurance company.]** An agent of an insurance company properly appointed and qualified to procure and effect insurance for the company, residing at a different place from where the principal office of the company is located, is such a "managing agent" that legal service of a summons and complaint against the company may be made by serving on him. (Bain v. Globe Ins. Co., 9 How. Prac. 448 [Sp. T. 1854].)

—— **A superintendent controlled by the home office.]** Where a person has the control as the agent of a life insurance company, subject to the direction of the home office, of a district comprising the city of Troy and village of Lansingburgh and vicinity, with nine assistant superintendents and sixty-two

sub-agents subject to his orders, and has in such district the entire superintendence of all the business of such company, he is a managing agent of the company within the meaning of subdivision 3 of section 431 of the Code of Civil Procedure, and the fact that he is controlled in the discharge of his duties by the home office does not render him any the less a managing agent. (Ives v. Metropolitan Life Ins. Co., 78 Hun, 32 [1894].)

—— **"Representative," when not a managing agent.]** Upon a motion to set aside the service of a summons upon a person alleged to be the managing agent of a foreign corporation in the State of New York, the affidavits alleged that such person was not, at the time of the service, defendant's managing agent in any sense, but was its "representative" in the city of Chicago, where he resided, and was only temporarily visiting in the city of New York when served. The opposing affidavits were to the effect that such person was in New York at the time upon business connected with the company; that he stated that he represented it, and that his name appeared in the Chicago directory as "manager" of the company.

Held, that sufficient was not shown to establish that such person was the managing agent of the defendant within the meaning of section 432 of the Code of Civil Procedure, and that there was no valid service of the summons. (Coler v. The Pittsburg Bridge Company, 146 N. Y. 281 [1895].)

—— **A ticket seller not a managing agent.]** One who merely sells tickets for them in such case is not deemed a managing agent upon whom service of process may be made. (Doty v. Mich. C. R. R. Co., 8 Abb. 427 [N. Y. Supr. Ct. Sp. T. 1859].)

—— **A baggage master is not a managing agent.]** A suit cannot be legally commenced against a railroad corporation (for loss of baggage or anything else) by the service of a summons upon a "baggage master" in their employ. He is not such a "managing agent" as the statute contemplates, but a general appearance waives the irregularity of such a service. (Flynn v. Hud. R. R. Co., 6 How. Prac. 308 [Sp. T. 1851].)

—— **Service on a telegraph operator, insufficient.]** An operator of a telegraph company in charge of a local office of said company is not a "managing agent" upon whom process can be served. (Jepson v. Postal Telegraph Cable Co., 22 Civ. Proc. R. 434 [Cattarangus County Ct. 1892].)

—— **Service made on an employee, insufficient.]** A corporation cannot be served by delivering papers to an employee, but the managing agent having control in the place in which he is located is the proper person upon whom to make service. (Ruland v. Canfield Pub. Co., 18 Civ. Proc. R. 282 [N. Y. City Ct. 1889].)

—— **A superintendent of soliciting agents is not.]** A summons cannot be served upon the superintendent of agents soliciting for a domestic life insurance company, who has no other authority or power, as he is not a managing agent of said company. (Schryver v. Met. Life Ins. Co., 29 N. Y. Supp. 1092 [Ulster Co. Cir. 1894].)

—— **Relation of an attorney not that of an agent.]** The relation of an attorney and client does not constitute an agency, such that service upon one, having no other connection with a foreign corporation than that of attorney

of record in an action to which it is a party, gives the court jurisdiction (Taylor v. G. S. P. Association, 136 N. Y. 343 [1893].)

—— **Form of affidavit of service.]** It is not necessary for the person who makes the affidavit to state what grounds he has for knowing that the person whom he served was said corporation's managing agent. (*Ib.*)

—— **Who are officers de facto of a religious corporation, on whom service may be made.]** The trustees of a religious corporation and officers appointed by them, whose elections and appointments were in conformity with the formalities prescribed by the statute, and who have in fact acted and are acting as such, are at least officers *de facto* upon whom alone a valid service of process can be made. (Berrian v. Methodist Society, 4 Abb. 424 [N. Y. Supr. Ct. Sp. T. 1857].)

—— **On railroad corporations.]** (See Code of Civil Procedure, § 2880.)

—— **On express companies.]** (See Code of Civil Procedure, § 2881.)

—— **On a board of supervisors.]** (1 R. S. 384, § 3.)

—— **On foreign corporations.]** Personal service of a summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof within the State, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in section 16 of the General Corporation Law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found, with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation within the State.

4. If person designated as provided in section sixteen of the General Corporation Law dies or removes from the place where the corporation has its principal place of business within the State and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the State, process against the corporation in an action upon any liability incurred within this State or if the corporation has property within the State may, after such death, removal or revocation and before another designation is made be served upon the Secretary of State. (Code of Civil Procedure, § 432.)

—— **Foreign insurance company, before doing business in this State.]** It must designate the superintendent of insurance as its attorney upon whom legal process may be served. (Laws of 1892, chap. 690, § 30.)

—— Service on life or casualty insurance corporations upon the co-operative or assessment plan. (Laws of 1892, chap. 690, § 203.)

—— **Section 430 amended.]** Act amending section 430, in relation to designation of person upon whom to serve a summons, by substituting the words "State of New York" in place of "United States." (Laws of 1899, chap. 524.)

—— **Irregular designation of a person on whom process may be served.]** A certificate filed by an association in attempted compliance with subdivision

2 of section 432, Code of Civil Procedure, authorizing a nonresident corporation to designate a person within the State of New York upon whom process may be served, which does not designate the place where the service can be made, and is not accompanied by the consent of the person designated, nor filed in the Secretary of State's office, is fatally defective. (McClure v. Supreme Lodge, Knights of Honor, 41 App. Div. 131 [1899].)

—— **Service on the insurance superintendent for a company not admitted to do business in the State.]** The service of the summons upon the superintendent of the insurance department is inoperative and will be set aside where it appears that the defendant, a foreign fire insurance company intending to do business in the State of New York, appointed such superintendent its attorney to receive service of process, but that they were refused permission to do business in the State of New York, and thereupon requested such superintendent to return to them all the papers filed with him. (Richardson v. Western Home Ins. Co., 29 St. Rep. 820 [Sup. Ct. 1890].)

—— **An admission of service by the superintendent of the insurance department is sufficient.]** Where the superintendent of the insurance department of the State of New York has been appointed attorney to receive service of process in actions against a foreign insurance company, as provided by section 1 of chapter 346 of the Laws of 1884, his written admission of service of a summons in such an action, sent to him by mail, constitutes a sufficient service on the company. (Farmer v. National Life Association, 67 Hun, 119 [1893].)

—— **Clerk appointed by the superintendent of a foreign fire insurance company to take service.]** The superintendent of a foreign fire insurance corporation, who had power to appoint clerks and deputies and to prescribe their duties, appointed a clerk to take charge of the service of papers upon him for foreign corporations.

Held, that the superintendent had power to appoint a clerk to take charge of the matter of such service, and where service upon the clerk was authenticated by the written admission of the superintendent it was valid and binding upon the foreign corporation. (South Publishing Co. v. Fire Association, 67 Hun, 42 [1893].)

—— Law authorizing service on superintendent of insurance department does not preclude any other legal methods of service. (Howard v. Prudential Ins. Co., 1 App. Div. 135 [1896]; Silver v. Western Assurance Co., 3 id. 572 [1896].)

—— Service on cashier of domestic life insurance company, held valid in Russell v. Washington Life Ins. Co., 62 Misc. Rep. 403.

—— Service of summons on the cashier of a foreign insurance company in this State can only be justified under subdivision 3 of section 432 of the Code of Civil Procedure. In this case the company had designated the State Superintendent of Insurance as a person authorized to receive service of process, but the plaintiff served the summons upon a person alleged to be its cashier. Summons was not delivered to the sheriff, there was no statement that the cause of action arose in this State, or that the defendant had property here. Held that the service was defective and should be set aside. (Willcox v. Phila. Cas. Co., 136 App. Div. 626.)

—— Where defendant corporation shows that it has ceased to do business in this State and has revoked the appointment of the Superintendent of Insurance as the person to receive service of summons, service on the superintendent is a nullity unless plaintiff shows that as to him the power of attorney was irrevocable. (Badger v. Helvetia Swiss Fire Ins. Co., 136 App. Div. 32.)

—— The designation of the superintendent to receive service of process is not terminated or revoked by the ratification by the State superintendent of the license of the company to do business in this State. (Klein Bros. v. Ger. Union F. Ins. Co., 66 Misc. Rep. 536.)

—— **In default of designation, service on the counsel of a foreign corporation is good.]** The service of a summons here on the general solicitor or counsel of a foreign corporation is good service, where the corporation has failed to designate a person in this State on whom service of papers could be made, as required by chap. 279 of the Laws of 1855. (Clews v. The Rockford, R. I. & St. L. Co., 49 How. Prac. 117 [Sp. T. 1874].)

Where the only person held out by the corporation is occupying the relation of "a managing agent" within the State of New York, and such manager is served with a summons directed to the corporation while he is within the State of New York, the service is a good one. (Young & Fletcher Co. v. Welsbach Co., 55 App. Div. 19 [1900].)

—— **Service, how made on a foreign fire insurance company.]** An action may be commenced, under section 427 of the Code of Procedure, by a citizen of this State against a foreign fire insurance company, in either of the courts designated in that section, by the service of a summons in the form prescribed by the Code as in other civil actions. No other process is required either for the commencement or the maintenance of the action. (Gibbs v. Queens Ins. Co., 63 N. Y. 114 [1875].)

—— **On the secretary of a foreign corporation.]** Service, within this State, of a summons upon the secretary of a foreign corporation gives, by force of section 432 of the Code of Civil Procedure, the courts of this State jurisdiction of an action against such corporation, and it is not needful, in order to make such service effective, that the corporation should have any property within this State, or that the cause of action should have arisen here. (Miller v. Jones, 67 Hun, 282 [1893].)

—— **On the cashier of a foreign corporation.]** The service of the summons upon the cashier of a foreign corporation is valid under section 432 of the Code of Civil Procedure, provided such corporations has no other officers within the State. (McCulloh v. Paillard Non-magnetic Watch Co., 38 St. Rep. 406 [Sup. Ct. 1891].)

—— **Service on a director of a foreign corporation in an action under chap. 185 of 1857.]** Although by a special statute a foreign corporation was liable to be served by summons in the same manner as a domestic corporation, still, the service of a summons upon a director of such corporation in an action brought to recover a penalty under chap. 185 of the Laws of 1857 is insufficient under section 432 of the Code of Civil Procedure. (Quade v. N. Y., N. H. & Hartford R. R. Co., 39 St. Rep. 157 [N. Y. Supr. Ct. 1891].)

—— **Service on a nonresident director of a foreign corporation.]** A summons only may be served on a nonresident director of a foreign corporation while temporarily in this State, when the cause of action arises here. (Hiller v. B. & M. R. R. Co., 4 N. Y. Wkly Dig. 426 [Gen. T. 1877].)

—— **Service of a summons upon a foreign corporation by serving its president temporarily in this State not on business of the corporation.]** (Pope v. Terre Haute Car. Manuf. Co., 87 N. Y. 137 [1881].) Right of its president to resign to avoid service. (Ervin v. Oregon Steam Nav. Co., 22 Hun, 598 [1880].)

—— **Service on a corporation under the statute.]** Under the statutes of this State, service within this State on the proper officer of a foreign corporation is equivalent to personal service on a nonresident natural person. If such personal service cannot be made, service may be made by publication against corporations in the same cases in which it can be made against nonresident individuals. (Barnett v. Chi. & L. H. R. R. Co., 4 Hun, 114 [1875].)

—— **On a president after he has resigned.]** A president who has resigned from a foreign corporation and swears to the acceptance of his resignation is not a proper person upon whom to serve papers. (Sturges v. Crescent Jute Mfg. Co., 32 St. Rep. 848 [Sup. Ct. 1890). See, also, Buchanan v. Prospect Park Hotel Co., 14 Misc. Rep. 435 [1895].)

—— **Service on a director who claimed to have resigned.]** Where the director, who was also secretary and treasurer of a corporation, served with process, claimed to have resigned before the service, but no successor had been chosen, and the by-laws provided that directors should serve for one year "and until such time as successors are chosen," held, that the service of the summons on him was good. (Timolet v. S. J. Held Co., 17 Misc. Rep. 556 [1896].)

—— Service on a director who had resigned, though this reduces the number below the legal minimum, is bad. (Wilson v. Brentwood Hotel Co., 16 Misc. Rep. 48 [1896].)

—— **Service on a de facto president of a corporation pursuant to stipulation.]** Where the service of a summons was made on a *de facto* president of a corporation, pursuant to a stipulation between the parties, it was held to be binding, though by a subsequent order of another court, he was declared not to be *de jure* president. (Stillman v. Asso. Lacemakers Co., 14 Misc. Rep. 503 [1895].)

—— **On an officer of a corporation who had surrendered his stock.]** Where a resolution had been passed by the directors of a corporation to transfer all the property to the stockholders, who then surrendered their stock, but there had been no legal resignation of such directors, it was held that the corporation had been legally served by the delivery of the summons to a person who had been the secretary and officer of defendant. (Carnahgan v. Exporters & Producers Oil Co., 32 St. Rep. 1117 [Sup. Ct. 1890].)

—— **On the cashier of a bank whose charter has expired.]** Where the charter of a bank has expired and the corporation is no longer in existence, service upon its former cashier is of no effect. (Hayden v. Bank of Syracuse, 36 St. Rep. 899 [Sup. Ct. 1891].)

—— Service of summons on the grand foreman of the A. O. U. W. is good. (Balmford v. Grand Lodge A. O. U. W., 16 Misc. Rep. 4 [1896].)

—— **Property of the corporation within this State is essential to an order for publication.]** The courts of this State have no jurisdiction to order service of a summons on a nonresident defendant by publication, unless such defendant has property within the State when the order is made. (Fiske v. Anderson, 33 Barb. 71 [Gen. T. 1860].)

—— **Service on a resident director of a foreign corporation — when bad.]** Where the action arises without the State, service on a resident director of a foreign corporation is bad, unless the defendant has property within the State. (Stanton v. U. S. Pipe Line Co., 90 Hun, 35 [1895].)

—— **No personal judgment against a foreign corporation — when.]** Where service of a summons is made upon a proper officer of a foreign corporation, no attachment having been issued, and no voluntary appearance by the corporation, the courts of this State do not get jurisdiction of the defendant, so as to render a personal judgment. (Brewster v. Mich. C. R. R. Co., 5 How. Prac. 183 [Sp. T. 1850].)

—— **What must be shown by a corporation seeking to set aside a service on its alleged agent.]** Where a corporation moves to set aside service of process upon its agent, on the ground that he is not a managing agent, it is bound to show the precise relations of the agent toward it. (Donadi v. N. Y. St. Mut. Ins. Co., 2 E. D. Smith, 519 [1854]. See, also, Silver v. Western Assurance Co., 3 App. Div. 572 [1896]; Persons v. Buffalo City Mills, 29 id. 45 [1898].)

—— **Temporary receiver of a foreign corporation appointed under service on a managing agent.]** The court may appoint a temporary receiver for a foreign corporation in an action in which service has been made upon its managing agent where no person has been designated by said corporation to receive service and none of its officers are within the State. (Glines v. Supreme Sitting Order of Iron Hall, 50 N. Y. St. Rep. 281 [Sup. Ct. 1892].) Service on assistant superintendent held void in Kramer v. Buffalo Union Furnace Co., 132 App. Div. 415. See, also, Klein Bros. & Co. v. German Union F. Ins. Co., 66 Misc. Rep. 536, 136 App. Div. 31, 626.

—— **General manager.]** Service on general manager of foreign corporation who comes into this State on business of the corporation, effectual. Rudd v. McLean, etc., Co., 54 Misc. 49.

Leaving summons with salesman in the office is insufficient. Frankel v. Dover Mfg. Co., 104 N. Y. Supp. 459. See, also, Grant v. Cananea Cons. Copper Co., 189 N. Y. 241.

ATTACHMENT — Where an attachment has been issued and a levy made the suit will be upheld, though no summons has been served.] Where an attachment has been issued against the property of the defendant, and his goods have been taken under it, after which he dies, the court acquires sufficient jurisdiction to enable it to put the suit in such condition that the plaintiff can enforce his provisional lien, notwithstanding a summons has not been served, and the court has sufficient control of the action to substitute the personal representative of the deceased in his place, as a party defendant, in order that the summons may be duly served. (More v. Thayer, 10 Barb. 258 [Gen. T. 1850].)

——**Affidavit need not show that an action has been begun.**] The affidavits for an attachment need not show that an action has been begun, nor that a summons has been issued. (Maury v. American Motor Co., 25 Misc. Rep. 657 [1898].)

——**When attachment and levy not sustained because of nonservice of the summons on the defendant, who has died.**] April 10, 1877, a warrant of attachment, summons and complaint against Josiah Strayer were delivered to the sheriff for service. April fourteenth a levy was made under the warrant. On April eighteenth Strayer died, not having been served with the summons. On May twenty-eighth an order was granted allowing the action to be continued by the service of a summons and complaint therein on the defendants, his administrators; and on June eighteenth they were served upon them. Held, that as the summons was not served within thirty days from its issue, the warrant of attachment and the levy thereunder were void. (Kelly v. Countryman, 15 Hun, 97 [1878].)

JUDGMENT—When sustained.] What is a sufficient service upon a corporation, to support a judgment. Kieley v. Cent. Complete Combustion Mfg. Co., 13 Misc. Rep. 85 [1895].)

DIVORCE—Service of process in an action for.] See notes under Rule 72.

DELIVERY TO DEPUTY SHERIFF—Good.] The delivery of a summons to a deputy in charge of the sheriff's office is good service on the sheriff. (Dunford v. Weaver, 84 N. Y. 445 [1881].)

RULE 19.

Folios to be Numbered—Pleadings, etc., to be Legibly Written—Letter-press Copies—Objection, When Waived, Except as to Papers for Court—Allegations to be Marked on Papers Furnished to the Court.

Every pleading, deposition, affidavit, case, bill, exceptions, report, paper, order or judgment, exceeding two folios in length, shall be distinctly numbered and marked at each folio in the margin thereof, and all copies either for the parties or the court shall be numbered or marked in the margin so as to conform to the original draft or entry and to each other, and shall be indorsed with the title of the cause. All the pleadings and other proceedings and copies thereof shall be fairly and legibly written or printed, and if not so written or printed and folioed and indorsed as aforesaid, the clerk shall not file the same, nor will the court hear any motion or application founded thereon.

All pleadings or other papers in an action or special proceeding served on a party or an attorney, or filed with the clerk of the court, must comply with section 796 of the Code of Civil Procedure and must be written or printed in black characters; and no clerk of the court shall file or enter the same in his office unless it complies with this rule. The party upon whom the paper is

served shall be deemed to have waived the objection for non-compliance with this rule unless within twenty-four hours after the receipt thereof he returns such paper to the party serving the same with a statement of the particular objection to its receipt; but this waiver shall not apply to papers required to be filed or delivered to the court.

It shall be the duty of the attorney by whom the copy pleadings shall be furnished for the use of a court on trial, to plainly designate on each pleading the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings.

The first two paragraphs are Rule 20 of 1858. Rule 26 of 1871, amended. Rule 26 of 1874. Rule 19 of 1877. Rule 19 of 1880. Rule 19 of 1884, amended. Rule 19 of 1888, amended. Rule 19 of 1896.

The last paragraph is part of Rule 19 of 1877, amended. Rule 20 of 1884. Rule 20 of 1888. Rule 20 of 1896.

CODE OF CIVIL PROCEDURE.

§ 22. Writs, etc., must be in the English language, made out on paper or parchment — what technical words and abbreviations allowed.
§§ 518–546. General provisions, applicable to pleadings.
§ 721. Defects in, disregard after verdict, report or decision.
§ 726. When the original is lost or withheld, the court may order a copy to be filed.
§ 824. To be filed with clerk, within ten days after service.
§ 981. Copy pleadings to be furnished on the trial by the plaintiff.
§ 2533. Written pleadings may be required in the Surrogate's Court.

IRREGULARITY — In motion papers.] A motion to set aside a pleading as irregular, on the ground that it is not properly folioed, will be denied, with costs, if the moving papers contain the defect objected to. (Sawyer v. Schoonmaker, 8 How. Prac. 198 [Sp. T. 1853].)

—— In judgment.] Failure to folio judgment, entered pursuant to the direction of the court, does not render it void. It is merely an irregularity. Service of a copy thereof, with a notice of entry, is effective to limit the time for an appeal therefrom, unless the judgment cannot be set aside because of such irregularity. To take advantage of it, the party served should return the copy of the judgment, and apprise the opposing attorney of the irregularity to which he objects. (Baptist Society v. Tabernacle Church, 9 App. Div. 527 [1896]; S. C., 10 id. 288 [1896].) See, also, Goldstein v. Marx, 73 App Div. 545.

ILLEGIBILITY — Of motion papers.] Where motion papers are badly defaced with interlineations and erasures, the motion will be denied for that reason. (Johnson v. Casey, 3 Rob. 710; S. C., 28 How. Prac. 492 [Sp. T. 1865]; Henry v. Bow, 20 id. 215 [Sp. T. 1860].)

RULE 20.

Service and Settlement of Interrogatories.

Interrogatories to be annexed to a commission issued under article second of title three of chapter nine of the Code of Civil Procedure shall be served within ten days after the entry of the order allowing the commission. Cross-interrogatories shall be served within ten days after the service of the interrogatories, unless a different time is fixed therefor, by the order allowing the commission. In case a party shall fail to serve such cross-interrogatories within the time limited therefor, he shall be deemed to have waived his right to propound cross-interrogatories to the witness to be examined under the commission. Either party may, within two days after the service of the cross-interrogatories, or within two days after the time to serve cross-interrogatories has expired, serve upon the opposing party a notice of settlement of the interrogatories and cross-interrogatories before a justice of the court or county judge. The time at which such interrogatories or cross-interrogatories shall be noticed for settlement shall be not less than two nor more than ten days after the service of the notice. If neither party serves such a notice within the time limited therefor, the interrogatories and cross-interrogatories are to be deemed settled as served, and shall be so allowed without notice.

CODE OF CIVIL PROCEDURE.

§§ 887, 888. When commission to issue.
§ 889. How and upon what terms granted.
§ 890. Order made by judge.
§ 891. Interrogatories; how settled.
§ 892. Id.; to be annexed; directions for return.
§ 893. Commission to examine wholly or partly upon oral questions.
§ 894. When open commission may issue, or depositions may be taken.
§ 895. Depositions where adverse party is an infant or committee.
§ 896. Notice of examination upon oral questions.
§ 897. Open commission.
§ 898. Order directing depositions to be taken.
§ 899. Before whom depositions may be taken; notice of taking.
§ 900. How depositions taken.
§ 901. Commission or order to take depositions; how executed and returned.
§ 902. Certificate of execution.

§ 903. Certificate, a sufficient return.
§ 904. Return by agent.
§ 905. If agent is sick or dead.
§§ 906, 907. Filing deposition, etc., so returned.
§ 908. Commission, etc., by consent.
§ 909. Where a return to be kept; parties may inspect it, etc.
§ 910. When deposition may be suppressed.
§ 911. Deposition, etc., evidence.
§ 912. When interrogatories and deposition may be in a foreign language.
§ 913. Letters rogatory.

INTERROGATORIES — Settlement of.] While ordinarily the court reserves questions on the settlement of interrogatories until trial, yet where right to cross-examine is abused court may restrict the examination. (Treadwell v. Green, 89 App. Div. 60.)

—— Moving affidavit must show that witness is not within the State. (Matter of Adams, 31 App. Div. 298.)

—— Objection to testimony may be made on trial. (Wanamaker v. McGraw, 168 N. Y. 135.)

—— Justice under whom interrogatories were settled, without power to pass upon objections to them. (Spurr & Sons v. Empire State Surety Co., 122 App. Div. 449.)

—— In the absence of bad faith, the provisions are mandatory. (Oakes v. Riter, 118 App. Div. 772.)

—— What must be shown as to residence. (Brown v. Russell, 58 App. Div. 218.) Must show that his testimony is material. (Wallace v. Blake, 16 Civ. Pro. 384.)

—— What must be shown to obtain commission. (Boyes v. Bossard, 87 App. Div. 605.)

—— Objections to questions should be raised at the trial. (Irving v. Royal Exch. Assurance of London, 122 App. Div. 56.)

—— Order may be appealed. (Jennison v. City Sav. Bank, 85 N. Y. 546.)

—— As to granting open commission, see Deery v. Byrne, 120 App. Div. 6.

—— When order to take deposition unauthorized. (Stuart v. Spofford, 122 App. Div. 47.)

—— Original paper need not be annexed to interrogatories. (Com. Bank v. Union Bank, 11 N. Y. 203.)

—— Defective deposition taken without the State returned for correction. (Risley v. Harlow, 48 Misc. Rep. 277.)

—— When interrogatories should be framed in both English and foreign languages. (Roth v. Moutner, 115 App. Div. 148.)

—— As to power to issue letters rogatory, see Decauville Automobile Co. v. Met. Bank, 124 App. Div. 478.

See, also, Newton v. Porter, 69 N. Y. 133; Goldmark v. Met. Opera House Co., 22 N. Y. Supp. 136; Clark v. Man. R. Co., 102 N. Y. 656; Wanamaker v. McGraw, 168 N. Y. 125; Cudlip v. N. Y. Ev. Journal Co., 180 N. Y. 85.

RULE 21.

Non-enumerated Motions — For What Day Noticed.

Non-enumerated motions, in the Supreme Court, except in the first and second districts and motions noticed to be heard in Erie county, shall be noticed for the first day of the term or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made, and the notice shall not be for a later day, unless sufficient cause be shown (and contained in the affidavits served), for not giving notice for the first day. In other courts such motions may be made on any day designated by the judges therof. In the Appellate Division such motions may be noticed for any motion day in the term.

Rule 39 of 1858. Rule 27 of 1871, amended. Rule 27 of 1874, amended. Rule 21 of 1877. Rule 21 of 1880. Rule 21 of 1884. Rule 21 of 1888, amended. Rule 21 of 1896.

CODE OF CIVIL PROCEDURE.

§ 768. An application for an order is a motion.
§ 769. Motions in the Supreme Court, where to be made.
§ 770. Motion in New York city (except for a new trial on the merits) may be made to a judge out of court.
§ 771. In the absence of a judge, the motion may be transferred to another judge.
§§ 772, 773. What judges may make orders out of court.
§ 774. Review of an order made by a judge of another court.
§ 776. Subsequent application for an order after the denial of a proper application therefor.
§ 777. Application for judgment — how withdrawn — second application, when forbidden.
§ 778. Penalty for violating sections 776, 777.
§ 779. Costs of a motion — how collected.
§ 780. Time of notice of motion — order to show cause.

NOTICE — When for other than first day of term.] A motion may be noticed for a day in term other than the first, if a sufficient excuse appear upon the moving papers. (Whipple v. Williams, 4 How. Prac. 28 [Sp. T. 1849]; Ogdensburg Bank v. Paige, 2 Code R. 67 [Sp. T. 1849]; Walrath v. Killer, Id. 129 [Sp. T. 1850].)

—— Order to show cause must be returnable the first day of the term.] The rule requiring a motion to be noticed for the first day of the term is applicable to an order to show cause. (Power v. Village of Athens, 19 Hun, 165 [1879]. See Matter of Maginn, 100 App. Div. 230.)

COPIES OF PAPERS — Omission of the jurat in a copy of an affidavit — not fatal.] The omission to include the jurat in the copy of the affidavit served is not fatal. (Graham v. McCoun, 5 How. Prac. 353 [Sp. T. 1861]; S. C., 1 Code R. [N. S.] 43; Barker v. Cook, 16 Abb. 83 [Gen. T. 1863]; S. C., 25 How. Prac. 190, 40 Barb. 254. Defects in copies only, see Chatham Nat. Bk. v. Mer. Nat. Bk., 1 Hun, 702 [1884]; Union Furnace Co. v. Shipland, 2 Hill, 413 [1842]; Livingston v. Cheetham, 2 Johns. 479 [1807].)

—— **Copies served should include signatures, etc.]** Copies of papers served should include the signature of counsel, the jurat, etc. (Littlejohn v. Munn, 3 Paige, 280 [1832].)

—— **Relief — in case of an omission to serve the order.]** Relief granted where the party omits to serve the copy order, or affidavit. (Quinn v. Case, 2 Hilt. 467 [Com. Pl. Gen. T. 1859]; Littlejohn v. Munn, 8 Paige, 280 [1832].)

—— **The pleadings are not involved in the papers required to be served with the notice of motion.]** It would seem that the requirement that a notice of motion be accompanied by copies of the affidavits and papers on which it is made, does not include pleadings already served, and which need not be served again. (Badger v. Gilroy, 21 Misc. Rep. 466 [1897].)

—— **Papers served on a previous motion need not be reserved.]** A moving party who desires to use papers which on a previous motion have been recently served upon the adverse party and are still in the latter's possession, is not bound to serve such papers again; notice of his intention to use them is sufficient in analogy with Rule 23. (Deutermann v. Pollock, 36 App. Div. 522 [1899].)

—— **What papers read on motion.]** Only those papers that are served with the notice can be read on the motion. (Northrup v. Village of Sidney, 97 App. Div. 271.)

—— **Order of Surrogate — form of.]** A surrogate's order should contain a reference to the papers upon which it was made. (Matter of Gowdey, 100 App. Div. 275.)

RETURN — To whom to be made.] Where papers are to be returned for irregularity, if there be no attorney's name on them, they are to be returned to the party. If the party is a municipal corporation, having a counsel chosen under a statute, they should be returned to him. (Taylor v. The Mayor of New York, 11 Abb. 255 [Sp. T. 1860].)

—— **Indorsement stating defect.]** An answer returned because of defective verification, must have an indorsement to that effect. (Snape v. Gilbert, 13 Hun, 494 [1878]; Schreyer v. Dooley, 1 Law Bulletin, 73 [Sp. T. 1879].)

—— **Objection — must be explicitly stated.]** Where a party returns a paper as irregular, he must state his objections to it explicity. A mere statement that the service is irregular, and not in compliance with certain sections of the Code, is not enough. (Chemung Bank v. Judson, 10 How. Prac. 133 [Sp. T. 1854]; Broadway Bank v. Danforth, 7 id. 264 [Sp. T. 1852].)

—— **Jurisdiction of the Appellate Division — over motions.]** The Appellate Division has jurisdiction to hear and determine in the first instance any motion, contested or *ex parte*, that a Special Term may determine. (Matter of Barkley, 42 App. Div. 597 [1899].)

——**Further return to writ of certiorari.]** A further return will not be required to state facts not called for by the writ. (People ex rel. Meehan v. Greene, 103 App. Div. 393.)

——**In general.]** Motion defined, in Matter of Jetter, 78 N. Y. 601.

——Application to correct order should be made before justice who heard motion. (Dinkelspiel v. Levy, 12 Hun, 130.)

——Although it is the better practice for the respondent to submit all his affidavits to the opposing party in advance of an argument of a motion, such submission is not required in the second district by General Rule 21. (Wanser v. DeNyse, 116 App. Div. 796. See, also, Matter of Petition Argus Co., 138 N. Y. 565; Androvette v. Bowne, 15 How. Prac. 75; Matter of Quick, 92 App. Div. 121; affd., 179 N. Y. 601; Tracy v. Lichtenstadter, 113 App. Div. 754; Gross v. Gorsch, 56 Misc. Rep. 649; Wilner v. Ind. Order Abawos Israel, 122 App. Div. 615; Obermeyer & Liebnau v. Adisky, 123 id. 272; Hirschfeld v. Hassett, 59 Misc. Rep. 154; Roth v. Wallach, Id. 515.)

RULE 22.

Motions to strike out Irrelevant Matter — Notice of.

Motions to strike out of any pleading matter alleged to be irrelevant, redundant or scandalous, and motions to correct a pleading on the ground of its being "so indefinite or uncertain that the precise meaning or application is not apparent," must be noticed before demurring or answering the pleading and within twenty days from the service thereof. The time to make such motion shall not be extended unless notice of an application for such extension, stating the time and place thereof, of at least two days, shall be given to the adverse party.

Rule 50 of 1858. Rule 28 of 1871. Rule 28 of 1874, amended. Rule 22 of 1877. Rule 28 of 1880. Rule 22 of 1884. Rule 22 of 1888, amended. Rule 22 of 1896.

CODE OF CIVIL PROCEDURE.

§§ 520–536. Form and sufficiency of pleadings and verification.
§ 537. Frivolous pleadings, how disposed of.
§ 538. Sham defenses to be stricken out.
§ 545. Irrelevant, redundant and scandalous matter in pleadings — stricken out on motion.
§ 546. Indefinite or uncertain allegations cured by amendment.
§ 721. Defects cured by verdict, etc.
See note under Rule 37.

IRRELEVANT — Power of the court to strike out allegations in pleadings as irrelevant — how limited.] The court has no power, on motion of a party

defendant, to strike out all the allegations of the plaintiff referring to himself, simply because they are irrelevant to an alleged cause of action against some other defendant; neither the question as to whether the moving party was properly made a defendant, nor the question as to whether the facts alleged make out a good cause of action as to him, can be raised on such a motion. The power to strike out, on motion, averments in a pleading because of irrelevancy, applies simply to such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleadings against the moving party. (Hagerty v. Andrews, 94 N. Y. 195 [1883].)

—— **Facts alleged in support of a denial, not stricken out.]** A defendant is entitled to traverse all the allegations of the complaint, and where, in a suit for breach of promise to marry, the complaint alleges that there has been no misconduct on the part of the plaintiff, the answer may deny the allegation, alleging certain facts in support thereof, and such matter cannot be stricken out as irrelevant, redundant and scandalous inasmuch as it would affect the judgment in mitigating damages, though in form improperly pleaded as a partial defense. (Keegan v. Sage, 31 Abb. N. C. 54 [N. Y. Com. Pl. 1893].)

—— **When an answer is not frivolous.]** An answer denying any knowledge or information sufficient to form belief as to the truth of the material allegations contained in a complaint is not frivolous; it is only when the allegation of want of information relates to some affirmative allegation of defense, not putting in issue the allegations of the complaint, that it is subject to that criticism. The fact that a denial contained in an answer is inconsistent with other portions thereof is not a good ground for striking out such denial. (Sheldon v. Heaton, 78 Hun, 50 [1894].)

—— **Irrelevant matter — argument as to.]** When elaborate argument is necessary in order to show that matter is irrelevant, an order should not be granted directing such matter to be stricken out as irrelevant. (Gaylord v. Beardsley, 54 St. Rep. 234 [Sup. Ct. 1893].)

—— **What is irrelevant matter.]** A motion should be granted to strike out matter as irrelevant which it is not necessary to prove, and by which a court will not be affected in its decision. (Peaslee v. Peaslee, 2 Misc. Rep. 573 [N. Y. Supr. Ct. 1893]; Fasnacht v. Stehn, 53 Barb. 650; S. C., 5 Abb. [N. S.] 338 [Gen. T. 1869]; Park & Sons Co. v. National Wholesale Druggist Assn., 30 App. Div. 508 [1898].)

—— **What is not irrelevant matter.]** (Bussey & McL. Stove Co. v. Wilkins, 1 App. Div. 154 [1896]; Lynch v. Second Ave. R. R. Co., 7 id. 164 [1896]; Scharf v. Warren-Scharf Asphalt Paving Co., 15 id. 480 [1897]; Palmer v. Palladium Printing Co., 16 id. 270 [1897]; Dunton v. Hagerman, 18 id. 146 [1897]; Wendling v. Pierce, 27 id. 517 [1898]; Barney & Smith Car Co. v. Syracuse R. T. Ry. Co., 24 Misc. Rep. 169 [1898]; Phillips v. Phillips, 22 id. 475 [1898]; Warner v. Billings, 53 N. Y. Supp. 805 [1898].)

—— Matter irrelevant as to one party but irrelevant as to another, will not be stricken out. (Brown v. Fish, 76 App. Div. 329.)

—— An answer cannot be considered frivolous unless it is bad as a whole. (Strong v. Sproul, 53 N. Y. 497 [1873]; Munger v. Shannon, 61 id. 251 [1874].)

—— **What it comprehends.]** (Lee Bank v. Kitching, 11 Abb. 435 [N. Y. Supr. Ct. Gen. T. 1860]; Dovan v. Dinsmore, 33 Barb. 86 [Gen. T. 1860]; Aubery v. Fiske, 36 N. Y. 47 [1867]; Cahill v. Palmer, 17 Abb. 196 [Gen. T. 1863]; Robertson v. N. Y. Press Co., 2 App. Div. 49 [1896]; Schroeder v. Post, 3 id. 411 [1896]; Henriques v. Garson, 26 id. 35 [1898].)

—— **Not favored by the courts.]** Such motions not favored by the courts, and where evidence of the facts pleaded in the allegations sought to be stricken out has any bearing on the subject-matter of the litigation, motion will be denied. (Dalziel v. Press Pub. Co., 52 Misc. Rep. 207.)

—— Does not apply so as to authorize the determination of the validity of a defense. (Rankin v. Bush, 108 App. Div. 295.)

—— Motion to strike out, as irrelevant, a defense which is complete in itself, will be denied, although the defense is insufficient. (Noval v. Haug, 48 Misc. Rep. 198.)

—— Motion to dismiss complaint on the ground that it does not state facts sufficient to constitute a cause of action, has the effect of a demurrer and admits allegations of complaint. (Rothman v. Kosower, 48 Misc. Rep. 538.)

—— Power of striking out should be used with reluctance and caution. (Matter of City of New York, 48 Misc. Rep. 602.)

—— Where bare inspection of demurrer does not indicate that it was made in bad faith, it cannot be disposed of as frivolous. (Hildreth v. Mercantile Trust Co., 112 App. Div. 916. See, also, Beyer v. Henry Huber Co., 100 N. Y. Supp. 1029; Citizens' Cent. Nat'l Bank v. Munn, 49 Misc. Rep. 99.)

—— Motions to strike out portions of pleadings as irrelevant are addressed to the discretion of the court, are not favored, are denied unless it is clearly shown that the allegations are redundant and that the adverse party will not be harmed and are granted only when a denial will prejudice the moving party. (Indelli v. Lesster, 130 App. Div. 548; Hamilton v. Hamilton, 124 App. Div. 619.)

—— An entire defense cannot be struck out as irrelevant, though it be insufficient. (Tierney v. Helvetia-Swiss Ins. Co., 129 App. Div. 694.)

—— Facts anticipating a defense of estoppel are irrelevant in a complaint. (Welcke v. Tragesor, No. 2, 121 App. Div. 737.)

—— **If in any view relevant.]** The matter pleaded should not be stricken out, if it may be relevant in any possible view. (Dunton v. Hagerman, 18 App. Div. 146 [1897].)

—— **It must appear on the face.]** The irrelevancy or redundancy must appear upon the face of the pleadings. (Stewart v. Forst, 15 Misc. Rep. 621 [1896].)

—— **The matter must be clearly irrelevant.]** (Follett v. Jewett, 11 N. Y. Leg. Obs. 193 [Sp. T. 1853]; McGregor v. McGregor, 35 How. Prac. 385 [Gen. T. 1865]; Anon., 2 Sandf. 682 [1850]; Littlejohn v. Greeley, 22 How. Prac. 345 [Sp. T. 1861]; Lynch v. Second Ave. Railroad Co., 7 App. Div. 164 [1896].)

—— **If not, the remedy is by demurrer.]** (Struver v. Ocean Ins. Co., 9 Abb. 23; S. C., 2 Hilt. 475 [N. Y. Com. Pl., Gen. T. 1859]. See Lee Bank v. Kitching, 11 Abb. 439 [Gen. T. 1860]; S. C., 7 Bosw. 664].)

—— **When the remedy is by demurrer or motion on the trial.]** (Walter v. Fowler, 85 N. Y. 621 [1881]; Emmons v. McMillan Co., 20 Misc. Rep. 400 [1897]; Kelly v. Ernest, 26 App. Div. 90 [1898].)

—— **The entire pleading will not be stricken out.**] (Fasnacht v. Stehn, 5 Abb. [N. S.] 338 [Gen. T. 1869]; Blake v. Eldred, 18 How. Prac. 240 [Sp. T. 1858]; Howell v. Knickerbocker Life Ins. Co., 24 How. Prac. 475 [Sp. T. 1863]. See, also, Frank Brewing Co. v. Hammersen, 22 App. Div. 475 [1897].)

—— **In part relevant.**] Where a part of the paragraphs is relevant the omission to strike out the whole thereof will be denied. (Raines v. N. Y. Press Co., 12 Hun, 515 [1895].)

—— **A part of a pleading in tort, the rest being on contract, stricken out.**] Hunter v. Powell, 15 How. Prac. 221 [Gen. T. 1857].)

—— **When answer allowed to stand.**] The defendants in a foreclosure suit served and amended answer which alleged facts showing that one of the defendants had no interest whatever in the mortgaged premises; that he was induced by the representations of the mortgagee to sign the bond and mortgage in order to cut off his right as tenant by the curtesy, although he had no such right; that he signed the same upon the statement of the plaintiff that it was necessary for him to do so as he was the husband of one of the mortgagors, and that there was no consideration for his signing such bond and mortgage. Upon the plaintiff's motion, such amended answer was stricken out. Held, that the defendants were entitled to have the benefit of their answer, and that it should have been allowed to stand. (French v. Row, 77 Hun, 380 [1894].)

—— **Unnecessarily elaborate statements, not stricken out.**] Where statements are material to the points in question they cannot be stricken out as sham or irrelevant though unnecessarily elaborate. (Nordlinger v. McKim, 38 St. Rep. 886 [Sup. Ct. 1891].)

—— **In equity actions.**] In an equitable action great latitude is allowed the court with reference to striking out irrelevant matter, and where the matter alleged to be irrelevant might bear upon the question of costs, which rests in the discretion of the court, the refusal to strike it out is not error. (Town of Dunkirk v. L. S. & M. S. R. Co., 75 Hun, 366 [1894].)

—— **What papers should be served.**] A copy of the expurgated pleading need not be served after a portion of the original pleading has been stricken out as irrelevant. (Ross v. Dunsmore, 12 Abb. 4 [Sp. T. 1861]; S. C., 20 How. Prac. 328.)

—— **Denial of motion to strike out allegations as to a deceased defendant.**] Where a suit has been discontinued as to one of the defendants, who is dead, the plaintiff is not prejudiced by an order denying motion to strike out all allegations referring to deceased. (Sleeman v. Hotchkiss, 37 St. Rep. 648 [Sup. Ct. 1891].)

—— **Matter not stricken out because inconsistent.**] Where matter in an answer is not irrelevant or redundant, although it may be construed as inconsistent, a motion to strike it out will not be granted. (MacColl v. American Union Ins. Co., 89 Hun, 490 [1895].)

—— **Laches in an application to strike out inconsistent defenses.**] A motion to strike out of a pleading matter alleged to be irrelevant, redundant or scandalous, cannot be granted where the motion therefor is not made within twenty days after service of the pleading. A defendant may plead as many

defenses as he has, even if they are inconsistent. An answer cannot be stricken out or judgment rendered thereon where a part only is frivolous. (Siriani v. Deutsch, 12 Misc. Rep. 213 [Supr. Ct. Sp. T. 1895].)

—— **The validity of a defense cannot be determined on motion.]** Whether a defense to an action set up in an answer is or is not bad, cannot be determined on a motion; the proper remedy is by demurrer. (Smith v. American Turquoise Co., 77 Hun, 192 [1894].)

—— **Sufficiency of a pleading — not determined on a motion.]** When the sufficiency of a pleading cannot be determined on a motion. (Walter v. Fowler, 85 N. Y. 621 [1881]; Goodwin v. Thompson, 88 Hun, 598 [1895]; Mason v. Dutcher, 67 N. Y. St. Rep. 590 [1895].)

—— **To strike out redundant matter.]** A motion to strike out portions of a reply as redundant will not be granted where there exists only reiteration. (Pope Mfg. Ct. v. Rubber Mfg. Co., 100 App. Div. 349.)

SCANDALOUS — Striking out scandalous matter, discretionary.] The granting of a motion to strike out scandalous matter from an answer is within the discretion of the court, especially where it cannot by itself constitute a defense. (Wehle v. Loewy, 2 Misc. Rep. 345 [N. Y. Com. Pl. 1893].) If petition for alimony and counsel fees contains sufficient allegations to warrant relief, the right thereto is not impaired by scandalous and irrelevant matter contained in the petition. (Hawley v. Hawley, 95 App. Div. 274.)

—— **Plaintiff's attorney may move.]** When the plaintiff's attorney is the person aggrieved by the scandalous matter he may move to strike it out. It is no answer thereto that no party to the action is aggrieved. (*Ib.*)

TO MAKE DEFINITE AND CERTAIN — Insufficiency must clearly appear.] It should be entirely clear upon a motion to the court to make a pleading more definite and certain that the pleading is insufficient, before the court will interefere. (People v. Tweed, 63 N. Y. 201 [1875]; Cook v. Matteson, 33 St. Rep. 497 [Buffalo Supr. Ct. 1890].)

—— **When it will be granted.]** Marvel v. Stone, 3 App. Div. 413 [1896]; Hattermann v. Siemann, 1 id. 486 [1896]; Texas, etc., Oil Co. v. Mutual Fire Ins. Co., 58 Hun, 560 [1891]; Persch v. Allison, 85 id. 429 [1895]; Post v. Blazewitz, 13 App. Div. 124 [1897]; Rolker v. Gonzalez, 32 id. 224 [1898]; Dexter v. Village of Fulton, 86 Hun, 433 1895].)

—— **When it will be denied.]** Mason v. Dutcher, 67 N. Y. St. Repr. 590 [1895]; Pittenger v. S. T. Masonic Relief Assn., 15 App. Div. 26 [1897]; Kelly v. Sammis, 25 Misc. Rep. 6 [1898]; Kelly v. Ernest, 26 App. Div. 90 [1898]; Kucher v. Carrl, 23 Misc. Rep. 250 [1898]; O'Brien v. Ottenberg, 59 St. Rep. 379 [Sup. Ct. 1894].)

—— **When not indefinite.]** If the court can see the meaning of the allegations with ordinary certainty the pleading is not indefinite. (Madden v. The Underwriting Printing & Publishing Co., 10 Misc. Rep. 27 [N. Y. Supr. Ct. Sp. T. 1894].)

—— **Reference to ascertain facts — when improper.]** A motion to make an answer more definite and certain must be decided upon an examination of the answer. A reference to ascertain facts cannot he ordered. (Hopkins v. Hopkins, 28 Hun, 436 [1882].)

—— **Effect of other sufficient allegations.]** The fact that the complaint contains other allegations sufficient to warrant the relief asked for does not deprive the defendant of the right to have other indefinite allegations made definite. (People v. N. Y. Juvenile Guardian Society, 6 N. Y. Wkly. Dig. 136 [Gen. T. 1878].)

—— **Motion denied where the moving party had as definite knowledge as the other party.]** Where it is apparent from the allegations of a pleading that the adverse party has as much knowledge on the subject as the one who pleads, a motion should not be granted directing the same to be made more definite and certain. (Cook v. Matteson, 33 St. Rep. 497 [Buffalo Supr. Ct. 1890].)

—— **Separation of causes of action granted on motion to make the complaint more definite and certain.]** (Cohn v. Jarecky, 90 Hun, 266 [1895].)

—— **Fraudulent acts — surplusage.]** A motion to make a pleading more definite and certain will not be granted, where the allegations therein as to fraudulent acts may be regarded as surplusage. (Cook v. Matteson, 33 St. Rep. 497 [Buffalo Supr. Ct. 1890].)

—— **As to a counterclaim, when denied.]** Where a counterclaim is alleged in answer to a complaint on contract, a motion to make the answer more definite and certain as to whether the counterclaim sounds in tort should be denied where such answer, although alleging fraudulent acts which may be treated as surplusage, shows an intention to set up a claim on contract, and the demand for judgment is not for damages but for money and costs. (Cook v. Matteson, 33 St. Rep. 497 [Buffalo Supr. Ct. 1890].)

—— **Plaintiff not required to elect to charge fraud or mistake.]** The court should not grant the motion of defendant to have the complaint made more definite and certain in an action for relief on the ground of false items and mistakes in an account stated when it is apparent from the complaint that the fraud consisted in incorrect statements as to market prices of goods which were the subject-matter, nor should plaintiff be compelled to elect whether the errors in the account were simply mistakes or were made with intent to defraud. (Stern v. Ladew, 51 St. Rep. 456 [Sup. Ct. 1893].)

—— **Motion to make a complaint definite, etc., not granted after answer.]** The defendant cannot move to compel plaintiff to make his complaint more definite and certain after having served an answer thereto, and if the complaint contains a cause of action a motion to dismiss the same should not be granted. (Huber v. Wilson, 33 St. Rep. 849 [Sup. Ct. 1890].)

—— **Definite lines of work not required to be specified.]** In an action against two defendants the motion of one to have the complaint made more definite by setting out explicitly the lines of work to be performed by him, for a company whose charter plaintiff wishes to vacate, should not be granted, if such lines appear sufficiently upon the plans which his co-defendant has filed. (People v. N. Y. Central Underground Ry. Co., 39 St. Rep. 571 [Sup. Ct. 1891].)

—— **Allegations as to knowledge of fraud which are not obscure.]** A complaint in an action for fraud and deceit in inducing the plaintiff to purchase certain promissory notes, after setting forth the alleged false statements of the defendant, alleged that the defendant knew his statements to be false, and that

he "knew of facts and circumstances sufficient to charge him with knowledge of the falsity" of his statements. Held, that the latter allegation was not obscure, and that a motion to make the complaint more definite and certain should be denied. (American National Bank v. Grace, 67 Hun, 432 [1893].)

—— **Name of person to whom information was given, not required.]** Where a complaint in an action alleges that the agent of the defendant, a stock broker, gave information which was false and fraudulent, a motion to make said complaint more definite and certain by showing the name of the agent was properly denied. (Warsaw v. Hotchkiss, 27 N. Y. Supp. 491 [Sup. Ct. 1894].)

—— **Requiring a statement whether the defendant is charged personally or officially.]** In an action in which, before the trial, a motion is made to compel plaintiff to make the complaint definite, an order may be granted directing him to allege whether the defendant will be charged personally or officially. (Seasongood v. Fleming, 74 Hun, 639 [1893].)

—— **Requiring a definite description of the premises in question.]** Upon a motion to make a complaint more definite and certain in an action brought to recover for the use and occupation of real property, an order may be granted directing plaintiff to include a definite description of the premises alleged to have been occupied. (Gustaveson v. Otis, 75 Hun, 611 [1894].)

——**Action for a failure to procure insurance.]** In an action against insurance brokers for a failure to procure insurance, the complaint alleged that defendants assumed and undertook to procure renewals of insurance for the plaintiff, and that they neglected and failed to do so. A motion to make the complaint more definite and certain was denied, the order reciting a stipulation by plaintiff's counsel that plaintiff relied on the employment of defendants as insurance brokers, and their acceptance of the employment and undertaking as such to obtain insurance, and not upon an absolute agreement on their part to renew or obtain insurance.

Held, no error, as defendants were sufficiently protected thereby. (Van Tassel v. Beecher, 8 Misc. Rep. 26 [Supr. Ct. 1894].)

—— **Denials upon information — when insufficient.]** When the plaintiff is required by the court, under section 516 of the Code of Civil Procedure, to reply to new matter set up in the answer which constituted a defense by way of avoidance, averring the presentation and acceptance of an offer in writing containing sundry terms of sale and providing for the execution of mutual releases, and tendering an issue fatal to the plaintiff unless its legal effect could be avoided, a reply is not sufficient which merely denies knowledge or information sufficient to form a belief as to whether the offer is correctly set forth in the answer. The court will require such an insufficient reply to be made more definite and certain. (Steinway v. Steinway, 74 Hun, 423 1893]; affd., 157 N. Y. 710.)

——**What is not an excuse for an insufficient pleading.]** It is not an excuse for such an insufficient reply, that the plaintiff cannot be expected to remember accurately the terms of a writing read in his presence several years ago, when he could have demanded an inspection of the original, and, on refusal, the court would have compelled its production. (*Ib.*)

—— **Denials not required to be made more definite by adding other matter.]** Where an answer definitely and certainly puts in issue the allegations of the complaint the plaintiff is not entitled on a motion to make definite and certain to have further statements added to it. (White v. Koster, 89 Hun, 483 [1895].)

—— **Defendant not required to be more definite than plaintiff has been.]** Where a plaintiff has not himself set forth a will nor given the provisions thereof verbatim, he cannot insist that a defendant, who has followed his example by setting forth what he considers to be a summary of these provisions and a construction thereof, shall make his answer more definite and certain by alleging in the words of the will the part thereof which contains the devise under which the defendant claims. (Eisner v. Eisner, 89 Hun, 480 [1895].)

—— A motion to make more definite and certain will be denied where no particular clauses thereof are specified. A motion which asked merely that plaintiff be required to show clearly what he intended to claim in relation to the performance of a contract is properly denied. (Pope Mfg. Co. v. Rubber Mfg. Co., 100 App. Div. 353.)

—— **Motion is proper remedy.]** A motion is a proper remedy to require a complaint to be made more definite and certain, and defendants are not limited to a demand for a bill of particulars. (Viner v. James, 92 App. Div. 542.)

—— Motions to make a complaint more definite and certain, or, in the alternative, for a bill of particulars, are improperly joined. (Mutual Life Ins. Co. v. Grannis, 118 App. Div. 830; Mutual Life Ins. Co. v. McCurdy, No. 2, 118 id. 822. See, also, McGehee v. Cooke, 55 Misc. Rep. 40; Carlson v. Albert, 117 App. Div. 836; Christenson v. Pincus, Id. 810; Ebling Brewing Co. v. Adler, 103 N. Y. Supp. 93; Anderson v. McNeely, 120 App. Div. 676; People v. McClellan, 53 Misc. Rep. 469; Palmer v. Van Deusen, 122 App. Div. 282; Smythe v. Cleary, 127 id. 555; Friedman v. Denousky, 122 id. 258; Babcock v. Anson, Id. 73; Citizens' Central Nat. Bank v. Munn, 49 Misc. Rep. 319; Mullen v. Hall, 51 id. 59; Pigone v. Lauria, 100 N. Y. Supp. 976.

—— **Dismissal not proper remedy.]** The remedy for uncertainty in a complaint is not dismissal, but motion to make more definite and certain. (Palmer v. Van Deusen, 122 App. Div. 282.)

—— **Affidavit improper.]** Facts as to complaint are to be ascertained by the court on an inspection of it, and an affidavit to that effect is improper. Deubert v. City of New York, 126 App. Div. 359.

TIME — Motion, when made.] A motion to strike out irrelevant matter must be made before demurring or answering, and within twenty days from the service of the pleading. (New York Ice Co. v. Northwestern Ins. Co., 21 How. Prac. 234 [Sp. T. 1861]; S. C., 12 Abb. 74; Roosa v. Saugerties & Woodstock Turnpike Co., 8 How. Prac. 237 [Sp. T. 1853]; Barber v. Bennett, 4 Sandf. 705 [Sp. T. 1852]; Siriani v. Deutsch, 12 Misc. Rep. 213 [Supr. Ct. Sp. T. 1895].)

—— **Within what time.]** When the right to make such a motion is waived by procuring an extension of the time to answer or demur. (Brooks v. Hanchett, 36 Hun, 70 [1885].)

—— **Insufficient time.]** If the notice is not served in time, the party desiring the benefit of that fact must show it. (Roosa v. Saugerties & Woodstock Turnpike Co., 8 How. Prac. 237 [Sp. T. 1853]; Barber v. Bennett, 4 Sandf. 705 [Sp. T. 1862]; *contra*, Rogers v. Rathbone, 6 How. Prac. 66 [Sp. T. 1851].)

—— **Not at earliest possible moment.]** A motion to make a pleading more definite and certain need not be made at the earliest possible moment. Where the time "to plead or otherwise move" has been extended, the motion may be made before the expiration of the extension. (Hammond v. Earl, 5 Abb. N. C. 105 [Sp. T. 1878].)

—— Within twenty days from the service of an amended pleading. (Walker v. Granite Bank, 1 Abb. [N. S.] 406 [Sp. T. 1865].)

—— After lapse of a year from time of service of pleading, a motion to strike out parts of it comes too late. (Barber v. General Asphalt Co., 125 App. Div. 412.)

—— Before the cause has been noticed for trial. (Kellogg v. Baker, 15 Abb. 286 [Sp. T. 1862]; Esmond v. Van Benschoten, 5 How. Prac. 44 [Sup. T. 1850].))

—— **Motion to strike out cannot be made at the trial.]** A motion to strike out irrelevant or redundant matter cannot be made at the trial. (Simmons v. Eldridge, 19 Abb. 296 [Gen. T. 1865]; S. C., 29 How. Prac. 309; Smith v. Countryman, 30 N. Y. 655 [1864].)

—— **Time when paper served by mail.]** If answer is served by mail plaintiff has forty days within which to move to make the answer more definite and certain. (Borsuk v. Blauner, 93 App. Div. 306.)

WAIVER — Service of an answer.] An answer served after notice to strike out irrelevant matter in the complaint, waives the motion. (Goch v. Marsh 8 How. Prac. 439 [Sp. T. 1853]; Dovan v. Dinsmore, 20 id. 503 [Gen. T. 1860]; King v. Utica Ins. Co., 6 id. 485 [Sp. T. 1852].)

—— **Extension of time to answer.]** An extension of the time to answer is a waiver of all objections to the complaint, and a bar to a motion to strike out irrelevant matter, unless the right to make the motion is expressly given. (Marry v. James, 34 How. Pr. 238 [Sp. T. 1857]; Bowman v. Sheldon, 5 Sandf. 657 [Sp. T. 1852].)

—— **Stipulation, when not a waiver.]** A stipulation extending the time for defendant to answer, and to make such application as he should be advised, embraces a motion to strike out portions of the complaint. (Lackey v. Vanderbilt, 10 How. Prac. 155 [Sp. T. 1854].)

—— **What is not a waiver of a failure to serve notice in time.]** The retention, by an attorney, of a notice of motion to strike out of a pleading matter alleged to be irrelevant, redundant or scandalous, served on him more than twenty days after service of the pleading to which it relates, is not a waiver of the failure to serve the notice within such twenty days, as required by Rule 22 of the General Rules of Practice. (Gibson v. Gibson, 68 Hun, 381 [1893].)

NOTICE — Contents of.] The irrelevant or redundant matter should always be clearly pointed out by the moving party. (Bryant v. Bryant, 2 Rob. 612 [Sp. T. 1863]; Blake v. Eldred, 18 How. Prac. 240 [Sp. T. 1858]; Benedict v. Dake, 6 id. 352 [Sp. T. 1851].)

—— **Defects — specifying in motion papers.]** The motion papers must point out the defects alleged. (Rathbun v. Markham, 43 How. Prac. 271 [Sp. T. 1872].)

—— **Of the motion — irrelevant matter stricken out on motion for frivolousness.]** On a motion for judgment on the ground of frivolousness, and for other relief, irrelevant matter may be stricken out. (Thompson v. Erie Railroad Co., 45 N. Y. 468 [1871].)

RES ADJUDICATA — Denial to one defendant, not a bar to the application of another defendant.] The denial of the motion of one defendant is not a bar to a similar motion by another defendant. (New Jersey Zinc Co. v. Blood, 8 Abb. 147 [Sp. T. 1859].)

—— A denial of a motion is not a bar to an action. (Howell v. Mills, 53 N. Y. 322 [1873].)

DISCRETIONARY —Appeal to discretion, after a denial as a right.] An application may be made to the discretion of the court after a denial of a motion made on the ground of an absolute right thereto. (Hall v. Emmons, 9 Abb. [N. S.] 370 [Court of Appeals, 1870].)

—— The striking out of irrelevant and redundant allegations is discretionary. (Town of Essex v. N. Y. & C. R. R., 8 Hun, 361 [1867].)

APPEAL — Lies from an order denying the motion.] An appeal lies from an order denying a motion to have the complaint made more definite and certain. (Arietta v. Morrissey, 1 Abb. [N. S.] 439 [Gen. T. 1866].)

—— **Appeal from order striking out irrelevant matter — the complaint adjudged bad on demurrer.]** An appeal from an order striking out a portion of a complaint as irrelevant and redundant fails, where the complaint is adjudged bad upon a demurrer while the appeal is pending. (Ellison v. Sun Printing & Publishing Assn., 41 App. Div. 594 [1899].)

STAY — Stay of proceedings pending an appeal.] The proper method of suspending the operation of an order to make a pleading more definite, pending the appeal, is by a stay of proceedings, and not by an extension of the time for an amendment. (Culver v. Hollister, 17 Abb. 405 [Gen. T. 1864]; S. C., 29 How. Prac. 479.)

—— **In what case it may be granted.]** A stay of proceedings may be granted pending an appeal suspending the operation of an order striking out a portion of a pleading. (Culver v. Hollister, 17 Abb. 405; S. C., 29 How. Prac. 475 [Gen. T. 1864].)

RULE 23.

Affidavits of Merits.

All motions for relief to which a party is not entitled as matter of right shall be made upon papers showing merits, and the good faith of the prosecution or defense, which may be shown by any proof that shall satisfy the court.

Rule 21 of 1858, amended. Rule 29 of 1871, amended. Rule 29 of 1874. Rule 23 of 1877. Rule 23 of 1880. Rule 23 of 1884. Rule 23 of 1888. Rule 23 of 1896. Rule 23 as amended, 1910.

CODE OF CIVIL PROCEDURE.

§ 980. Inquest cannot be taken for want of an affidavit of merits, where the answer is verified.

See Rule 28.

INQUESTS — Not applicable to equity actions.] The rule which authorizes inquests, where no affidavit of merits is made, is not applicable to equity actions. (Devlin v. Shannon, 8 Hun, 531 [1876].)

AFFIDAVIT — Proper form.] As to the proper form of an affidavit of merits. (See Cannon v. Titus, 5 Johns. 355 [1810]; Swartwout v. Hoage, 16 id. 3 [1819].)

——As to counsel.] A failure to state that a counsel whose advice is sworn to is the counsel of the defendant in the action in which the affidavit is made is fatal. (State Bank of Syracuse v. Gill, 23 Hun, 40 [1881].)

—— "On the merits."] The words "on the merits" are essential. (Meech v. Calkins, 4 Hill, 534 [1842]; Jackson v. Stiles, 3 Caines, 93 [1805]; *contra*, Briggs v. Briggs, 3 Johns. 449 [1808].)

——Advice of counsel must be sworn to.] (Swartwout v. Hoage, 16 Johns. 3 [1819]; Bruen v. Merrill, 3 Caines, 97 [1805].)

—— Belief in advice.] Belief in the advice of the counsel is not sufficient. (Brittan v. Peabody, 4 Hill, 61 [1842]; and see note to this case.)

——"Fully and fairly stated his case," or "this case."] The affidavit must state that the party "has fully and fairly stated his case," or "this case," to his counsel. (Onondaga Bank v. Shepherd, 19 Wend. 10 [1837]; Bleecker v. Storm, 2 How. Prac. 161 [Sp. T. 1846]; Cary v. Livermore, Id. 170 [Sp. T. 1846]; Brownell v. Marsh, 22 Wend. 636 [1840]; Brown v. Masten, 2 How. Prac. 187 [Sp. T. 1846]; and the name of the counsel. Bowman Cycle Co. v. Dyer, 23 Misc. Rep. 620 [1898]; Gall v. Hutchinson, 26 id. 1 [1899].)

——"The facts of his case."] That he has fully, etc., stated "the facts of this case" is sufficient. (Jordan v. Garrison, 6 How. Prac. 6 [Sp. T. 1851].) "The facts of his case" is insufficient. (Fitzhugh v. Truax, 1 Hill, 644 [1841], *contra.*)

——"A good and substantial defense to the bond," insufficient.] (Meech v. Calkins, 4 Hill, 534 [Sup. Ct. 1842].)

——"His case in this cause," insufficient.] (Ellis v. Jones, 6 How. Prac. 296 [Sp. T. 1851].)

—— Defense "to said action for conversion," insufficient.] (Gold v. Hutchinson, 26 Misc. Rep. 1 [1899].)

——"A good and valid defense to the whole of the plaintiff's claim as set forth in said complaint, upon the merits thereof," insufficient.] (State Bank of Syracuse v. Gill, 23 Hun, 406 [1881].)

——"A defense in the action," insufficient.] (McMurray v. Gifford, 1 How. Prac. 14 [Chamb. 1850].)

——"His defense."] That he has fully, etc., stated "his defense," insufficient. (Tompkins v. Acer, 10 How. Prac. 309 [Sp. T. 1854]; Richmond v. Cowles, 2 Hill, 359 [1842]; Brownell v. Marsh, 22 Wend. 636 [1840].)

——"The facts of his defense," insufficient.] (Rickards v. Swetzer, 3 How. Prac. 413 [Sp. T. 1819]; S. C., 1 Code Rep. 117.)

——"Has a defense."] A statement that he has a defense to the declaration held insufficient. (Howe v. Hasbrouck, 1 How. Prac. 68.)

——Facts come to his knowledge.] The facts of the case, so far as they had come to his knowledge, and he believes them to exist, insufficient. (Brown v. St. John, 19 Wend. 617.)

——Affidavit of attorney.] In the absence of the party, an attorney may make the affidavit. (Geib v. Icard, 11 Johns. 82 [1814]; Philips v. Blagge, 3 id. 141 [1808].)

——Affidavit of agent.] An agent specially authorized to defend. (Johnson v. Lynch, 15 How. Prac. 199 [Sp. T. 1857].)

——Reason to be stated.] The reason why the party does not make the affidavit must be stated. (Roosevelt v. Dale, 2 Cow. 581 [Gen. T. 1824]; Mason v. Bidlemon, 1 How. Prac. 62 [Sp. T. 1844]; Davis v. Solomon, 25 Misc. Rep. 695 [1899].)

——Absence from the State.] Absence from the State is a good excuse for the affidavit not being made by the party. (Johnson v. Lynch, 15 How. Prac. 199 [Sp. T. 1857].)

——Affidavit by maker — how far available to the indorser.] How far the affidavit of the maker of a note is available to the indorser. (President, etc., of Ontario Bank v. Baxter, 6 Cow. 395 [Gen. T. 1826]; Clark v. Parker, 19 Wend. 125 [1838].)

——Default — not opened without affidavit.] An order opening a default is fatally defective where no affidavit of merits is presented, and will be set aside. (Thornall v. Turner, 23 Misc. Rep. 363 [1898 Appellate Term]; Davis v. Solomon, 25 id. 695 [1899]; Maguire v. Maguire, 75 App. Div. 534 [1902].)

See Haberstitch v. Fischer, 67 How. Prac. 318; Beglin v. People's Trust Co., 48 Misc. Rep. 494.

See notes under Rule 28.

RULE 24.

Affidavit for Order Extending Time.

No order extending a defendant's time to answer or demur, or the plaintiff's time to reply to a counterclaim, shall be granted, unless the party applying for such order presents to the judge to whom the application is made an affidavit of the attorney or counsel retained to defend the action that from the statement of the case made to him by the defendant he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof, or an affidavit of the attorney or counsel for the plaintiff, that from the statement of the case made to him by the plaintiff he verily believes that the plaintiff has a good and substantial defense upon the merits to the cause of action set forth as a

counterclaim, or to some part thereof, as the case may be. The affidavit shall also state the cause of action and the relief demanded in the complaint and, where a counterclaim has been interposed, the cause of action alleged as a counterclaim and the relief demanded in the answer; and whether any and what extension or extensions of time to answer, demur or reply by stipulation or order have been granted.

When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order, except upon two days' notice to the adverse party of the application for such order.

Rule 22 of 1858, amended. Rule 30 of 1871, amended. Rule 30 of 1874, amended. Rule 24 of 1877. Rule 24 of 1880. Rule 24 of 1884. Rule 24 of 1888, amended. Rule 24 of 1896. Rule 24 amended, 1910.

CODE OF CIVIL PROCEDURE.

§ 781. The time within which a proceeding in an action is prescribed to be taken, may be enlarged.

§ 782. The affidavit upon which the order was obtained must be served with it.

§ 783. Relief may be granted after the expiration of the time within which a proceeding should have been taken.

§§ 784, 785. When the time cannot be extended.

§ 2089. Enlarging time to make return, etc., in mandamus proceedings.

AFFIDAVIT NECESSARY—An order extending the time to answer.] When procured without the affidavits required by this rule it is irregular. (Graham v. Pinckney, 7 Rob. 147 [Sp. T. 1867]; Ellis v. Van Ness, 14 How. Prac. 313 [Sp. T. 1857].)

DEMURRER—After an order extending the time to answer is irregular.] After an order has been obtained extending the time to answer, it is irregular for the defendant to demur. (Davenport v. Sniffin, 1 Barb. 223 [Sp. T. 1847].)

STRIKING OUT—A pleading—motion for, by what extension authorized.] An extension of the time to answer and make such application as defendant should be advised authorizes a motion to strike out a portion of the pleadings. (Lackey v. Vanderbilt, 10 How. Prac. 155 [Sp. T. 1854].)

ADDITIONAL TIME—When it commences to run.] An order granting additional time does not commence to run until the time thereby extended has expired. (Schenck v. McKie, 4 How. Prac. 246 [Sp. T. 1849]; S. C., 3 Code Rep. 24; Pattison v. O'Connor, 23 Hun, 307; Mercantile Nat'l Bank v. Corn Exch. Bank, 68 Hun, 95.)

—— **Seven days' time—when it commences to run.]** An order granting "seven days' time to plead" commences to run from the date of the order. (Simpson v. Cooper, 2 Scott, 840.)

—— **Mailing of order on the last day, sufficient.]** If the order extending the time to answer is mailed on the last day it is sufficient. (Schuhardt v. Roth, 10 Abb. 203 [Sp. T. 1860].)

——**When rule does not apply.]** Rule 24, providing in regard to the date of issue, where an extension of time has been given, does not apply to a case where the plaintiff has served a notice of trial on the last day left to him, but six hours before defendant served by mail his answer. (Wallace v. Syracuse, B. & N. N. R. R. Co., 27 App. Div. 457 [1898].)

WAIVER — Of right to have the complaint amended.] An application for further time to answer is a waiver of a right to have the complaint amended. (Bowman v. Sheldon, 5 Sandf. 662 [Gen. T. 1852]; S. C., 10 N. Y. Leg. Obs. 339; Marry v. James, 34 How. Prac. 238 [Sp. T. 1857].)

LACHES — Of court — party not injured by.] If the concurrence of the court is necessary to the doing of an act, the party will not be affected by its delay; and if its decision be after the time for doing the act is passed it may be entered as of an earlier date. (Clapp v. Graves, 9 Abb. 20 [N. Y. Com. Pl. Gen. T. 1859]; S. C., 2 Hilt. 317; 26 N. Y. 418.)

—— **Of attorney.]** An order extending the time to answer will not be granted where the party has been guilty of gross laches. (Hays v. Berryman, 6 Bosw. 679 [Sp. T. 1860].)

TIME — Statutory Construction Law — computation of time.] The Statutory Construction Law, as amended by Laws of 1894, chapter 447, changes the general rule as to the computation of time by days, weeks and months, and provides that the day from which it is made shall be excluded; but the rule as to years remains as before, and includes the day from which it is made. (Aultman & Taylor Co. v. Syme, 91 Hun, 632 [1895].)

—— **Computation of time.]** An act which is required to be done more than fourteen days "before" March sixteenth may be lawfully done on March second. (People v. Burgess, 153 N. Y. 561 [1897].)

—— **Fractions of a day.]** The law does not regard fractions of a day except when the hour itself is material. (Marvin v. Marvin, 75 N. Y. 240 [1878].)

——**A week.]** A week is a definite period of time commencing on Sunday and ending on Saturday. (Steinle v. Bell, 12 Abb. Prac. [N. S.] 171.)

——**"Month" and "day" defined.]** The word "month" when used in a statute means a calendar month, and the word "day" means the space of time between two midnights. (People v. Nash, 12 N. Y. Wkly. Dig. 545 [Gen. T. 1881]. See Laws of 1892, chap. 677, §§ 26, 27.)

—— **Order extending time may be ex parte — when properly granted.]** An order extending the time to answer may be made *ex parte*, where the time has not expired, and is properly granted in case a motion to consolidate two actions is pending. (Condon v. Church of St. Augustine, 14 Misc. Rep. 181 [1895].)

RULE 25.

Ex Parte Application — Statements as to Previous Application.

Whenever application is made *ex parte* on affidavit to a judge or court for an order, the affidavit shall state whether any previous

application has been made for such order, and, if made, to what court or judge and what order or decision was made thereon, and what new facts, if any, are claimed to be shown. For failure to comply with this rule, any order made on such application may be revoked or set aside. This rule shall apply to proceedings supplementary to execution, and to every application for an order or judgment made in any action or special proceeding.

Rule 23 of 1858. Rule 31 of 1871, amended. Rule 31 of 1874, amended. Rule 25 of 1877. Rule 25 of 1880. Rule 25 of 1884, amended. Rule 25 of 1888, amended. Rule 25 of 1896.

CODE OF CIVIL PROCEDURE.

§ 776. Subsequent applications for an order, after a denial of a prior application therefor.
§ 777. Application for judgment cannot be withdrawn without permission — second application, what must be stated in.
§ 778. Persons violating the last two sections punished for contempt.
§ 1892. Application for leave to sue official bond may be *ex parte*.

PREVIOUS APPLICATION — Fact as to, must be stated in supplementary proceedings.] An affidavit to maintain an order for the examination of a judgment-debtor in supplementary proceedings must comply with this rule. (Diossy v. West, 1 Monthly L. Bulletin [N. Y.], 23 [N. Y. Com. Pl. December, 1878].)

—— Effect of its not being stated.] The failure to state that no previous application has been made, is an irregularity which does not compel the court to refuse to grant the order, or to vacate it after it has been granted. (Bean v. Tonnelle, 24 Hun, 353 [1881]; Pratt v. Bray, 10 Misc. Rep. 445 [1894]; Skinner v. Steele, 88 Hun, 307 [1895]; Matter of National Gramophone Corp., 82 App. Div. 593 [1903].)

—— Only an irregularity.] Where an order directing the examination of the defendant before trial has been vacated by reason of the insufficiency of the papers upon which the application was made, the failure of the plaintiff upon his second application for an order directing such examination to comply fully with the provisions of Rule 25, by showing what new facts are claimed to be shown on the second application or whether or not there are any new facts, is at most an irregularity and does not compel the court to refuse the order or to vacate it after it is granted. (Skinner v. Steele, 88 Hun, 307 [1895].)

—— Order may still be granted.] An order to show cause may be granted upon affidavit, after a hearing, even if the affidavit does not state that no previous application has been made for such order. (Wooster v. Bateman, 4 Misc. Rep. 431 [N. Y. Supr. Ct. 1893].)

Order for examination before trial will be vacated where moving papers do not show that no previous application for the order has been made. (Mitchell v. Green, 121 App. Div. 677.)

As to what is a renewal, see Harris v. Brown (93 N. Y. 390). Application to correct order should be made before judge who heard motion. (Dinkelspiel v. Levy, 12 Hun, 130.)

RENEWAL — Leave to renew was formerly unnecessary.] When the application is made *ex parte* to a judge, or a justice out of court upon affidavits, leave to renew is not necessary. (Belmont v. Erie R. R. Co., 52 Barb. 637–643 [Sp. T. 1869].)

—— Omission to enter order.] The omission to enter an order does not justify a new application. (Peet v. Cowenhoven, 14 Abb. 56 [Chamb. 1861]; Hall v. Emmons, 2 Sweeny, 396 [N. Y. Supr. Ct. Gen. T. 1870].)

RES ADJUDICATA — Decision on a motion is not.] A denial of a motion is no bar to an action. (Howell v. Mills, 53 N. Y. 322 [1873].)

See notes under Rule 37.

RULE 26.

Judgment on Failure to Answer, where it May be Applied for — First District.

When the plaintiff in an action in the Supreme Court is entitled to judgment upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any Special Term in the district embracing the county in which the action is triable, or, except in the first district, in an adjoining county; such application, except in the first judicial district, may also be made at a Trial Term in the county in which the action is triable. When a reference or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable, unless the court shall otherwise order. In the first judicial district, every motion or application for an order or judgment where notice is necessary, must be made to the Special Term for the hearing of motions, and where notice is not necessary, to the Special Term for the transaction of *ex parte* business, except where other provision is expressly made by law, or the general or special rules of practice. In the county of Kings all such applications shall be made at the Special Term for the hearing of motions. Any order or judgment granted in violation of this provision shall be vacated by the Special Term at which the application should have been made, or by the Appellate Division of the Supreme Court; and no order or judgment granted in violation of this rule shall be entered by the clerk.

Rule of 1858. Rule 33 of 1871, amended. Rule 33 of 1874. Rule 26 of 1877, amended. Rule 26 of 1880, amended. Rule 26 of 1884. Rule 26 of 1888, amended. Rule 26 of 1896.

CODE OF CIVIL PROCEDURE.

§ 419. If a copy complaint or notice be not served with the summons, the plaintiff cannot take judgment without application to the court.
§ 420. Judgment may be taken without application to the court — when.
§ 536. Reference on default in certain actions for tort — defendant may prove mitigating circumstances.
§ 1212. Judgment by default, how taken.
§ 1213. Amount, how determined.
§ 1214. Application to the court for judgment by default — when necessary.
§ 1215. Proceedings on such application.
§ 1216. Application for judgment by default in cases other than where the summons was personally served.
§ 1217. Attachment and undertaking for restitution required in certain actions.
§ 1218. A judgment cannot be taken against an infant till twenty days after appointment of guardian *ad litem*.
§ 1219. When and of what proceedings defendant in default is entitled to notice.
§ 1526. Effect of a judgment by default, in an action of ejectment.
§ 1545. Duty of court in case of a default in an action for partition.
§ 1605. Recovery of dower against an infant by collusion or default of guardian does not prejudice its rights.
§ 1635. Payment into court after judgment in foreclosure of a part of the amount secured by the mortgage is rendered — proceedings on subsequent default.
§ 1645. Judgment by default in an action to determine claims to real property.
§ 1729. Judgment by default in an action of replevin — damages how ascertained.
§ 1753. Judgment annulling marriage not to be rendered by default, without proof, etc.
§ 1757. Judgment not to be taken by default in an action for divorce, without proof.
§ 1774. Regulations concerning judgments by default, in matrimonial actions.

DEFAULT — Practice where only part of the defendants are in default.] Proper practice where there are several defendants, some of whom appear and others of whom are in default. (Lyon v. Yates, 61 N. Y. 661 [1875]; Catlin v. Billings, 13 How. Prac. 511 [Sp. T. 1857]; S. C., 4 Abb. 248.)

—— What notice sufficient to justify entry of judgment.] A notice that a judgment will be taken for a sum specified "with interest" from a day named, is sufficient to justify the entry of a judgment in a case in which the complaint is not served. (Swift v. De Witt, 1 Code R. 25 [Gen. T. 1848]; S. C., 6 N. Y. Leg. Obs. 314; 3 How. Prac. 280.)

—— What defendant concedes by his default, and his rights thereafter. (Bassett v. French, 10 Misc. Rep. 672 [1895].)

—— **What notice is sufficient.]** (Mason v. Corbin, 29 App. Div. 602 [1898].)

—— **Judgment on default — not more favorable than asked for.]** Where there is no answer, the judgment entered in the action should not be more favorable to the plaintiff that that demanded in the complaint. (Harrison v. Union Trust Co. of New York, 144 N. Y. 326. See, also, McVity v. Stanton, 10 Misc. Rep. 105 [1894].)

—— **A report must be made and filed on a reference.]** If a reference be ordered a report must be made and filed. (Am. Ex. Bk. v. Smith, 6 Abb. 1 [N. Y. Sup. Ct. Gen. T. 1857].)

—— **Order of default — not necessary.]** An order of default need not be entered on a failure to answer. (Watson v. Brigham, 3 How. Prac. 290 [Sp. T. 1848].)

—— **Proper form of notice of assessment of damages.]** (Kelsey v. Covert, 15 How. Prac. 92 [Sp. T. 1857]; S. C., 6 Abb. 236, n.)

—— **Application when proper at Trial Term.]** When, in a proceeding for the substitution of an attorney in two pending suits, the judge at Special Term, after hearing the motion, refers the matter to a referee to take proof and report what sum is due to the attorney sought to be removed and directs the application to stand over for further consideration until the referee shall make his report, it is not improper practice to notice the motion for the confirmation of such report for a Trial Term at which the same judge who held the Special Term is then sitting. Rule 26 is not applicable under such circumstances. (Hinman v. Devlin, 40 App. Div. 234 [1899].)

—— **When time to answer is extended.]** When the time of a defendant to answer is entended by order, plaintiff cannot take judgment until the time to answer as extended has expired. (Littauer v. Stern, 177 N. Y. 233.)

As to References, see notes under Rule 30.

—— **In general.]** Notice that judgment will be taken for certain sum with interest from certain date, sufficient. Clerk cannot enter judgment for unliquidated damages without order of court. (Matter of Scharrmann, 49 App. Div. 278; Bullard v. Sherwood, 85 N. Y. 253, revg. 22 Hun, 462.)

What proof admissible under plea of justification. (Lampher v. Clark, 149 N. Y. 472.) May plead facts arising subsequent to commencement of action. (Gabay v. Doane, 66 App. Div. 507. See Bradner v. Faulkner, 93 N. Y. 515; Gressman v. Morning Journal Assn., 197 id. 474.)

Remedy for default is by motion to open. (Hawkins v. Smith, 91 Hun, 299.)

Whether proof shall be taken at separate time is a matter of practice. (Lyon v. Yates, 61 N. Y. 661.)

Omission to apply to court is an irregularity and judgment is not void. (Bissell v. N. Y. C. & H. R. R. Co., 67 Barb. 385.)

RULE 27.

Orders Granted on Petitions — Recitals in — May be Docketed as Judgments.

Orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners,

and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments.

Rule 56 of 1858. Rule 35 of 1871. Rule 35 of 1874. Rule 27 of 1877. Rule 27 of 1880. Rule 27 of 1884. Rule 27 of 1888. Rule 27 of 1896.

CODE OF CIVIL PROCEDURE.

§ 15. No punishment for nonpayment of interlocutory costs — except when ordered to be paid for misconduct. (See Civil Rights Law, § 20.)

§ 16. Orders for payment of money on contract — disobedience to, not punishable by arrest. (See Civil Rights Law, § 21.)

§ 779. Costs directed to be paid by an order, if not paid in ten days, proceedings to be stayed — costs to abide event — taxed as part of the costs of the action.

§ 1730. When final judgment in replevin to be docketed.

§ 1816. Docket of judgment against an executor individually and in his representative capacity.

§ 2550. Docket of final order awarding costs in summary proceedings to recover land.

§ 2379. Docket of judgment on award of arbitrators.

§ 2553. Docket of decree of surrogate for the payment of money.

§ 3247. Costs in case of transfer of cause of action.

ATTORNEY'S FEES — Docket of order for, improper.] Rule 27 does not permit an order fixing the value of attorney's services, rendered to a party to an action, to be docketed as a judgment. (Myer v. Abbett, 20 App. Div. 390 [1897].)

JUDGMENT — Entry of, in a special proceeding.] The final order in a special proceeding cannot be the basis of a separate and independent judgment. (Matter of Lexington Avenue, 30 App. Div. 602 [1898, affd., 157 N. Y. 678.)

See notes under Rule 37.

—— Execution may issue to collect alimony.] (Lansing v. Lansing, 4 Lans. 379 [Gen. T. 1871]; S. C., 41 How. Prac. 248; Miller v. Miller, 7 Hun, 208 [1876]. (See Howe v. Howe, 5 Wkly. Dig. 460 [N. Y. Com. Pl. Sp. T. 1878]; Ramppen v. Ramppen, 1 L. Bulletin, 11 [Sp. T. 1878].)

—— Also to collect money directed to be paid from a trust fund.] (Randall v. Dusenbury, 9 J. & S. 456 [N. Y. Supr. Ct. Gen. T. 1876].)

—— Enforcement of a judgment against a dissolved corporation.] (Hastings v. Drew, 50 How. Prac. 254 [Sp. T. 1874].)

—— A receiver may enforce by execution a judgment between other parties which requires money to be paid to him.] (Geery v. Geery, 63 N. Y. 252 [1875].)

CONTEMPT — Order not enforcible by execution, may be by proceedings for contempt.] Disobedience may be punished as a contempt where the judgment or order cannot be enforced by execution. (O'Gara v. Kearney, 77 N. Y. 423 [1879].)

RULE 28.

Inquests May be Taken, When.

Rule 28 repealed, 1910.

CODE OF CIVIL PROCEDURE.

§ 980. Inquest cannot be taken where the answer is verified.
See notes under Rule 23.

APPEARANCE — By defendant, though no affidavit filed.] When a cause is called in its regular order on the calendar, the defendant has a right to appear, though no affidavit of merits has been filed. (Starkweather v. Carswell, 1 Wend. 77 [1828].)

TRIAL — Before the court.] The trial must be before the court, or the court and a jury; the case cannot be sent to a sheriff's jury. (Gilberton v. Fleischel, 5 Duer, 652 [Sp. T. 1856]; Dolan v. Pelly, 4 Sandf. 673 [1851].)

—— Plaintiff must prove his case, if there be an answer.] Where the defendant has answered, the plaintiff must prove the allegations denied. (Patten v. Hazenell, 34 Barb. 421 [Gen. T. 1861].)

—— Defendant may examine plaintiff's witnesses.] The defendant may examine plaintiff's witnesses for the purpose of controverting the plaintiff's proof, but not for the purpose of showing a substantive defense. (Kerker v. Carter, 1 Hill, 101 [Sup. Ct. 1841]; Hartness v. Boyd, 5 Wend. 563 [1830].)

—— Counterclaim not replied to must be allowed.] If a counterclaim be set up and it is not replied to, it must be allowed. (Potter v. Smith, 9 How. Prac. 262 [Sp. T. 1854].)

—— Inquest not proper after discharge of the jury.] An inquest cannot be taken after the discharge of the jury. (Haines v. Davis, 6 How. Prac. 118 [Sp. T. 1851]; S. C., 1 Code R. [N. S.] 407; Dickinson v. Kimball, 1 Code R. 83 [Sp. T. 1848].)

WHEN SET ASIDE — Because of unexpected absence.] When an inquest will be set aside because of the unexpected absence of one of the defendant's material witnesses. The right to do so is not affected by the fact that the trial court refused to postpone the trial. (Cahill v. Hilton, 31 Hun, 114 [1883].)

REVIEW — How obtained — judgment taken on an inquest must be received by motion and not by appeal.] Where a judgment has been entered upon findings made and filed, after an inquest taken at a Circuit, on the failure of the defendant to appear, the remedy of the defendant is by motion to set aside the judgment, and not by appeal. (Greenleaf v. Brooklyn, etc., Railroad Company, 37 Hun, 435 [1885]; affd., Greenleaf v. B., etc., R. Co., 102 N. Y. 96.)

SERVICE OF AFFIDAVIT OF MERITS — Affidavit must be served before first day of term.] The affidavit must be filed and served before the first day of the Circuit. (Baker v. Ashley, 15 Johns. 536 [1818].)

—— **On second day.]** Where an affidavit of merits is not filed until the second day of the Circuit, it must be so served as in all probability to bring its service to the knowledge of plaintiff's attorney before an inquest is taken. (Smith v. Aylesworth, 24 How. Prac. 33 [Gen. T. 1862]; Brainard v. Hanford, 6 Hill, 368 [1854].)

VERIFIED PLEADING — No inquest.] No inquest can be taken in any case for want of an affidavit of merits where the answer is verified. (Code of Civil Procedure, § 980.)

EQUITY CASES — Rule not applicable to.] This rule does not apply to equity cases. (Devlin v. Shannon, 8 Hun, 531 [1876].)

RULE 29.

Opening of Counsel and Examination of Witnesses and Summing Up.

In the trial of civil causes, unless the justice presiding or the referee shall otherwise direct, each party shall open his case before any evidence is introduced, and, except by special permission of the court, no other opening by either party shall thereafter be permitted.

On the trial of issues of fact, one counsel only on each side shall examine or cross-examine a witness, who shall not repeat the answer or answers of such witness at the time he shall be under examination. One counsel only on each side shall sum up the cause, and he shall not occupy more than one hour, and the testimony, if taken down in writing, shall be written by some person other than the examining counsel; but the judge who holds the court may otherwise order, or dispense with this requirement.

While addressing the court, examining witnesses or summing up, counsel shall stand.

Rule 30 of 1858. Rule 37 of 1871. Rule 37 of 1874. Rule 29 of 1877. Rule 29 of 1880. Rule 29 of 1884, amended. Rule 29 of 1888, amended. Rule 29 of 1896. Rule 29 as amended, 1910.

OPENING AND CLOSING CASE — A legal right.] The right of a party holding the affirmative to open and close the case is a legal right. (Millerd v. Thorn, 56 N. Y. 402 [1874]; Murray v. N. Y. Life Ins. Co., 85 id. 236 [1881].)

—— **Right to open and close, a substantial one.]** The privilege the party having the affirmative of the issues in an action has of opening and closing the case on trial is founded upon a substantial right, the denial of which, unless it be made to appear that he could not have been injured thereby is error. (L. O. N. Bank v. Judson, 122 N. Y. 278 [1890].)

—— **Test of the right.]** The question as to which party has this right is to be determined by the pleadings, and the test is whether, without any proof, plaintiff, upon the pleadings, is entitled to recover upon all the causes of action alleged in his complaint. If he is not, no matter how little proof the issue may require, if it is requisite to establish it by evidence, plaintiff has the right to open and close the case. If he is, and defendant alleges a counterclaim, controverted by plaintiff, or sets up an affirmative matter of defense, which is the subject of trial, the defendant has that right. (*Ib.*)

—— **Its denial requires a reversal.]** A judgment will be reversed because of an error of the trial court in deciding as to which party should open and close the case. (Plenty v. Rendle, 43 Hun, 568 [1887].)

—— **Refusal to instruct a party to take the affirmative.]** A refusal to instruct the opposite party to take the affirmative affords no valid ground for an exception. (Clark v. Smith, 9 Misc. Rep. 164 [N. Y. Com. Pl. Gen. T. 1894].)

—— **Error in allowing the affirmative, cured.]** An error in allowing the plaintiff the affirmative of the issue may be cured by his consent and offer to allow defendant the final summing up. (Lake Ontario Nat. Bank v. Judson, 33 N. Y. St. Rep. 371 [1890]; S. C., 122 N. Y. 638.)

—— **When the question of relative right should be presented.]** A request on the trial to the court to state the order in which counsel shall present the case to the jury, can only be made after the whole evidence has been presented. (Mead v. Shea, 92 N. Y. 122 1883].)

—— **Right, how determined.]** The question as to the right to the affirmative is to be determined upon the state of the pleadings when the case comes to trial. (Kolbe v. Price, 14 Hun, 55 [1878]. See Gilland v. Lawrence, 13 N. Y. Wkly. Dig. 372 [1881].)

—— **Defendant must claim the affirmative upon the trial of the action.]** Where the plaintiff has the affirmative upon the pleadings and the defendant does not claim it upon the trial, it is not error to deny the defendant's application for the affirmative in summing up. (Crawford v. Tyng, 7 Misc. Rep. 239 [N. Y. City Ct. 1894].)

—— **Issues under which plaintiff has the affirmative.]** When, in an action brought to recover for goods sold and delivered, the answer contains a general denial of the allegations of the complaint and puts in issue the question of sale and delivery as well as that of price and payment, the plaintiff has the affirmative of the issue, and is entitled to open and close the case. (Felts v. Clapper, 69 Hun, 373 [1893].)

—— **Where exemplary damages are allowable, the affirmative is upon the plaintiff — what decides the right to open and close.]** In an action where exemplary damages are allowable, the affirmative is upon the plaintiff. Where, in a libel suit, there is a question whether there was actual or implied malice, the affirmative is with the plaintiff, and the act of defendant's counsel in withdrawing the general denial, admitting the publication of the article and standing on justification and privilege and mitigation, will not give him the right to open and close.

The question as to who should have the right to open and close, should be decided upon the pleadings, and not upon admissions, or oral withdrawals. (Parish v. Sun Printing & Publishing Assn., 6 App. Div. 585 [1896].)

—— **Where plaintiff has right to open and close in an action for rent.]** In an action for rent, where the complaint alleges that defendant had neglected and refused to pay the rent due and payable, and the answer denies said allegation, it is reversible error to deny plaintiff the right to open and close since he was bound to prove the nonpayment. (Trenkmann v. Schneider, 23 Misc. Rep. 336 [1898].)

—— **Issues under which the defendant has the affirmance.]** In an action by the payee of a note against the maker, the answer admitted the making of the note and did not deny any of the allegations of the complaint and alleged affirmatively that the note was given without consideration under an agreement that the same was to be paid only out of the profits of a certain business that had realized no profits. Held, that a denial of the right to open and close, excepted to, was error entitling defendant to reversal of a judgment against him. (Brown v. Tausick, 1 Misc. Rep. 16 [N. Y. City Ct. 1892].)

—— **Allegations of the complaint admitted.]** Where the answer admits the allegations of the complaint, and the defense was upon a counterclaim, the defendant is entitled to make the closing argument to the jury, and a denial of the privilege affects a substantial right. (Staats v. Hausling, 22 Misc. Rep. 526 [1898].)

—— **In an action for rent.]** In an action for rent under a lease the complaint alleged the making of the lease, which provided for rent payable monthly in advance; that plaintiff had performed all the conditions of the lease, and that a certain sum was due for the month of September, which defendants refused to pay. The answer admitted the making of the lease, and that defendants refused to pay the amount demanded; denied all other allegations of the complaint, and set up affirmative defenses. Held, that no material allegation of the complaint was denied and that defendants had a right to the affirmative of the issue. (Hurliman v. Seckendorf, 9 Misc. Rep. 264 [City Ct. of Brooklyn, 1894]; S. C., 10 id. 549 [1894]; distinguished, Trenkmann v. Schneider, 23 id. 336 [1898].)

—— **Time allowed for arguments discretionary.]** It is a matter of discretion with the court to determine what time shall be allowed in summing up under the circumstances of the case, and unless such discretion is abused the Court of Appeals will not interfere with it. (Rehberg v. The Mayor, etc., of New York, 1 Eastern Reporter, 182 [Ct. of App. 1885].)

—— **Time allowed — how objection should be taken.]** Where the time allotted to defendant's counsel was thirty minutes, and to the district attorney twenty-five, and it appeared that the former was stopped by the court at the expiration of his time but the latter continued his address for five minutes more than his allotted time, when he was stopped, held, that this did not tend to establish an abuse of discretion; that the defendant's counsel had the right to ask the court to stop the district attorney at the expiration of his time, and not having done so, there was no ground for complaint. (The People v. Kelly, 94 N. Y. 526 [1884].)

—— **Counsel limited to points in issue.]** Counsel will be restrained in his statements to the points in issue. (Fry v. Bennett, 3 Bosw. 201 [N. Y. Supr. Ct. 1858]; Mitchell v. Borden, 8 Wend. 570 [1832].)

—— **Reading a book.]** It is error to allow counsel in summing up to read from a pamphlet proved to have been issued by the defendant but not put in evidence. (Koelger v. Guardian Life Ins. Co., 57 N. Y. 638 [1874].)

—— An exception to allowing counsel to read to the jury, as part of his argument but not as evidence, parts of a book, cannot be sustained if the case does not disclose what he reads. (Lyons v. Erie Railway Co., 57 N. Y. 492 [1874].)

—— **Reading from a law book.]** In an action brought to recover a balance alleged to be due upon a contract for the sale of wrought scrap iron, a verdict was rendered sustaining a counterclaim interposed by the defendant which set up a failure of the plaintiff to perform the written contract in which the weight and quality of the iron were guaranteed. In addressing the jury the defendant's counsel was allowed, against the objection and exception of the plaintiff, to read to the jury extracts from Bliss on Insurance, which state the doctrine of warranty and the necessity of strictly complying therewith, as applicable to policies of insurance. Held, that this was error, as the doctrine of warranty governing policies of insurance were not applicable to sales of chattels. That, although counsel may, perhaps, be allowed in this State to read to the jury when what is read is the law of the case and can by no possibility prejudice the adverse party, yet it is a custom more honored in the breach than in the observance, and should not be allowed as long as the jury are required to accept for their guidance the legal rules pronounced by the court. (Lesser v. Perkins, 39 Hun, 341 [1886].)

—— **Reading to the jury an opinion of the Court of Appeals.]** A reversal should not be granted where an attorney reads to the jury an opinion of the Court of Appeals. (Williams v. Brooklyn Elevated R. R. Co., 32 St. Rep. 702 [Sup. Ct. 1890].)

—— **Reading from an opinion given on a former appeal is error.]** The publication of a libelous article was admitted. The statement therein that plaintiff was defendant, instead of complainant, in a criminal action was proved to be the error of the reporter, which was corrected in the next issue of the defendant's newspaper. No malice, in fact, or substantial damages were alleged or proved. Held, that it was error to permit plaintiff's counsel, in summing up, to read an extract from an opinion on a former appeal in the case which had a tendency to induce the jury to believe that, as a matter of law, plaintiff had a right to substantial, as distinguished from nominal, compensatory damages. (Griebel v. Rochester Printing Co., 24 App. Div. 288 [1897].)

—— **Reading to the jury a newspaper article.]** A new trial should not be granted where a counsel in summing up reads a newspaper article in regard to individual rights being infringed upon by corporations, such article, however, not referring to the particular company defendant, and when the counsel might have stated the substance thereof. (Williams v. Brooklyn Elevated R. R. Co., 32 St. Rep. 702 [Sup. Ct. 1890].)

—— **Interference by the court with counsel.]** The interference by the court with counsel when opening a case to the jury is, as a general rule, a matter of discretion and not the subject of exception. (Walsh v. People, 88 N. Y. 458 [1882].)

—— **Interruption of the summing up by the judge.]** A new trial should be granted where upon the trial the judge interrupted the plaintiff's counsel when summing up his case before the jury, asking him to shorten his argument, and in consequence of which the counsel became confused and failed to discuss material facts. (Campanello v. N. Y. Central, etc., R. R. Co., 39 St. Rep. 445 [Buffalo Supr. Ct. 1891]; affirmed, 39 St. Rep. 274.)

—— **Statement of counsel.]** What statements of counsel, if objected to warrant reversal. (Mulligan v. Met. S. R. Co., 89 App. Div. 207; Benoit v. N. Y. C. & H. R. R. Co., 93 App. Div. 24.)

Right to open and close.] Right is determined by the pleadings at the time of trial and cannot be altered by admissions made during course of trial. (Hollander v. Farber, 52 Misc. Rep. 507.)

—— The refusal of the right of the defendant to close the case, where the only issue tried is on his counterclaim, held, reversible error. (Fischer v. Frohne, 51 Misc. Rep. 578.)

—— In action for agreed price and value of work done, where answer places in issue averments relating to price and value, plaintiff has affirmative of issue. (Petzoldt Co. v. Cohn, 114 N. Y. Supp. 165. See, also, Cilley v. Pref. Acc. Ins. Co., 109 App. Div. 394.)

—— **Examining witnesses.]** Practice of counsel in summing up to the jury under guise of asking questions and getting prejudicial and inadmissible matters before the jury condemned. (Scott v. Barker, 129 App. Div. 241; Frahm v. Siegel-Cooper Co., 131 id. 747; Quigg v. Post & McCord, Id. 155.)

—— Misconduct of counsel in making improper remarks and statements in summing up held cured by an instruction of the court to disregard them. (Patterson v. Heiss, 110 N. Y. Supp. 1042.)

—— **Handing exhibit to jury.]** Act of plaintiff's counsel in handing exhibit to jury on its retirement, without first asking permission of the court, held immaterial and unprejudicial. (Wilson v. Faxon, Williams & Faxon, 63 Misc. Rep. 561.)

—— **Improper remarks of counsel.]** See Reehill v. Fraas, 129 App. Div. 563; Freedman v. Press Publishing Co., 65 Misc. Rep. 85; Stein v. Brooklyn, Queens Co., etc., Ry. Co., 62 id. 309; Hordern v. Salvation Army, 124 App. Div. 674; Adler v. Lesser, 110 N. Y. Supp. 196; Kelsey v. City of N. Y., 123 App. Div. 381; Haigh v. Edelmeyer, etc., Co., Id. 376; Horton v. Terry, 126 id. 479; Orendorf v. N. Y. Cent. Ry. Co., 119 id. 638; Cox v. Continental Ins. Co., Id. 682; Loughlin v. Brassil, 187 N. Y. 128; Nelson v. Forty-second St., etc., R. R. Co., 55 Misc. Rep. 373.)

PROOF — Order of determined by the court.] The court determines as to the order of proof. (Carnes v. Platt, 15 Abb. [N. S.] 337 [Gen. T. 1873]; Place v. Minster, 65 N. Y. 89 [1875]; Pollatschek v. Goodwin, 17 Misc. Rep. 587 [1896]; Johnston v. Mutual Reserve L. Ins. Co., 90 N. Y. Supp. [124 St. Rep.] 539.)

—— **The court may limit the examination of a witness.]** After a party has been permitted to examine a witness at length in reference to a transaction, it is in the discretion of the court to exclude further examination upon

the subject, and its decision is not reviewable in the Court of Appeals. (Cowing v. Altman, 79 N. Y. 167 [1879].)

—— **What limit may be imposed upon a cross-examination.]** So far as the cross-examination of a witness relates to facts in issue or relevant facts it may be pursued by counsel as matter of right, but when the object is to test the accuracy or credibility of the witness, its method and duration are subject to the discretion of the court, and the exercise of this discretion, unless it is abused, is not the subject of review. (Langley v. Wadsworth, 99 N. Y. 61 [1885].)

—— **Cross-examination on irrelevant topics.]** Inquiries on irrelevant topics to discredit a witness on his cross-examination, and the extent to which a course of irrelevant inquiry may be pursued, are matters committed to the discretion of the court, and the exercise of such discretion is not the subject of review except in the case of plain abuse and injustice. (People v. Braun, 158 N. Y. 558 [1899].)

—— **Witness to remain until the case is closed.]** Right of one party to have a witness, once summoned and called to testify by his adversary, remain in court after his examination until the case is closed. (Neil v. Thorn, 88 N. Y. 270 [1882].)

—— **Reading deposition.]** Where the deposition of a party, taken before trial, is read thereon and no objection is taken, he is not thereby precluded from being examined on the trial. (Misland v. Boynton, 79 N. Y. 630 [1880].)

—— **Explanation of absence of witness.]** In what cases the district attorney will be allowed, in answer to comments of counsel for the prisoner, to explain why a witness is absent. (Blake v. People, 73 N. Y. 586 [1878].)

RULE 30.

Nonsuit before Referee — Referee's Report — Testimony in References Other than of Issues — Exceptions.

On a hearing before a referee or referees, the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited, or his complaint may be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to a referee or the referees for their decision; in which case the referee or referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them; the report of the referee shall be filed with the testimony, and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding. At any time after the

report is filed either party may bring on the action or proceeding at Special Term on notice to the parties interested therein.

Rule 32 of 1858, amended. Rule 39 of 1871. Rule 39 of 1864, amended. Rule 30 of 1877. Rule 30 of 1880. Rule 30 of 1884. Rule 30 of 1888 Rule 30 of 1896. Rule 30 amended, 1910.

CODE OF CIVIL PROCEDURE.

§ 90. Clerks of courts of record in New York county not to be appointed referees without consent of the parties. See Judiciary Law, § 251.
§ 721. Omission of a referee to be sworn immaterial after the report has been made.
§ 827. Reference may be ordered for certain special cases.
§ 888. Commission to take testimony — may issue in aid of a reference.
§ 992. What rulings may be excepted to.
§ 994. When and how exceptions may be taken to the report of a referee.
§ 997. Settlement of a case upon appeal in the event of the disability of the referee before whom it was tried.
§ 1004. Motion for new hearing after the trial of specific questions by a referee.
§ 1011. Reference by consent — clerk to enter order — appointing a new referee where the one named refuses to act or a new trial is granted.
§ 1012. When reference by consent not allowed as of course.
§ 1013. Compulsory reference — when ordered.
§ 1014. Proceedings where the reference is for trial of part of the issues.
§ 1015. Reference upon questions incidentally arising.
§ 1016. Referee to be sworn.
§ 1018. General powers of a referee upon a trial.
§ 1019. Within what time the report must be filed.
§ 1021. Decision of referee upon a demurrer or where a nonsuit is granted.
§ 1022. Decision of referee upon an issue of fact — when it must award or deny costs — exception.
§ 1024. Qualifications of referee — when judge may act as referee.
§ 1025. Several referees may be appointed.
§ 1026. Proceedings on such a reference.
§ 1215. Judgment by default — reference may be ordered on application for — judgment, how entered.
§ 1216. Judgment by default, when summons has been served by publication, etc.
§ 1219. When a defendant in default is entitled to notice.
§ 1221. Where the issues are tried separately the judgment upon the last trial is to cover all the issues.
§ 1223. Proceedings and power of referee on an application under section 1221.
§ 1226. Judgment — when a reference has been ordered upon one or more specific questions of fact.
§ 1230. Reference — when the judgment requires the appointment of a referee to do any act thereunder.

§ 1231. Final judgment may be ordered to be settled before a referee.
§ 1232. Interlocutory references or inquisitions, how reviewed.
§ 1545 *et seq.* Reference in partition.
§ 1607 *et seq.* Reference to admeasure dower.
§ 1659. Referee, on trial of action for waste, may view the property.
§ 1739. Referee to sell chattels in an action to foreclose a lien. See Lien Law, § 208.
§ 2305 *et seq.* Reference on petition for discovery of death of life tenant.
§ 2334 *et seq.* Reference in proceedings for sale of infant's real estate.
§ 2407. Reference to ascertain liens on surplus in foreclosure by advertisement.
§ 2423. Reference on voluntary dissolution of a corporation. See Gen. Corp. Law, §§ 176, 178, 181, 182, 184.
§ 2546. Surrogate may refer questions of fact, or account to a referee.
§ 2718. Reference of a disputed claim against the estate of a decedent.
§ 3367. Reference of issues arising in a condemnation proceeding — time within which decision must be filed.
§ 3378. Reference to determine the rights of conflicting claimants to the compensation paid in such proceeding.
§ 3380. Reference to ascertain amount of damages where the plaintiff has been given temporary possession.
§ 3392. Reference on an application for leave to sell, etc., corporate real estate. See Gen. Corp. Law, § 72.
§ 3431. Reference to determine rights of conflicting claimants on an application to foreclose a lien on a vessel. See Lien Law, § 97.

See notes under Rules 31, 32.

DISCONTINUANCE — After allowance of alimony and counsel fee to defendant.] When the defendant has acquired some fixed rights in the action, *e. g.*, allowance of alimony and counsel fee in divorce suit, which a discontinuance would affect, the plaintiff cannot discontinue without leave of the court on notice. (Leslie v. Leslie, 3 Daly, 194 [1870]; affirmed, 10 Abb. Prac. [N. S.] 64 [Ct. of App. 1871].)

—— Counterclaim.] The plaintiff may discontinue, although defendant has put in a counterclaim. (Tubbs v. Hall, 12 Abb. Prac. [N. S.] 237 [N. Y. Com. Pl. Sp. T. 1871].)

—— Extra allowance.] The court may, however, compel payment of an extra allowance in addition to costs as a condition of such discontinuance. (Tubbs v. Hall, 12 Abb. Prac. [N. S.] 237 [N. Y. Com. Pl. Sp. T. 1871].)

—— Proper remedy on referee's dismissal of the complaint.] On a trial before a referee plaintiff submitted to a nonsuit, the referee entering in his minutes "complaint dismissed, with costs." Defendant thereupon refused to proceed with proof of his counterclaim, though requested to do so by the plaintiff, and claimed his right to tax costs and enter judgment. Plaintiff moved then for a dismissal of the counterclaim, which was denied, and judgment was entered by defendant upon the report of the referee according to the minutes. Held, that the motion for an order directing that the judgment of dismissal be vacated, and the case sent back to the referee to take proof and try the issue

raised by the counterclaim and reply thereto was properly denied, plaintiff's remedy being by appeal. (Albany Brass & Iron Co. v. Hoffman, 30 App. Div. 76 [1898].)

—— **Right of defendant to withdraw a counterclaim.]** Upon the trial of an action before a referee, the defendant may withdraw a counterclaim set up in his answer, in the same manner that the plaintiff may submit to a nonsuit on a trial at circuit, up to the time that the case is submitted to the referee. (Brown v. Butler, 58 Hun, 511 [1890].)

REFERENCE — Residence of referee — where the referee may sit — when a reference should be ordered.] The referee need not reside in the county in which the venue is laid. He may be authorized to sit in any county to take testimony. (O'Brien v. Catskill Mountain Railroad Co., 32 Hun, 636 [1884].)

—— **Reference to take an account and report, also to decide certain questions.]** The provision of the Code of Civil Procedure (§ 1015) authorizing the court to direct a reference "to take an account and to report to the court thereon either with or without the testimony * * * and also to determine upon a question of fact arising in any stage of the action * * * except upon the pleadings," does not authorize a reference simply to take testimony but to determine a question of fact and report such determination, and this only to determine some question of fact which arises collaterally not upon the pleadings. (Doyle v. M. E. R. Co., 136 N. Y. 505 [1893].)

—— **Power of the legislature to authorize it.]** As to whether the legislature has power under the Constitution to confer upon the courts power to grant such a reference, *quære*. (*Ib.*)

—— **New refereees — of claim against estate.]** Where a disputed claim against the estate of a deceased person has been referred, pursuant to section 2718 of the Code of Civil Procedure, the proceeding becomes an action in the Supreme Court, and the practice laid down by the Code for cases in that court which have been referred by stipulation must be followed. Where in such a case two of three referees appointed decline to serve, in the absence of any provision to the contrary in the stipulation for the reference, the court has the power to appoint other referees, and the exercise of this power is not discretionary but mandatory. (Hustis v. Aldridge, 144 N. Y. 508 [1895].)

—— **Books not required to be left with the referee.]** When the books of a judgment-debtor have been produced by him upon his examination, he cannot be compelled to leave them with the referee for the judgment-creditor to examine. (Barnes v. Levy, 23 Civ. Proc. Rep. 253 [N. Y. City Ct. 1893].)

—— **Order of reference of action made on practice motion.]** The court, upon a practice motion, has no power to make an order of reference to hear and determine. The only order which it can make is to direct a referee named to take the testimony and report with his opinion. (Matter of Lord, 81 Hun, 590 [1894].)

—— **Form of order of reference to settle issues of fact preparatory to taking testimony.]** (Miller v. Wilson, 1 Barb. 222 [Sp. T. 1847].)

—— Common-law action not referable against objection of plaintiff by reason of fact that counterclaim has been interposed which will involve long examination of accounts. (Snell v. Niagara Paper Mills, 193 N. Y. 433; Lindner v. Starin, 128 App. Div. 604.)

—— As to reference in partnership accounting, see London v. Meryash, 132 App. Div. 323.

—— Question whether reference will be ordered without consent of parties to be determined from examination of the complaint alone where counterclaim is entirely independent of the facts in complaint. (Berry v. Maldonado & Co., 61 Misc. Rep. 442.)

—— When omission to appoint guardian before commencement of action, mere irregularity. (Rimo v. Rossil Iron Works Co., 120 N. Y. 433.)

—— Court has power to correct error in name of owner in summons in foreclosure action. (Stuyvesant v. Weil, 167 N. Y. 421.)

—— As to when reference will be ordered, see Lustgarten v. Harlam, 56 Misc. Rep. 606; Russell v. McDonald, 125 App. Div. 844; Roome v. Smith, 123 id. 416; Canavan Bros. Co. v. Automobile Club, 121 id. 751; Lindner v. Starin, 60 Misc. Rep. 431; Neal v. Gilleran, 123 App. Div. 639; Johnson v. Wellington Copper, etc., Co., 58 Misc. Rep. 353; Matter of Warren, 125 App. Div. 169; Prince Line v. Seager Co., 118 id. 697; Cavard v. Texas Crude Oil, etc., Co., Id. 299; Wynkoop v. Wynkoop, 119 id. 679; O'Brien v. Butchers' Dressed Meat Co., 54 Misc. Rep. 297; Aronin v. Phila. Casualty Co., Id. 630; Matter of Clement v. Hegeman, 187 N. Y. 274; Fowler v. Peck, 51 Misc. Rep. 645; Smith v. London Assu. Corp., 114 App. Div. 868; People ex rel. Stewart v. Feitner, 53 Misc. Rep. 334; Hill v. Reynolds, 119 App. Div. 689; Kindelberg v. Chapman, No. 2, 115 id. 154; Hoff v. Robert H. Reed Co., 110 id. 96; Owasco Lake Cemetery v. Teller, Id. 45; Moyer v. Village of Nelliston, Id. 602; Blun v. Mayer, 113 id. 242; Matter of Bishop's Estate, 111 id. 545; Russell Hardware, etc., Co. v. Utica Drop Forge, etc., Co., 112 id. 703; Bentz v. Carleton & Hovey Co., 100 N. Y. Supp. 206.

REFEREE DISQUALIFIED — Referee disqualified by reason of having acted in a former action between the same parties.] A referee is disqualified from hearing and deciding proceedings relating to the custody of an infant by reason of his having already in an action for divorce found one of the parents guilty of adultery. (Matter of Bliss, 39 Hun, 594 [1886].)

—— When a referee's report will be set aside because of bias and prejudice upon the part of the referee.] In this action it appeared that the referee from time to time as the trial proceeded importuned the defendant to aid him in securing an appointment to an office from the Governor and believed that the defendant could, by earnestly exerting himself, secure it for him; that these importunities continued to be addressed or suggested after the submission of the case and until near the time of its decision, and there was reasonable cause to believe that the prejudice was occasioned by the failure of the defendant to answer the last letter from the referee, which was written shortly before the case was decided. Held, that the report should be set aside. (Burrows v. Dickinson, 35 Hun, 492 [1885].)

—— Misconduct of referee — disqualifying him to settle the case on appeal.] After a referee had made his report in favor of the plaintiff, the latter, as a consideration of its delivery, executed an agreement giving to the former a first lien for his fees "upon the judgment and claim of the plaintiff," the same to be paid out of the "first moneys collected * * * upon said judgment or

any subsequent judgment that may be recovered." Both the plaintiff and referee knew at the time that the defendant intended to appeal. Held, that the referee was disqualified from settling the case, and that the plaintiff having by his own act created the disqualification was not entitled as of course to the benefit of the provisions of the Code of Civil Procedure, section 997, which, in case of disability of a referee, permits the court to prescribe the manner of settling the case. (Leonard v. Mulry, 93 N. Y. 392 [1883].)

—— **When waiver is final.**] Waiver is final where the attention of the party to a reference has been called to possible disqualification of referee for having served as clerk in the office of one of the attorneys. (Fleck v. Cohn, 131 App. Div. 248.)

REPORT — When judgment is entered without authority, and when it is void for error of referee.] Where an inconsistency appears in the report of the referee as to which of two persons he has decided against, and where the report stated as a conclusion of law, in an action against defendant as executrix, the plaintiffs were entitled to a judgment against defendant, without stating as executrix, held, that the clerk had no authority to enter judgment against her as executrix, and that a judgment so entered was not irregular merely but was void. (Matter of Baldwin, 87 Hun, 372 [1895].)

—— **Testimony accompanying the report, if not in full, should present the substance of what is material.**] Where a referee was appointed to take and state an account of the affirmative claim of the defendant, and the referee reported in favor of the defendant and a judgment was entered upon the report, held, that if it was regarded as a reference other than for the trial of the issues in an action the testimony should be signed by the witnesses and should accompany the report of the referee, as provided in General Rule 30, and the testimony, if not quite in full, should present the substance of that which was material. (Williams v. Lindblom, 90 Hun, 370 [1895].)

—— **Referee's report, on reference to state an account.**] Where, in an action in which no answer is interposed, it is necessary to take and state an account for the information of the court before judgment, and a reference is ordered for that purpose, the report of the referee has the effect of a special verdict (Code of Procedure, § 272); and where exceptions are filed to the report by defendant, which are overruled, the report confirmed and judgment rendered, an appeal from the judgment brings up the question whether the facts reported are sufficient to sustain the judgment; and upon a case with exceptions joined with the report, errors of law on the part of the referee may be reviewed. (Darling v. Brewster, 55 N. Y. 667 [1874].)

—— **Finding of fact, included in conclusions of law.**] A finding of fact, though necessary to uphold the judgment, if included in the findings of law, is sufficient. (Sherman v. Hudson River R. R. Co., 64 N. Y. 254 [1876]; Matter of Clark, 119 N. Y. 433 [1890].)

—— **Finding inconsistent with the pleadings and the evidence — when judgment set aside because of.**] Where the justice at Special Term finds a fact in conflict with the pleadings and not supported by the evidence, the judgment should be reversed where it is possible that such finding might have influenced the decision. (Duckelspiel v. Franklin, 2 N. Y. Wkly. Dig. 396 [Sup. Ct. 1876]; Ballau v. Parsons, 11 Hun, 602 [1877].)

—— **What findings required.]** The referee is required to make such findings of fact as are necessary to sustain his conclusions of law. He is not required to find other facts which are merely of a negative character. (McAndrew v. Whitlock, 2 Sweeny, 623 [Gen. T. 1870]; Nelson v. Ingersoll, 27 How. Prac. 1 [Gen. T. 1864].)

—— **Omission to state a necessary conclusion of law.]** When the omission to find a conclusion of law, resulting necessarily from facts found, is immaterial. (Cragger v. Lansing, 64 N. Y. 417 [1876].)

—— **Finding that evidence "leaves the mind in doubt."]** Where a referee finds in his report that the evidence "leaves the mind in doubt," it is error, and a new trial will be ordered. (Bradley v. McLaughlin, 8 Hun, 545 [1876].)

—— **Reference to determine issues in an accounting.]** Report may state account between the parties without an interlocutory judgment that an account is necessary. (Young v. Valentine, 177 N. Y. 347.)

—— **When finding necessary.]** Where issues were tried before referee his report containing no findings not insufficient, etc. (La Grange v. Merritt, 83 App. Div. 279.)

—— **Report, not excepted to, may be canceled.]** Rule 30 provides that a referee's report becomes absolute if not excepted to for eight days after notice of filing, but the county judge may, for good cause, cancel the same as for example, if the report shows that the referee has in his hands a large surplus which he never in fact received. (Wilson & Adams Co. v. Schorpp, 41 N. Y. St. Rep. 471 [Sup. Ct. 1891].)

—— **Ambiguous findings — so construed as to sustain judgment.]** (Hill v. Grant, 46 N. Y. 496 [1871]; Fuller v. Conde, 47 id. 89 [1871]; Waugh v. Seaboard Bank, 115 id. 42 [1889]; Tyron v. Baker, 7 Lans. 511 [Gen. T. 1873].)

—— **Report of referee under order entered upon remittitur of Court of Appeals, how reviewed.]** The report of a referee, appointed under an order entered upon a remittitur of the Court of Appeals, to assess the damages to which plaintiff is entitled, cannot be reviewed by defendants upon a case and exceptions, but only in compliance with this rule. (Bates v. Holbrook, 41 Misc. Rep. 129.)

—— **Filing of report terminates the action.]** The filing of the report of a referee appointed to hear and determine the issues in an action operates as a termination of the action. (Spencer v. Huntington, 100 App. Div. 463.)

—— **Report cannot be filed after death of referee.]** Under a reference to state accounts of assignee where the referee has signed his report but not filed it and then died. Held, report could not thereafter be filed. (House v. Wechsler, 104 App. Div. 124.)

—— On the trial of a demurrer or on a nonsuit. (Code of Civil Procedure, § 1021.)

—— On the trial of an issue of fact. (Code of Civil Procedure, § 1022.)

—— Where there are several referees a majority of them may sign the report. (Code of Civil Procedure, § 1026.)

CONFIRMATION OF REPORT — Report of deficiency on foreclosure — need not be confirmed — nor need a further judgment be entered.] Referee's report of deficiency on a foreclosure sale, need not be confirmed. No further judgment need be entered thereon. (Moore v. Shaw, 15 Hun, 428 [1878].)

—— **Report of sale in foreclosure — how far confirmation is necessary.]** How far it is necessary to have a report of sale by a referee in foreclosure confirmed in order to perfect the title as between the mortgagor and purchaser, considered. (Moore v. Shaw, 15 Hun, 428 [1878].)

—— **Surplus money proceedings — notice to all claimants necessary.]** Under Rule 64 it is necessary on an application to confirm the report of the referee in surplus money proceedings to give notice of such application to every party who has appeared in the foreclosure action or who has filed with the clerk notice of a claim to such surplus money, although the report of the referee has been filed and notice of its making and filing has been given, and no exceptions have been filed thereto.

Rule 30 is not, so far as it conflicts with Rule 64, applicable in this respect to such a proceeding. (Van Voast v. Cushing, 32 App. Div. 116 [1898].)

—— **When the report becomes absolute.]** If a party neglect to except to a referee's report, for eight days after notice of its filing, it becomes absolute, although it be defective on its face. (Catlin v. Catlin, 2 Hun, 378 [1874].)

Trial before referee has the same force as trial at Special Term and findings will not be set aside unless in the opinion of the court there was prejudicial error. (Coates v. Village of Nyack, 127 App. Div. 153.)

Determination of referee under Laws of 1902, chapter 60, final and conclusive, unless set aside by the court. (People v. Federal Bank, 122 App. Div. 810.)

Where an action at law is tried before a referee, errors in the admission of evidence which are not so substantial as to raise a presumption of prejudice do not require a new trial. On a trial before a referee the rule is the same as in suits in equity. (Weibert v. Hanan, 136 App. Div. 388.)

—— **If exceptions be not filed.]** Under Rule 30 of the General Rules of Practice, the report of a referee appointed to take and state the accounts of an assignee for the benefit of creditors, and to determine the respective priorities of the creditors, becomes absolute unless exceptions thereto are filed and served within eight days after the service of notice of the filing of the report. (Matter of Talmage, 39 App. Div. 466 [1899].)

—— **Findings of referee not conclusive on the court.]** The finding of a referee to whom is referred disputed questions of fact arising upon a motion, is not conclusive upon the court. It is but to inform the conscience of the court, and may be adopted or disregarded. (Marshall v. Meech, 51 N. Y. 140 [1872].)

—— **Questions presented by an appeal.]** Where exceptions filed to a referee's report are overruled, and a decree is made confirming the report, an appeal from the decree brings up for review only the questions presented by the exceptions. (Matter of Talmage, 39 App. Div. 466 [1899].)

—— **Ex parte confirmation improper.]** The report on a reference ordered for the information of the court on a motion cannot be confirmed *ex parte*. (Sproull v. Star Co., 27 Misc. Rep. 27 [1899].)

—— **Notice of a motion to confirm report — when premature.]** A notice of a motion to confirm the report of a referee appointed to assess the damages sustained through the granting of a preliminary injunction, served before the

time for filing exceptions has expired, is premature, and the motion should be denied. (James v. Horn, 19 App. Div. 259 [1897].)

—— Where made in the first department. (Empire B. & M. L. Assn. v. Stevens, 8 Hun, 515 [1876].)

REFERENCE, HOW TERMINATED.] Under section 1019 of the Code of Civil Procedure, either party may terminate the reference unless the referee has, within sixty days from the time when the case was finally submitted to him, made his report and filed the same with the clerk or delivered it to the attorney for one of the parties; it is no longer sufficient for him to have made his report and notified the party in whose favor it was made that it is ready for delivery. (Phipps v. Carmen, 23 Hun, 150 [1880]; Waters v. Shepherd, 14 Hun, 223 [1878], overruled. See, however, Geib v. Topping, 83 N. Y. 46 [1880].)

—— Failure of a referee to file his report — what excuses.] Failure of a referee to deliver or file his report within sixty days — a delay of the successful party to take it up, when induced by representations as to a settlement made by the unsuccessful party, does not justify the vacating of an order of reference. (Dwyer v. Hoffman, 39 Hun, 360 [1886].)

—— What is a sufficient delivery of a referee's report.] What is a sufficient delivery of a report of a referee to prevent either party from terminating the reference under section 1019 of the Code of Civil Procedure. (Little v. Lynch, 34 Hun, 396 [1885].)

Failure to report.] Where referee of disputed claim against estate fails to file report within sixty days, reference may be terminated and new referee appointed. (Morris v. Garneau, 1 Cur. Ct. December, 98. See, also, Burritt v. Burritt, 53 Misc. Rep. 26; Matter of Robinson, Id. 171.)

—— When notice to terminate the reference is ineffectual.] Where, after a referee had made his report, the parties consent to an order returning the report to make a supplemental finding on the question of costs, and the matter is not thereafter finally submitted to the referee, so as to set the sixty days running, within which he must make his report, a notice to terminate the reference under Code of Civil Procedure, section 1019, is effectual. (Merritt v. Merritt, 18 App. Div. 313 [1897].)

—— Filing of report ends reference.] After referee has made his decision court has no power to alter or change it. (Union Bag & Paper Co. v. Allen Bros. Co., 94 App. Div. 595.)

Findings.] Referee to assess damages is not required to file separate findings of fact and conclusions of law. (Teale v. Tilyou, 127 App. Div. 287; Lederer v. Lederer, 108 id. 228.)

REFEREE TO BE SWORN — Not in a foreclosure action.] A referee to compute the amount due after default, in an action for foreclosure, need not be sworn. (McGowan v. Newman, 4 Abb. N. C. 80 [N. Y. Supr. Ct. Sp. T. 1878]. See Id., p. 78.)

—— In the case of infants.] On a reference under section 1015, the referee must take the oath; if there are infants, there can be no waiver, and the proceedings will be set aside if the oath be not taken. (Exchange Fire Ins. Co. v. Early, 4 Abb. N. C. 78 [Sp. T. 1878]. See Id., p. 80.)

—— **The omission to take the oath is a mere irregularity — proceeding in the cause is a waiver of it.]** (Nason v. Luddington, 56 How. Pr. 172 [Gen. T. 1878]. See WAIVER, *post*.)

—— The former rule is not changed by section 1016 of the Code of Civil Procedure, except where there are infants or parties not represented. (*Ib.*)

—— Neglect — how cured. (See Code of Civil Procedure, § 721.)

FEES OF REFEREE — Paid by receiver out of fund.] Where a referee is appointed to take proofs and report as to the claims of a receiver of an insolvent life insurance company for expenses and compensation, the court may, in its discretion, in the first instance order the fees of the referee to be paid directly out of the fund. (Attorney-General v. Continental Life Ins. Co., 93 N. Y. 45 [1883]; Matter of Merry, 11 App. Div. 597 [1896].)

—— **Stipulated sum "for every hearing" — meaning of.]** Under a stipulation that the referee's compensation should be a sum specified per day "for every hearing," held that the referee was not entitled to charge for days for which appointments were made, but on which no hearings were had because of a prior agreement to adjourn. (Mead v. Tuckerman, 105 N. Y. 557 [1887].)

—— **Stipulation that a referee fix his own fees is not sufficient.]** A stipulation that a referee fix his own fees is not a sufficient compliance with the Code of Civil Procedure, section 3296, to sustain an allowance of more than $10 per day. (Brown v. Sears, 23 Misc. Rep. 559 [1898].)

—— **Several actions.]** Fees where the same parties try several actions before the same referee. (Brown v. Sears, 23 Misc. Rep. 559 [1898].)

—— **Referee may insist that his fees be paid before delivery of report.]** The referee may insist that his fees be paid before the delivery of his report, but upon the implied condition on his part that if they are greater than the amount ultimately allowed, he will refund the excess. (Duhrkop v. White, 13 App. Div. 293 [1897].)

—— **Fees may be recovered by referee, though report not filed in sixty days.]** A referee may recover compensation without an express promise to pay, and the fact that he did not file his report within the sixty days prescribed by the Code of Civil Procedure, section 1019, will not preclude recovery, in the absence of proof that either party elected to terminate the reference. (Nealis v. Meyer, 21 Misc. Rep. 344 [1897].)

—— **Presumption on appeal.]** Where the number of days employed does not appear in the case, the allowance of referee's fees by a surrogate will be presumed to be correct. (Kearney v. McKeon, 85 N. Y. 136 [1881].)

Referee who fails to file his report within time prescribed by law forfeits his right to fees. (Bottome v. Neeley, 124 App. Div. 600.)

As to compensation of referee, see Carter v. Builders' Construction Co., No. 2, 130 App. Div. 609; Morgenthaler v. Carlin, 132 id. 361; People v. Bank of Staten Island, 132 id. 589; Dollard v. Koronsky, 61 Misc. Rep. 392; Duffy v. Muller, 52 id. 11.

—— **Stenographer's fees.]** As to stenographer's fees, see Eckstein v. Schleimer, 62 Misc. Rep. 635; Bottome v. Neeley, 124 App. Div. 600; Finch v. Wells, 66 Misc. Rep. 384.

REFERENCES IN PARTITION PROCEEDINGS. See notes under Rule 66.

REFERENCES UNDER MORTGAGE FORECLOSURE. See notes under Rules 60 and 64.

REFERENCES IN ACTION FOR DIVORCE OR SEPARATION. See notes under Rule 72.

EXCEPTIONS.] (See "Exceptions" under Rule 32.)

SIGNING TESTIMONY — The remedy for the failure of a witness to sign the testimony is by motion.] Where the witness fails to sign the testimony the remedy is by motion, and not by exception to the report. (Nat. State Bank v. Hibbard, 45 How. Prac. 281–287 [Sp. T. 1873].)

FILING TESTIMONY — Testimony must be filed with the report.] The testimony taken by a referee must be filed with his report. If the stenographer delivers his notes to the referee for examination, but not to be filed until the stenographer's fees are paid, the referee must nevertheless file them with his report. (See Pope v. Perault, 22 Hun, 468.)

CHANCERY PRACTICE — Review under.] Under the old chancery practice the report of a referee upon the passage of a receiver's account, would only be reviewed upon petition in an independent proceeding. This practice was abrogated by the thirty-ninth rule, under which exceptions to such a report are to be filed, and a hearing upon the report and such exceptions had. (Matter of Guardian Savings Institution, 9 Hun, 267 [1876].)

ATTORNEY'S LIEN — Reference to report on.] An appeal from an order confirming the report of a referee, to whom it was referred to report the extent of the liens of the attorney and of certain persons employed as associate counsel upon a certain judgment, is governed by the provisions of Rule 39, and not by those of Rule 40. (Brown v. Mayor, 9 Hun, 587 [1877].)

See notes under Rule 10.

INJUNCTION — Order confirming report of referee as to damages from injunction — not to provide for their payment.] In proceedings to determine the damages sustained by reason of an injunction having been granted, the order confirming the report of the referee appointed to ascertain the amount of damage resulting therefrom should be limited to fixing the amount of damage, and provisions therein requiring the plaintiff to pay the same are improper. (Lawton v. Green, 64 N. Y. 326 [1876].)

WAIVER — Proceeding with reference — a waiver of what.] Proceeding upon a reference is a waiver of all objections to the order of reference on the ground of irregularity, but not of the objection that the court had not jurisdiction. (Garcie v. Sheldon, 3 Barb. 232 [Gen. T. 1848].)

INSANITY OF REFEREE.] In a case where, on the day the referee signed his report he was adjudged a lunatic in a proceeding in the Supreme Court, it was held that judgment on his decision should be set aside. (Schoenberg & Co. v. City Trust, etc., Co., 52 Misc. Rep. 104.)

FIRST DISTRICT — Procedure in the first district as to the filing of reports, except on reference of the issues. All reports must be filed, and a note of the day of filing be made by the clerk. In all cases where any of the defendants appear so as to be entitled to notice, such report cannot be confirmed until eight days after service of notice of the filing of the same. All parties who have appeared in the cause or proceeding may consent in writing

to waive the delay of eight days, and have the report confirmed at once. In cases where no one appears for the defendant, the report may be presented to the court for the final order of confirmation and judgment, without waiting eight days. (Somers v. Miliken [not reported], INGRAHAM, J., Nov. 1858.)

—In the first district a motion to confirm a report, at what Special Term to be made.] In the first district a motion to confirm a report made after the entry of an interlocutory decree, must be made at a Special Term held for the hearing of enumerated motions, and not at a Special Term and Chambers held for the hearing of nonenumerated motions. (Empire B. & M. L. A. Assn. v. Stevens, 8 Hun, 515 [1876].) See, also, Rule 26.

Powers of referee.] Referee appointed in a summary proceeding by a client to compel attorney to pay over moneys, has no power to hear and determine the controversy as the court itself must do so. (Matter of Cartier v. Spooner, 118 App. Div. 342.)

Referee appointed to hear and determine has the same power as Special Term. (Ward v. Bronson, 126 App. Div. 508; Collins v. St. Lawrence Club, 123 id. 207.)

Under provisions of Code of Civil Procedure referee has the same power to amend pleadings to conform to the proof as that possessed by the court. (Perkins v. Storrs, 114 App. Div. 322. See, also, Keeler v. Bell, 48 Misc. Rep. 427.)

Power of referee to permit amendment on trial. (McLaughlin v. Webster, 141 N. Y. 77; Bussing v. City of Mt. Vernon, 121 App. Div. 502; Garlock v. Garlock, 52 Misc. Rep. 647.)

Removal of referee.] A referee will not be removed on account of conduct in which the complaining party acquiesced. (Teale v. Tilyou, 127 App. Div. 287.)

RULE 31.

New Trial — Motion for — Where to be Made — Case or Exceptions, When Made.

When an order grants or refuses a new trial, except on the exceptions taken during the trial, it shall specify the grounds upon which the motion was made and the ground or grounds upon which it was granted. In all actions where either party is entitled to have an issue or issues of fact settled for trial by a jury, either as a matter of right or by leave of the court, if either party desires such a trial, the party must within twenty days after issue joined, give notice of motion that all the issues or one or more specific issues be so tried. If such motion is not made within such time, the right to a trial by jury is waived. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, in proper form to be incorporated in the order; and the court or judge

may settle the issues, or may refer it to a referee to settle them. Such issues must be settled in the form prescribed in sections 823 and 970 of the Code of Civil Procedure.

When any specific question of fact involved in an action or any question of fact not put in issue, is ordered to be tried by a jury, as a substitute for a feigned issue, and has been tried, or a reference other than of the whole issue has been ordered under the Code, and a trial had, if either party shall desire to apply for a new trial, on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence (except when the judge directs such motion to be made upon his minutes at the same term of the court at which the issues are tried), a case or exceptions shall be made, or a case containing exceptions, as may be required; which case or exceptions must be served and settled in the manner prescribed by the rules of court for the settlement of cases and exceptions in other cases. Such motions shall be made, in the first instance, at Special Term.

Rule 33 of 1858. Rule 40 of 1871. Rule 40 of 1874, amended. Rule 31 of 1877, amended. Rule 31 of 1880. Rule 31 of 1884, amended. Rule 31 of 1888. Rule 31 of 1896. Rule 31 as amended, 1910.

CODE OF CIVIL PROCEDURE.

§ 823. Feigned issues abolished, and order for trial substituted.
§ 968. What issues of fact are triable by a jury.
§ 969. In what actions issues are triable by the court.
§ 970. Order for trial by jury of specific questions of fact — when of right.
§ 971. When discretionary.
§ 972. Trial of the remaining issues of fact by the court.
§§ 1002, 1003. Motion for a new trial where there has been a trial of specific questions by a jury.
§ 1004. Motion, where and upon what made.
§ 1005. Final judgment, etc., not stayed by a motion for a new trial.
§ 1006. An exception taken on the trial does not prejudice a motion for a new trial.
§ 1014. Proceedings on a reference for a trial of a part of the issues.
§ 1753. Action to annul marriage — settlement of issues.
§ 1757. Divorce — settlement of issues, where answer denies the allegation of adultery — mode of trial.
§ 1778. Corporation, when obliged to serve, with its answer or demurrer, a copy of an order directing that the issues be tried.
§ 1950. Order settling issues — unnecessary in an action for usurping an office or franchise.

§ 1958. Id.; in an action to vacate letters-patent.
§ 2168. Issues to be settled before trial, on opposition to insolvent's discharge, when. See Debtor and Creditor Law, § 69.
§ 2193. Issues to be settled, for trial on opposition to insolvent's petition for exemption, etc., from imprisonment. See Debtor and Creditor Law, § 105.

FEIGNED ISSUES — To what case Rule 31 is applicable.] Rule 31 of the General Rules of Practice providing that "in cases where the trial of issues of fact is not provided for by the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of special motion," etc., does not apply to a motion for the trial of issues as to value or damages. (Eggers v. Manhattan Co., 27 Abb. N. C. 463 [N. Y. Supr. Ct. 1891].)

—— Former practice — not changed by the Code.] The Code has not changed the former practice in respect to feigned issues, except so far as to substitute a simple interrogatory for the legal fiction of a wager. (Brinkley v. Brinkley, 2 T. & C. 501 [Gen. T. 1874]; S. C. on appeal, 56 N. Y. 192 [1874].)

Submission of specific questions, the findings are not conclusive on the court.] Where an order for a trial by jury of specific questions of fact in an equity action is made, the findings have no greater force or effect than the findings in the old procedure by feigned issue, for which this is a substitute. The findings of the jury are ancillary to the judgment of the court, and the trial of the issue is by the latter. (Vermilyea v. Palmer, 52 N. Y. 471 [1873]; Brinkley v. Brinkley, 2 T. & C. 501; Randall v. Randall, 114 N. Y. 499 [1889]; McClave v. Gibb, 157 id. 413 [1898].)

—— Conclusive, unless a new trial is moved for.] The decision upon issues framed and settled is conclusive unless a new trial is moved for. (Chapin v. Thompson, 23 Hun, 12 [1880].)

—— Jury trial in equity cases — how secured on a counterclaim.] In an action for equitable relief triable by the court, if the answer sets up a counterclaim founded on a cause of action at law, and the party desires a jury trial of the issues on the counterclaim, he must, within ten days after the joining of issue on the counterclaim proceed under Rule 31 of the General Rules of Practice to give notice of a special motion on the pleadings that the issues on any specific questions of fact be tried by a jury. (Mackellar v. Rogers, 9 Civ. Proc. R. 6 [N. Y. Supr. Ct. Gen. T. 1885].)

—— Equity actions not covered by Code of Civil Procedure, § 970.] The provision of the Code of Civil Procedure (§ 970), as amended in 1891 (chap. 208, Laws of 1891), declaring that "where a party is entitled by the Constitution or express provision of law to a trial by jury of one or more issues of fact, or where one or more questions arise on the pleadings as to the value of property, or as to the damages which a party may be entitled to recover, either party may apply on notice at any time to the court for an order directing all such issues or questions to be distinctly and plainly stated for trial accordingly," and requiring the court on such application to cause such issues or

questions to be so stated, does not apply to actions of a purely equitable nature, but merely widens the right to a jury trial in those cases to which said section was previously applicable. (Sheppard v. M. R. Co., 131 N. Y. 215 [1892].)

—— **Equity action to set aside a deed — second motion for a new trial.]** Where, in an action in equity to set aside a deed, the court denied the defendant's motion for a new trial on the minutes, certain issues having been submitted to a jury, the defendant is not precluded from again moving for a new trial upon a case and exceptions, when the application is made at a Special Term for final judgment. (Anderson v. Carter, 24 App. Div. 462 [1897].)

—— **Settlement of issues.]** The court may submit to a jury additional issues arising upon the proofs and material to the final determination. (Farmers & Mechanics' Bank v. Joslyn, 37 N. Y. 353 [1867].)

—— **Motion, when not premature.]** Simply because the trial of such issues may not be necessary on account of the determination of the matter in dispute in other respects such motion is not premature if made after issue joined. (Eggers v. Manhattan Co., 27 Abb. N. C. 463 [N. Y. Supr. Ct. 1891].)

—— **Motion for jury trial, must be made within the prescribed time.]** A motion to frame issues for trial by a jury, will be denied, if not made within the time prescribed by Rule of Practice 31, unless some special reasons for framing issues exist. (N. Y. Life Ins. & Trust Co. v. Ines, 41 N. Y. Supp. 225 [1896].)

—— **Power of the court to order issues to be settled although more than ten days have elapsed since they have been joined.]** In this action, brought to foreclose two mortgages, a judgment of the County Court was entered, sustaining the defense of usury to one and rejecting it as to the other. The General Term reversed so much of the judgment as was in favor of the plaintiff and granted a new trial. Thereupon the County Court, upon the motion of the plaintiff, granted an order to settle the issues as to this mortgage, for trial by a jury. Held, that the court had power so to do, although more than ten days had elapsed since the issues had been joined in the action. (Apel v. O'Connor, 39 Hun, 482 [1886].)

—— **When application for, granted.]** In a proper case, the court will direct the issues to be tried by a jury, even though the application is not made within ten days after issue joined. (Clark v. Brooks, 26 How. Prac. 285 [Sp. T. 1864].)

—— **May be directed after the case has been submitted.]** After an equity case has been tried and finally submitted for decision, the court, at Special Term, has the power, of its own motion, to direct certain issues therein to be passed upon by a jury, if the case be one in which, under similar circumstances, the late Court of Chancery was authorized to direct a feigned issue. (Brinkley v. Brinkley, 2 N. Y. Sup. Ct. Rep. 501 [Gen. T. 1874]; *contra*, O'Brien v. Bowes, 4 Bosw. 657 [Gen. T. 1860]; S. C., 10 Abb. 106.)

—— **Power not affected by Code of Procedure, § 267.]** The power to direct trial of feigned issues is not restricted or affected by the provisions requiring the judge to make and file his decision within a specified time. This provision

is necessarily with the implied qualification that no other disposition is made of the case. (Brinkley v. Brinkley, 56 N. Y. 192 [1874].)

—— **When application for, not granted.]** Where an application for a jury trial of issues is made by a party not entitled thereto as of right, Rule 31, providing for ten days' notice after the joinder of issue, is applicable, and it is improper to grant such application upon behalf of a party in default, where no reason is given why the application was not made within ten days after joinder of issue. (Ellensohn v. Keyes, 6 App. Div. 601 [1896].)

—— **Not after trial.]** But not after the trial has commenced. (People v. Albany & Susquehanna R. R. Co., 1 Lans. 308 [Sp. T. 1869]; S. C., 55 Barb. 344; 7 Abb. [N. S.] 265; 38 How. Pr. 228.)

Provisions of section 970, Code of Civil Procedure, do not apply to an action for divorce. (Haff v. Haff, 64 Misc. Rep. 122; Wilcox v. Wilcox, 116 App. Div. 421.)

Court has no authority to entertain application for new trial on the ground of newly discovered evidence until a case and exceptions have been made and settled. (Soloman v. Alexander, 128 App. Div. 441.)

—— **Issues as to the terms of a partnership — should not be framed until after the accounting.]** Issues should not be framed until after an accounting in a case in which a partnership is admitted to have existed, when its terms are in dispute. (Johnson v. Arnold, 1 Law Bulletin, 53 [N. Y. Supr. Ct. Sp. T. 1879].)

—— **Motion to set aside a judgment — when feigned issue not to be directed.]** A feigned issue should not be directed upon a motion to set aside the judgment where the notice of motion merely asks (in addition to the principal motion) for such further or other relief as the court may grant. (Mann v. Savage, 7 How. Prac. 449 [Sp. T. 1853].)

—— **Notice of trial at Special Term — not a waiver.]** The service of a notice of trial for Special Term does not waive the right to move for awarding of issues as to value or damages as conferred by section 970 of the Code, as amended by the Laws of 1891, chapter 208. (Underhill v. Manhattan Ry. Co., 27 Abb. N. C. 478 [Supr. Ct. 1891].)

FORM OF ORDER — As to the proper form of order of reference to settle issues of fact, preparatory to taking testimony.] (See Miller v. Wilson, 1 Barb. 222 [Sp. T. 1847].)

REVIEW — A refusal to settle issues is not appealable to the Court of Appeals — proper remedy.] A refusal to grant an order settling issues, in an action for equitable relief, to be tried by a jury, does not necessarily deprive the defendant of his right to such trial. If he has that right and the cause is brought to trial before the court, without a jury, he may then object, and it will be the duty of the court to order the cause to be tried before a jury. If the court refuses to do so, the remedy of the party aggrieved is by appeal from the judgment. An appeal will not lie to the Court of Appeals from the order denying a motion to settle the issues. (Colman v. Dixon, 50 N. Y. 572 [1872]; Hudson v. Caryl, 44 id. 553 [1871]; Davis v. Morris, 36 id. 569 [1867]; Kinne v. Kinne, 2 N. Y. Sup. Ct. Rep. 393 [Gen. T. 1873].)

—— **An order granting trial of feigned issue is discretionary.]** A motion made in chancery for an issue to be awarded for trial by a jury, is addressed to the discretion of that court, and the order made upon the motion is, therefore, not appealable to the Court of Appeals. (Candee v. Lord, 2 N. Y. 269 [1848].)

—— **An order setting aside issues and directing others to be settled, is discretionary.]** An order setting aside issues already tried, and directing that other issues be settled by a referee and be tried, is discretionary, and not appealable to the Court of Appeals. (Colie v. Tifft, 47 N. Y. 119 [1871]; Bennett v. Stevenson, 53 id. 508 [1873].)

—— **The manner of trial in equity cases rests in the discretion of the court.]** Where an action is brought in equity, and the demand is for purely equitable relief, the trial of questions of fact by the court is in its discretion. (Rexford v. Marquis, 7 Lans. 249 [Gen. T. 1872]; Knickerbocker Life Ins. Co. v. Nelson, 8 Hun, 21 [1876].)

—— **Equity cases — framing issues discretionary — not ordered simply to avoid conflict of evidence.]** The framing of issues for the jury in a purely equitable action is a matter entirely in the discretion of the court, and will not be ordered merely because the trial will probably involve a conflict of evidence. (Cantoni v. Forster, 12 Misc. Rep. 343 [1895].)

—— **Denial of motion for new trial of special issues is not appealable.]** An order made by a judge at the Circuit, refusing a new trial upon his minutes, in the case of a trial of special issues in an equity action, is not appealable. The defeated party must wait until after the trial of the action at Special Term, or at least until after a motion at Special Term for a new trial. (Hatch v. Peugnet, 64 Barb. 189 [Gen. T. 1872].)

—— **An order directing the trial of issues is.]** An order directing that issues be framed is appealable. (Ellensohn v. Keyes, 6 App. Div. 601 [1896].)

—— **Motion for a new trial necessary.]** Where, in an action brought to foreclose a mortgage, issues of fact are framed and, in pursuance of an order to that effect, tried by a jury, a motion for a new trial on a case and exceptions founded upon irregularities committed on the trial by the jury must be made before the entry of judgment in the action, otherwise the finding of the jury will be deemed to have been acquiesced in, and questions of fact involved therein cannot be reviewed on an appeal from the judgment. (Chapin v. Thompson, 23 Hun, 12 [1880]. See, also, Ulbricht v. Ulbricht, 89 Hun, 479 [1895].)

—— **Defendant not obliged to move to frame issues in a divorce action.]** The right of a defendant in an action for an absolute divorce to have the issue of fact tried by a jury is an absolute one, of which she can only be deprived in the manner prescribed by the Code; she is not bound to move for the framing of issues; that is the duty of plaintiff, and the defendant's failure so to move affords no ground for vacating an order for alimony. (Ulbricht v. Ulbricht, 89 Hun, 479 [1895].)

JURY TRIAL — The right of trial by jury is determined by the court, not by the parties.] The court, not the parties, determines whether an issue shall be tried by a jury. (Knickerbocker Life Ins. Co. v. Nelson, 8 Hun, 21 [1876]. See Penn. Coal Co. v. Del. & Hud. Canal Co., 1 Keyes, 72 [1863].)

—— **Jury trial, when.]** When a party is entitled to jury trial. (Lefrois v. County of Monroe, 88 Hun, 109 [1895]; Pegran v. N. Y. Elevated R. R. Co., 147 N. Y. 135 [1895]; Johnson v. Alexander, 23 App. Div. 538 [1897]; Herb v. Metropolitan Hospital, 80 id. 145 [1903].)

—— Right of jury trial is waived when plaintiff chooses his forum, serves notice of trial and fails to move to frame issues within the time limited. (Ettlinger v. Trustees of Sailors' Snug Harbor, 122 App. Div. 681.)

—— As to what issues should be tried by the court and what by a jury. (See Bush v. Bush, 103 App. Div. 588.)

—— **When a party is not entitled to jury trial.]** (Hart v. Brooklyn Elevated R. R. Co., 89 Hun, 82 [1895]; Goldschmidt v. N. Y. Steam Co., 7 App. Div. 317 [1896]; Laufer v. Sayles, 5 id. 582 [1896]; Ellensohn v. Keyes, 6 id. 601 [1896]; Schillinger Fireproof Cement Co. v. Arnott, 152 N. Y. 584 [1897].)

—— **When the right to a jury trial must be demanded — laches.]** A party desiring to avail himself of the right to a trial by jury must make his demand before trial and not wait until after the case has been opened and a motion made to dismiss the complaint. (Marshall v. De Cordova, 26 App. Div. 615 [1898].)

—— **Equitable action — issue of damages — when triable by a jury.]** It seems that in an equitable action, if the defendant apply therefor, the court may direct that the issue as to the amount of damages involved be tried by a jury. (Brooklyn Elevated R. R. Co. v. Brooklyn, Bath & West End R. R. Co., 23 App. Div. 29 [1897].)

—— **Jury trial where equitable relief is sought in an action for a nuisance — order granting new trial appealable.]** Where in an action to abate a nuisance and for damages the complaint asks for equitable relief, the defendant is entitled to have the issues of fact tried by a jury under section 970 of the Code of Civil Procedure, and an order granting plaintiff a new trial is appealable. (Lefrois v. County of Monroe, 88 Hun, 109 [1895].)

—— **Action growing out of equitable doctrine of subrogation, triable at Trial Term.]** Where an insurance company subrogated to the rights of insured sues for negligence causing the loss, the action is at law for negligence, though growing out of the equitable doctrine of subrogation, and hence properly triable at the Trial Term. (German Am. Ins. Co. v. Standard Gas Light Co., 67 App. Div. 539; 73 N. Y. Supp. [107 St. Rep.] 973.)

—— **If a case embraces both legal and equitable claims, the whole case must go to the jury.]** If the pleadings show both legal and equitable claims, the whole case must go to the jury. (People v. Albany & Susq. R. R. Co., 5 Lans. 25 [Gen. T. 1871]; affd., 57 N. Y. 161; Davis v. Morris, 36 id. 569 [1867]. See Loomis v. Decker, 4 App. Div. 409 [1896].)

—— **Action for both legal and equitable relief.]** In a case in which both legal and equitable relief is demanded the plaintiff, by election, may submit to have the issues tried by the court and thereby waives his right to a jury trial. (Loomis v. Decker, 4 App. Div. 409 [1896].)

—— **In what case defendant is not entitled to have issues framed and tried at law.]** Where a defense of usury and fraud is interposed in an action for foreclosure and to recover any deficiency, the defendant cannot claim as a mat-

ter of right to have the issues framed and tried at law. (Knickerbocker Life Ins. Co. v. Nelson, 8 Hun, 21 [1876].)

—— **Action to foreclose a mechanic's lien.]** An action to foreclose a mechanic's lien is triable by the court alone, even though, by stipulation, the personal responsibility of the contractors is substituted for a lien on the real property. The remedy of a party thereto desiring a jury trial is to apply to the court to frame issues under section 823 of the Code of Civil Procedure. (Schillinger, etc., Cement Co. v. Arnott, 152 N. Y. 584 [1897].)

—— **Past damages done by an elevated railroad.]** Where plaintiff brings an action for past damages, resulting from the operation of an elevated railway, and to restrain its further operation in front of his premises, the question of past damages must be brought before a jury upon application of defendant, section 970 of the Code as amended being applicable to such cases. (Eggers v. Manhattan Ry. Co., 27 Abb. N. C. 463 [N. Y. Supr. Ct. 1891].)

—— **A party not entitled to equitable relief may have a trial at law.]** A party failing to make out a case for purely equitable relief is still entitled to a trial by jury of his legal cause of action. (Black v. White, 37 N. Y. Supr. Ct. 320 [Gen. T. 1874]; Sternberger v. McGovern, 56 N. Y. 12 [1874]; Genet v. Howland, 30 How. Prac. 361 [Sp. T. 1866]; Lewis v. Varnum, 12 Abb. 305 [N. Y. Com. Pl. Gen. T. 1861].)

Waiver of a jury trial.] The failure to demand a jury trial in an action for an injunction and damages amounts to a waiver of the right thereto. (Hartman v. Manhattan Ry. Co., 82 Hun, 531 [1894].)

POWER OF THE COURT OVER THE VERDICT — Not a trial of the issue.] Where a specific question of fact is to be tried by a jury, it is not the trial of the issue. The facts found must be approved by the court before they can constitute the basis of a judgment. (Vermilyea v. Palmer, 52 N. Y. 471; Randall v. Randall, 114 id. 499 [1889]; McClave v. Gibb, 157 id. 413 [1898]; Brown v. Clifford, 7 Lans. 46 [Gen. T. 1872].)

—— **Motion for a new trial necessary.]** Where, in an action brought to foreclose a mortgage, issues of fact are framed and, in pursuance of an order to that effect, tried by a jury, a motion for a new trial on a case and exceptions, founded upon irregularities committed on the trial by the jury, must be made before the entry of judgment in the action, otherwise the finding of the jury will be deemed to have been acquiesced in, and questions of fact involved therein cannot be reviewed on an appeal from the judgment. (Chapin v. Thompson, 23 Hun, 12 [1880]; 89 N. Y. 270 [1882].)

—— **Motion for new trial — newly-discovered evidence.]** A motion for a new trial upon the ground of newly-discovered evidence, will be denied where it is apparent that ordinary care and diligence in the preparation of the case for trial would have enabled the moving party to make the proof which he seeks to present upon the second trial. (Reid v. Gaedeke, 38 App. Div. 107 [1899]; Farmers' National Bank v. Underwood, 12 App. Div. 269 [1896]; Hagen v. N. Y. C. & H. R. R. Co., 100 id. 218.)

—— **The General Term cannot set aside a verdict, where no application therefor has been made below.]** Where, in an equity action, specific questions of fact are ordered to be tried by a jury, and its verdict is produced and used

on the trial of the action, no application having been made to set it aside, the General Term cannot, on appeal, set it aside and order a new trial. (Jackson v. Andrews, 59 N. Y. 244 [1874].)

—— **Acquiescence presumed, in case a motion is not made for a new trial.]** If the unsuccessful party does not move for a new trial, he will be deemed to have acquiesced in the verdict on the issue tried. (Ward v. Warren, 15 Hun, 600 [1878].)

—— **Conditions imposed on granting a new trial — a mere tender of performance is insufficient.]** The condition of an order for a new trial, requiring the payment of costs and delivery of an undertaking, is not complied with by a mere tender of the costs and undertaking which the other party refuses to accept on the ground that he intends to appeal from the order, but to make the order effectual after affirmance there must be an actual payment of the costs and delivery of the undertaking. (Stokes v. Stokes, 38 App. Div. 215 [1899].)

—— **Full costs are allowed** where a motion for a new trial is made on a case. (Reid v. Gaedeke, 38 App. Div. 107 [1899].)

—— **Dismissal of complaint — not proper on the trial of issues, settled.]** Upon the trial before a jury of issues settled in an equity action, the complaint cannot be dismissed as to one or all the defendants. A verdict upon all the issues as to all the parties must be rendered, and the cause afterward heard by the court. (Moore v. Metropolitan Nat. Bank, 55 N. Y. 41 [1873]; Birdsall v. Patterson, 51 id. 43; MacNaughton v. Osgood, 114 id. 574 [1889].)

—— **Motion for new trial — upon what terms granted.]** (Smith v. City of New York, 55 App. Div. 90 [1900]; Larsen v. U. S. Mortgage & Trust Co., 104 id. 76.)

—— **Improper statement of counsel to jury — ground for new trial.]** Where statements to a jury made by a counsel tend to mislead the jury and to awaken their prejudices and arouse their passions and such statements receive the sanction of the court, a new trial is properly granted. (Kinne v. Int. Railway Co., 100 App. Div. 5.)

—— New trial for inconsistencies in referee's report. (Cohen v. Wittemann, 100 App. Div. 338.)

—— **Error in rulings on the trial of feigned issues where the verdict is made the basis of the judgment — effect of.]** Where erroneous rulings have been made in a case in which issues have been framed for trial by a jury, and the verdict, in part influenced by them, has been made the basis of a final recovery, a new trial should be ordered, despite the provisions of section 1003 of the Code of Civil Procedure, declaring that an "error in the admission or exclusion of evidence, or in any other ruling or direction of the judge upon the trial, may, in the discretion of the court which reviews it, be disregarded if that court is of opinion that substantial justice does not require that a new trial should be granted." (Bowen v. Becht, 35 Hun, 434 [Gen. T. 1885].)

—— **When the judgment in such case will be set aside.]** Where such erroneous rulings have been made by the justice presiding at the trial before the jury of the specific questions referred to them, and it appears from the decision of the justice before whom the issues in the action were tried at Special

Term, and from the judgment entered thereon, that the findings of the jury upon the questions submitted to it were considered by him in arriving at his decision, the judgment will be reversed. (*Ib.*)

—— **A motion must be made before commencement of hearing directed by interlocutory judgment.]** A motion for a new trial for the purpose of reviewing an interlocutory judgment, must be made before the commencement of the hearing directed by the said judgment. (Greene v. Roworth, 6 Misc. Rep. 130 [N. Y. Com. Pl. 1893].)

—— **New trial granted on wrong reason.]** An order granting a new trial will not be set aside because a wrong reason was given for granting it. (Ross v. Met. S. R. Co., 104 App. Div. 378.)

—— **Third trial.]** Verdict against the weight of evidence not sustained because of third trial. (Meinvenken v. N. Y. C. & H. R. R. Co., 103 App. Div. 319.)

PARTITION — Action brought under chapter 238 of 1853 — issues settled.] In an action for partition brought by an heir under the provisions of chap. 238 of the Laws of 1853 (see Code of Civil Procedure, §§ 1537, 1866, relative to disputed wills), the court, at Special Term, has authority to direct issues of fact to be settled, and that the verdict of the jury thereon be certified to the Special Term for further proceedings. It is within the discretion of the court whether the case shall be so disposed of or shall be placed upon the Circuit calendar for the court to submit to the jury such questions of fact as are presented by the pleadings; and the exercise of this discretion is not reviewable. (Hewlett v. Wood, 62 N. Y. 75 [1875]; Weston v. Stoddard, 137 N. Y. 119 [1893].)

DIVORCE — See notes under Rule 72.

RULE 32.

Making and Settling Cases, Exceptions, etc.— Amendments — Settlement of by the Justice — Extensions of Time to be on Notice.

Whenever it shall be necessary to make a case, or a case and exceptions, or a case containing exceptions, the same shall be made, and a copy thereof served on the opposite party within the following times:

If the trial was before the court or referee, including trials by a jury of one or more specific questions of fact in an action triable by the court, within thirty days after service of a copy of the decision or report and of written notice of the entry of the judgment thereon.

In the Surrogate's Court, within thirty days after service of a copy of the decree or order and notice of the entry thereof.

If the trial were before a jury, within thirty days after notice of the decision of a motion for a new trial, if such motion be made

and be not decided at the time of the trial, or within thirty days after service of a copy of the judgment and notice of its entry.

The party served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing a case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted for settlement at a time and place to be specified in the notice, to the judge or referee before whom the cause was tried.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the judge or referee for settlement, mark upon the several amendments his allowance or disallowance thereof, and shall also plainly mark thereon and upon the stenographer's minutes the parts to which the proposed amendments are applicable, together with the number of the amendment. If the party proposing the amendments claims that the case should be made to conform to the minutes of the stenographer he must refer at the end of each amendment to the proper page of such minutes. The judge or referee shall thereupon correct and settle the case. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than ten days after the service of such notice. The lines of the case shall be so numbered that each copy shall correspond. The surrogate, on appeal from his court, may by order allow further time for the doing of any of the acts above provided to be done on such appeals.

Cases reserved for argument and special verdicts shall be settled in the same manner. The parties may agree on the facts proven to be inserted in the case, instead of the testimony, on the approval of the judge.

No order extending the time to serve a case, or a case containing exceptions, or the time within which amendments thereto may be served, shall be made unless the party applying for such order serve a notice of two days upon the adverse parties of his intention to apply therefor, stating the time and place for making such application.

Rule 34 of 1858, amended. Rule 41 of 1871, amended. Rule 41 of 1874, amended. Rule 32 of 1877, amended. Part of fifth paragraph from Rule 34 of 1877, added. Rule 32 of 1880. Rule 32 of 1884. Rule 32 of 1888, amended. Rule 32 of 1896, amended.

CODE OF CIVIL PROCEDURE.

§ 25. Settlement of case by judge out of office allowed.
§ 992. What rulings may be excepted to.
§ 994. Exceptions after the close of the trial to the findings of law.
§ 995. Exceptions during trial — how made and how noted.
§ 996. Exceptions to rulings — how reviewed.
§ 997. Case on appeal or on motion for a new trial, when necessary — how made and settled.
§ 998. Motion for new trial on minutes, or for irregularity or surprise, or on appeals where reliance is only upon exceptions taken — case not necessary.
§ 999. Motion for new trial on minutes — appeal from order thereon — case necessary on.
§ 1000. Exceptions on jury trial, ordered to be heard at Appellate Division in first instance.
§ 1001. Motion for new trial at Appellate Division when trial was by court or referee — exceptions, within what time to be taken.
§ 1002. When motion for new trial to be made at Special Term.
§ 1003. Review of trials of specific questions by a jury.
§ 1004. Motion for new hearing after trial of specific questions by a referee — case, when necessary.
§ 1005. Final judgment not stayed by motion for a new trial.
§ 1006. When exceptions not to prejudice a motion for a new trial.
§ 1007. Notes of stenographer may be treated as minutes.
§ 1010. Trial by the court — within what time the decision should be filed.
§§ 1021, 1022. Decision — what to contain.
§ 1180. Exceptions to decision on challenge to jury.
§ 1279. Case on submission of controversy without action.
§ 1315. What papers are to be transmitted to the appellate court.
§ 1339. Case on appeal from judgment of Appellate Division rendered on a verdict taken subject to the opinion of the court — statement of facts.
§ 1353. Upon what papers an appeal will be heard.
§ 2545. Settlement of case on appeal from a Surrogate's Court.
§ 2576. When case to be made and settled on appeal from Surrogate's Court.
§ 3251. Amount of costs for making and serving case and amendments.

FINDINGS — Court may still make findings.] Notwithstanding the repeal of section 1023 of the Code of Civil Procedure and the amendment of section 1022 thereof, the court upon trial of an action may still state separately the findings of fact and conclusions of law and direct the judgment to be entered thereon. (Walrath v. Abbott, 85 Hun, 181 [1895].)

—— Requests to find no longer authorized.] The right of a party to an action to have a referee pass upon his proposed finding was not saved from the operation of the Repealing Act (section 1, chap. 688, Laws of 1894) by

the provisions of section 31, chap. 677 of the Laws of 1892. (Lazarus v. Metropolitan Elevated R. Co., 145 N. Y. 581 [1895].)

—— **Upon whom findings of fact are binding.]** Where the respondents do not appeal, they are bound by the findings of fact made by the trial court, while the appellants are bound by all to which they do not except, and after affirmance by the General Term, by all, even of those excepted to, that find any reasonable support in the evidence. (Cox v. Stokes, 156 N. Y. 491 [1898].)

—— **Trial by the court.]** Findings of fact and conclusions of law must be made and signed, and a trial of a contested question of fact by the court cannot be reviewed unless such a decision be made. (Benjamin v. Allen, 35 Hun, 115 [1885].)

—— **Facts not found and not asked for, not ground for reversal.]** Facts not found by a referee, and as to which no finding was requested, may not be considered for the purpose of reversing a judgment. (Burnap v. National Bank of Potsdam, 96 N. Y. 125 [1884]; Palmer v. C. H. Cemetery, 122 id. 429 [1890].)

—— **Negative facts.]** A referee is not required to find facts of a purely negative character. (McAndrew v. Whitlock, 2 Sweeny, 632 [Gen. T. 1870].)

—— **Evidence and argument improper.]** Neither evidence, argument nor comment has any legitimate place in findings of fact or law. (Glacius v. Black, 50 N. Y. 147 [1872].)

—— **Findings where a judgment is rendered on the pleadings.]** Where a judgment is rendered on the pleadings, no findings of fact are required. (Eaton v. Wells, 82 N. Y. 576 [1880].)

—— **Where the complaint is admitted to be true.]** Where the court tries a case under an admission that the allegations of the complaint are true and no evidence is given by either party, the findings should follow the statements of the complaint. (Brown v. Steiger, 21 Hun, 219 [1880].)

—— **Additional findings — cannot be made on the settlement of a case.]** A judge or referee cannot make additional findings of fact or law upon the settlement of the case, and after his report or decision has been filed. (Palmer v. Phœnix Ins. Co., 22 Hun, 224 [1880]; Gormerly v. McGlynn, 84 N. Y. 284 [1881].)

—— **Ambiguous findings construed to sustain the judgment.]** If the findings of the trial court are capable of two constructions, and the evidence is not contained in the case, the appellate court will adopt the construction which will sustain the judgment. (Drake v. Village of Port Richmond, 1 App. Div. 243 [1896].)

—— **Difference between opinion and findings.]** The fact that the opinion filed by a justice before whom an action was tried, and the findings signed by him do not coincide, in no way forms a ground for the reversal of a judgment, inasmuch as the opinion cannot be referred to for the purpose of showing the incorrectness of the findings upon which the judgment is based. (Tannenbaum v. Armeny, 81 Hun, 581 [1894].)

—— **Inconsistent ruling.]** The attorney claiming inconsistent rulings cannot avail himself of the referee's findings upon respondent's objections and

exceptions appearing in the case on appeal from which they should have been omitted. (Clark v. House, 40 St. Rep. 956 [Sup. Ct. 1891]. See, also, Mason Stable Co. v. Lewis, 16 Misc. Rep. 359 [Sup. Ct. App. T. 1896].)

—— **To reverse conclusions of law, the facts found must be inconsistent with them.]** To reverse the conclusions of law of a referee, it must appear from the facts found that they are erroneous. (Collender v. Phelan, 79 N. Y. 366 [1880].)

—— **Inconsistent findings to be reconciled.]** Where the findings of a trial court are apparently inconsistent, it is the duty of the appellate court, if possible, to reconcile them and give effect to the real meaning and intent of the court in making them. (Health Department v. Purdon, 99 N. Y. 237 [1885].)

—— **It is the duty of the appellate court to harmonize them.]** It is the duty of the Court of Appeals to harmonize the findings of a trial court so as to arrive at the real intention, if it can be done; and an intention to reverse a deliberate finding will not be imputed because of collateral findings in which an inadvertent or immaterial expression is used. (Bennett v. Bates, 94 N. Y. 354 [1884].)

—— **Right of the defeated party where the findings are conflicting.]** Where a referee's findings of fact are conflicting the defeated party is entitled to those which are most favorable to his side of the case. (Bonnell v. Griswold, 89 N. Y. 122 [1882]; Kelly v. Leggett, 122 id. 633 [1890]; Israel v. Manhattan R. Co., 158 id. 624 [1899].)

—— **Irreconcilable findings construed in favor of the appellant.]** Where inconsistent findings are irreconcilable the Court of Appeals must accept as true those most favorable to the appellant's contention. (Parsons v. Parker, 159 N. Y. 16 [1899].)

—— **Insufficiency of finding.]** The insufficiency of the finding is not of itself a ground for the reversal of the judgment. (Van Slyke v. Hyatt, 46 N. Y. 263 [1871].)

—— **Rule as to reviewing facts.]** While a review of the facts by an appellate tribunal is proper, it is under no obligation to arbitrarily adopt the conclusions of the trial court, yet great consideration should be accorded to its opinions, especially where there is evidence upon both sides, and the mind of the court is called upon to weigh conflicting statements and inferences and to decide upon the credibility of opposing witnesses. (McNaney v. Hall, 86 Hun, 415 [1895]; Hewlett v. Saratoga Carlsbad Spring Co., 84 id. 248 [1895].)

—— **Looking to evidence to sustain findings.]** Where the court at General Term has all the facts before it, all the evidence being contained in the appeal book, support for the conclusions of law may be sought upon the evidence, unless the trial court or referee has by an express finding or ruling concluded questions essential to the judgment against the respondent. (Page v. Metropolitan Elevated Railway Co., 10 Misc. Rep. 134 [1895].)

—— **Conflicting evidence, findings not disturbed.]** Where the evidence is conflicting, the findings made by the trial court will not be disturbed. (Stiles v. Benjamin, 92 Hun, 102 [1895]; Requa v. Requa, 16 App. Div. 629 [1897]. See, also, Kane v. Kane, 13 id. 544 [1897]; Fuller v. Tolman, 92 Hun, 119 [1895].)

—— The decision of a referee who sees the witness, made upon conflicting evidence, should be sustained. (Solomon v. Continental Fire Ins. Co., 28 App. Div. 213 [1898].)

—— **Findings of court sustained by evidence — not reversible on facts by the Appellate Division.]** Where the findings of the trial court were in accordance with the conceded facts, or the uncontroverted testimony, the Appellate Division is not authorized to reverse upon the facts; if it does, a question of law is presented which the Court of Appeals may properly review. (Benedict v. Arnoux, 154 N. Y. 715 [1898].)

—— **Reviewing findings.]** The findings of a referee on questions of fact should not be disturbed unless it appears that the proof so clearly preponderates in favor of a contrary conclusion that it can be said with reasonable certainty that the referee erred in his conclusions. (Sayles v. DeGraff, 82 Hun, 73 [1894]; Ringle v. The Wallis Iron Works, 86 id. 153 [1894].)

—— **Reviewing verdict.]** An appellate court will not set aside the verdict of a jury rendered upon conflicting evidence, on the ground that improper testimony was admitted, unless it appears that the result would have been different had the testimony objected to been omitted. (Van Epps v. Harnes, 88 Hun, 229 [1895].)

—— **Filing exceptions to findings not necessary where there is a certificate.]** Where there is a certificate that the case contains all the evidence, it is not necessary on appeal to the Appellate Division that appellant file exceptions to the findings of fact. (Watts v. Bd. of Education, 9 App. Div. 143 [1896].)

—— **In Court of Appeals.]** While the determination of the General Term upon all questions as to the weight of evidence is final and not reviewable in the Court of Appeals, where there is no conflict in the evidence, or that which appears to be in conflict is but a mere scintilla, or is met by well-known and scientific facts about which there is no conflict, the Court of Appeals may review the decision, if contrary to the evidence, and reverse it. (Hudson v. Rome, Watertown & Ogdensburg R. R. Co., 145 N. Y. 408 [1895].)

—— Court of Appeals cannot correct a case which contains an improper finding of fact. (B. O. H. Co. v. City of Binghamton, 156 N. Y. 651.)

—— **Findings of fact sustained by evidence, not reviewable in the Court of Appeals.]** The Court of Appeals, when a referee has found facts and his findings have been affirmed by the General Term, will not review such findings if there is any evidence to support them. (Potter v. Carpenter, 71 N. Y. 74; Bryce v. Lorillard Fire Ins. Co., 55 id. 242 [1873].)

—— **Question of fact in Court of Appeals — when it cannot be raised.]** No question can be raised in the Court of Appeals upon a matter of fact, in a case tried by a referee, as to which no facts were found by the referee or requested to be found. (Stewart v. Morss, 79 N. Y. 629 [1880].)

—— **When on appeal from a Surrogate's Court, the facts will not be reviewed.]** On an appeal from a judgment of the General Term affirming a decree of the surrogate admitting a will to probate, the Court of Appeals will not review questions of fact as to which there is conflicting evidence. (Hewlett v. Elmer, 103 N. Y. 156 [1886].)

—— **Fact, when found by the Court of Appeals.]** A fact may be supplied by the Court of Appeals from the evidence to sustain, but for the purpose of reversing a judgment. (Eq. C. O. F. Co. v. Hersee, 103 N. Y. 25 [1886]; Everson v. City of Syracuse, 100 id. 577 [1885]; Ostrander v. Hart, 130 id. 406 [1892].)

—— **Appeal on judgment-roll alone.]** Where an appeal is heard upon a judgment-roll alone, the question to be determined by the appellate court is, whether in any view of the facts found the judgment rendered was properly ordered. (Kincaid v. Kincaid, 85 Hun, 141 [1895]; First National Bank of Syracuse v. N. Y. C. & H. R. R. R. Co., Id. 160 [1895].)

—— **What is not a finding of fact.]** A finding that plaintiff failed to establish his case by a fair preponderance of evidence is not a finding of fact within the meaning of section 1022 of the Code, although so designated in the decision. (Franck v. Franck, 11 Misc. Rep. 569 [1895].)

—— **A conclusion of law construed to be a finding of fact.]** Where the defense to an action of foreclosure was a general denial and the evidence is not in the record, the appellate court may assume that a conclusion of law that the defendant was not in default was a finding of fact. (Mutual Benefit Loan & Building Co. v. Jaeger, 34 App. Div. 90 [1898].)

—— **Findings in State court conclusive on appeal to United States court.]** (15 Albany Law Journal, 267.)

CASE — Requisites of a case.] A case on appeal must contain so much of the evidence, and other proceedings upon the trial, as is material to the questions to be raised thereby, and also the exceptions taken by the party making the case; and in a case where a special question is submitted to the jury, or the jury has assessed damages, such exceptions taken by any party to the action as shall be necessary to determine whether there should be a new trial in case the judgment should be reversed.

It is not necessary to state in a case that a finding upon the facts or a ruling upon the law was made where the finding or ruling appears in a referee's report, or in the decision of the court upon a trial by the court without a jury. (Code of Civil Procedure, § 997.)

—— **Practice as to making.]** As to the manner of reviewing the decision of a judge or referee, and the making and settling of a case and exceptions, see The People v. Albany & Susquehanna Railroad Company (57 Barb. 204 [Gen. T. 1870], and the note of Mr. N. C. Moak at page 210.) Who to prepare it. (Luce v. Morison, 2 Law Bulletin, 95 [1880].)

—— **Contents of case.]** What should be contained in the case, considered. (Dainese v. Allen, 14 Abb. [N. S.] 363 [N. Y. Supr. Ct. Gen. T. 1873.]

—— Exceptions to findings of fact present no question for review where no case has been made containing the evidence. (Drake v. N. Y. Iron Mine, 156 N. Y. 90 [1898].)

—— The opinion of the court below forms no part of the record, and cannot be referred to in order to show the grounds of the decision. (Randall v. N. Y. El. R. R. Co., 149 N. Y. 211 [1896]; Lounsbury v. Duckrow, 22 Misc. Rep. 434 [Onondaga County Ct. 1898].)

—— A copy of the account, served in pursuance of a demand therefor, if not

put in evidence, is no part of the record. (Spies v. Michelson, 15 Misc. Rep. 414 [Sup. Ct. Tr. T. 1896].)

—— When the omission of a colloquy between court and counsel will deprive the appellant of the right to review a most material circumstance, it is proper to insert it in the case. (Moroney v. Cole, 56 Misc. Rep. 454.)

—— Remarks of counsel and court concerning the admissibility of evidence should not appear in the case where everything necessary to show the objection, the grounds of the same, the ruling of the court, and the exceptions, appear. (Davidson v. N. Y. City Ry. Co., 122 App. Div. 11; Pulcino v. Long Island R. R. Co., 125 App. Div. 629.)

—— All findings made by court or referee must be incorporated in the formal decision directing entry of judgment or it will not be considered on the appeal. Requests to find are not to be inserted unless the court refuses to find. (Elterman v. Hyman, 117 App. Div. 519; People v. Brown, 118 id. 38; Selah v. N. Y. Times Co., Id. 384. See, also, Blewett v. Hoyt, 117 App. Div. 32.)

—— **Narrative form.]** A case not settled where the evidence is not reduced to narrative form. (Donai v. Lutjens, 20 Misc. Rep. 221 [Sup. Ct. Sp. T. 1897].)

—— **Preparation of case necessary only through rules of practice — failure to serve case.]** The rules of practice alone make the preparation of a case on appeal necessary, and a failure to serve a case does not fall within the provisions of Code of Civil Procedure (§ 1303) relative to mistakes or defects in perfecting an appeal. (Odell v. McGrath, 16 App. Div. 103 [1897].)

—— **Appeal by both parties — separate records.]** Where both parties appeal and make up separate records, each must stand upon his particular record for the assertion of the legal rights to which he claims to be entitled. (Black v. Brooklyn Heights R. R. Co., 32 App. Div. 468 [1898].)

—— **Two independent cases cannot be incorporated in one appeal book.]** The practice regulating the hearing of appeals does not permit two independent cases to be incorporated into one appeal book, but the record on each appeal should be printed by itself, so that independent judgment-rolls may be made up, embracing the papers and only the papers applicable to each. (Geneva & Waterloo Ry. Co. v. N. Y. C. & H. R. R. R. Co., 24 App. Div. 335 [1897].)

—— **A case essential to review.]** In an action in which a judgment has been entered upon a verdict of the jury, directed by the court, upon appeal, in order that the General Term may review it as required by section 997 of the Code of Civil Procedure, a case must be prepared and settled. (John Douglas Co. v. Moler, 30 Abb. N. C. 293 [N. Y. City Ct. 1893]; S. C., 3 Misc. Rep. 373].)

—— **Not necessary for review in all cases.]** A party desiring to appeal from a judgment entered upon a decision of the court is not obliged to prepare a case to be settled, but he may file exceptions to the findings of the trial court upon questions of law and have his appeal heard upon those exceptions. (Schwarz v. Weber, 103 N. Y. 658 [1886] Delaney v. Valentine, 11 App. Div. 316 [1896].)

—— **Where a formal case and exceptions is unnecessary.]** A formal case and exceptions which show what proceedings were had before a referee are not

necessary in the case of a reference directed by an interlocutory judgment, to inquire and report; the appellant must proceed exclusively under Rule 30 of the General Rules of Practice. (Crossley v. Adams, 55 St. Rep. 218 [N. Y. Supr. Ct. 1893].)

—— **What must be presented by a case in case of a sealed verdict.]** Upon receipt of a sealed verdict for the defendant, one of the jurors stated that he had changed his mind since the night before, whereupon the court directed a verdict for the defendant. The case upon appeal from the judgment entered thereon did not contain the testimony or the previous rulings of the court. Held, that, under the circumstances, the appellate court could not determine the correctness of the ruling, and the judgment could not be disturbed. (Walsh v. Manhattan Railway Company, 13 Misc. Rep. 505 [1895].)

—— **Exception on trial.]** Where any exception is taken at the trial, the party may make a case presenting such exception. (Huff v. Bennett, 2 Sandf. 703 [Sp. T. 1850]; S. C., 2 Code R. 139.)

—— **Case to contain all that occurred on the trial.]** All that occurred at the trial in regard to the requests to charge and exceptions to the same should be contained in the case on appeal. (N. Y. Rubber Co. v. Rothery, 29 St. Rep. 37 [Ct. Ap. 1890].)

—— **Case should contain a statement that it contains all the evidence.]** In the absence of a statement in the case that the case on appeal contains all the evidence, the Appellate Division will presume that sufficient evidence was given to support the judgment. (Uhlefelder v. City of Mt. Vernon, 76 App. Div. 349.)

—— **It should contain all the colloquy between the court and counsel.]** The case on appeal should set forth the whole of a colloquy between court and counsel, in which it is claimed that an admission was made by defendant's counsel, and not the conclusion of the court therefrom that such admission was made. (Cooley v. Trustees of the New York & Brooklyn Bridge, 36 App. Div. 520 [1899].)

—— **Order of stating evidence on appeal.]** Where, on a trial before a referee, testimony taken upon a former trial was read in a different order from that in which it was contained in the record, and the parties concurred in recommending the referee to examine it, in the order in which it was printed, held, that it should be so printed on appeal from the referee's decision. (Greggs v. Day, 45 N. Y. Supp. 309 [1897].)

—— **Case to state real facts.]** A party has a right to have the case show the actual facts as they really happened on the trial. (Kamermann v. Eisner & Mendelson Co., 25 Misc. Rep. 405 [1898].)

—— **A paper not read should not be in the case.]** An appraiser's certificate, which the trial judge states positively has not been read or used in evidence, and has, therefore, not influenced the jury, should not be included in the record of a case on appeal. (McManus v. Western Assurance Co., 40 App. Div. 86 [1899].)

—— **Intelligent index.]** Where, upon appeal, the attorney in making up his case presents an intelligible index, and indicates at the top of each page the nature of the contents thereof, the court is greatly facilitated in examining the testimony and exhibits. (Foster v. Bookwalter, 78 Hun, 352 [1894].)

—— **An order striking out findings of court — when properly inserted in a case on appeal.]** Exceptions taken to the refusal of the court to find in accordance with a request are properly inserted in the case on appeal (Code Civ. Pro., § 997), and so an order striking them out, where it does not appear that they were not properly taken, is error. (Young v. Young, 133 N. Y. 626 [1892].)

—— **The error claimed must appear in the record.]** To be available for reversal the error must appear from record. (Hughes v. Hughes, 10 Misc. Rep. 180 [1894].)

—— **Failure to print exhibits as directed by the court, is irregular.]** A statement in a case on appeal, concerning exhibits, "the plans bearing the stenographer's mark not having been produced though demanded, the appellant has been unable to print the same," interpolated in the place of the trial judge's direction "here insert the same," held, irregular and the case recalled for correction. (McCready v. Lindenborn, 24 Misc. Rep. 606 [1898].)

—— **Necessity of incorporating rejected documents.]** Where a resolution of a corporation is in writing, if the corporation desires to offer it in evidence in an action in which it is a defendant it should produce it, and if it is rejected, should have it marked for identification and incorporated in the case on appeal, so that the court can determine upon the appeal whether it was competent.

Where an offer is made by a corporation to prove the substance of such a resolution, which is objected to, it is proper for the referee to rule that the offer is improper, and that the corporation should offer the resolution and have it marked for identification in case it be rejected. (Mengis v. Fifth Avenue Railway Company, 81 Hun, 480 [1894].)

—— **Omitting letters submitted to the jury.]** When a judgment has been rendered in an action in which there has been conflicting evidence in regard to whether there was simply a delivery of chattels for trial or a sale, upon appeal, if the case does not contain letters submitted to the jury relating to the subject, an order reversing the judgment will not be granted. (Sloane v. Lockwood Chemical Co., 45 St. Rep. 265 [Brooklyn City Court, 1892].)

—— Absence from case of papers covered by the certificate is no ground for dismissing appeal. (Rosskam v. Curtis, 15 App. Div. 190 [1897].)

—— **Omitting cumulative evidence.]** When upon appeal in the defendant's case a statement appears that "this case does not contain all the evidence taken at the trial; there was additional evidence for the defendant which was cumulative," it will be presumed that evidence which does not appear in the case sustained the facts found. (Guion v. Mundy, 45 St. Rep. 667 [N. Y. Com. Pl. 1892].)

—— **Case presenting only questions of law — insertion of all the evidence in, not proper.]** In the settlement of a bill of exceptions, only so much of the evidence as may be necessary to present the questions of law upon which the exceptions were taken upon the trial should be inserted, and where, on the settlement of the exceptions, the evidence has been unnecessarily inserted and the expense of the appellant to print and present his case thereby increased, an appeal lies from an order denying a motion for a resettlement made for

the purpose of excluding such unnecessary evidence. (Marckwald v. Oceanic Steam Nav. Co., 8 Hun, 547 [Gen. T. 1876]; 3 N. Y. Wkly. Dig. 401.)

—— **Case upon specific exceptions or questions only.]** The appellant has the right to make up a case on appeal upon specific exceptions or questions, and to print only such evidence as relates thereto. (Firth v. Rehfeldt, 47 N. Y. Supp. 474 [1897].)

—— **Appeal upon the judgment-roll alone.]** Where the appeal in an action is heard upon the judgment-roll therein it is incumbent upon the appellant, in order to succeed, to show that the trial court could not, in any view of the facts found, properly order a judgment for the respondent. (Primeau v. National Life Assn., 77 Hun, 418 [1894].)

—— **To review legal questions a case need not contain all the evidence.]** Where a finding of fact by a court or referee is without evidence to support it, it is a ruling upon a question of law (Code Civ. Pro., § 993),* and if excepted to presents a legal question which is reviewable upon appeal.

It is not necessary for the purposes of such review that the case should show that it contains all the evidence. (Halpin v. Phœnix Ins. Co., 118 N. Y. 165 [1890]; Israel v. Manhattan R. Co., 158 N. Y. 624 [1899].)

—— **A bill of exceptions should contain a concise statement of facts.]** A bill of exceptions should contain only a concise statement of facts presenting the points intended to be relied upon as ground of error, or simply so much of the evidence as may appear to be requisite for that purpose. (Tweed v. Davis, 1 Hun, 252 [Gen. T. 1874]; Price v. Powell, 3 N. Y. 322 [1850].) It should not contain questions withdrawn, answers excluded, or testimony not necessary to raise the questions on the exceptions. (Hoffman v. Ætna Fire Ins. Co., 1 Rob. 501 [1863]; S. C., 19 Abb. 325.)

—— **Exceptions and introductory statement of proceedings, without the evidence.]** On an appeal from a judgment entered upon the report of a referee, the appellant served a case for argument containing an introductory statement of the proceedings in the cause, the notice of appeal, the judgment record, containing the referee's report and the exceptions filed thereto, but not containing the evidence. Held, that the practice of the appellant was correct. A motion to strike out the exceptions and introductory statement in the case was denied. (Davie v. Van Wie, 1 N. Y. Sup. Ct. 530 [Gen. T. 1873].)

—— **Respondent presumed to have had inserted all the testimony necessary to sustain the rulings.]** Upon an appeal from a judgment dismissing a complaint, the Appellate Division, in the absence of a certificate that the case contains all the evidence, will assume that the respondent has procured to be inserted therein all the testimony deemed essential to sustain the ruling. (Hewett v. Town of Thurman, 41 App. Div. 6 [1899].)

—— **Evidence omitted from proposed case — duty of respondent to supply.]** If the party making up the case omits any evidence, it is the duty of the other party, if he deems the evidence material to sustain the findings, to cause it to be inserted by amendment. (Tomlinson v. The Mayor, 44 N. Y. 601 [1871]; Wescott v. Fargo, 6 Lans. 325 [Gen. T. 1872]. See West v. Wright,

* Repealed by chapter 946 of 1895.

86 Hun, 436 [1895]; Porter v. Smith, 35 Hun, 118 [1885]; Burrows v. Dickinson, 115 N. Y. 672 [1889]; Kissam v. Kissam, 21 App. Div. 142 [1897].)

—— **Papers omitted from case — presumption.**] Papers on which the original order was made, and on which the motion for reargument was founded which were recited in the order appealed from, did not appear in the record. Held, that the General Term would assume that they sustained the order of the Special Term, which should be affirmed. (Matter of McBride, 90 Hun, 259 [1895].)

—— **Rulings on questions of law — what is notice to the respondent.**] As to the rulings on questions of law, there is no need that the case on appeal should affirmatively show that it contains all the evidence received at the trial, and since an exception to the denial of a nonsuit raises a question of law, and serves as a notice to the respondent of an intention to raise the question of error on the ruling excepted to, and puts upon him the responsibility of supplying the requisite proof by amendment to the case. (Miner v. Edison Electric Ill. Co., 22 Misc. Rep. 543 [N. Y. City Ct. 1898].)

—— **When the case need not contain all the testimony, etc.**] It is not necessary that the appellant's case contain all the testimony and exhibits if it shows the objection to the tax which he wishes to have set aside. (Matter of Byrnes, 34 St. Rep. 332 [Sup. Ct. 1890].)

—— **Certificate not necessary to obtain review of rulings of the trial judge, or of his charge.**] A certificate that the case contains all the evidence is not necessary to entitle the appellant in an action which was tried before a jury, to review exceptions to the rulings of the trial judge or to his charge, although based upon the insufficiency of the evidence. (Rosenstein v. Fox, 150 N. Y. 354 [1896].)

—— **Failure of certificate to state that it contains all the evidence — what errors of evidence reviewed.**] Where the certificate does not state that it contains all the evidence, only errors in the admission or exclusion of evidence are open to review, and if none appear, the findings of fact are conclusive. (Fleck v. Rau, 9 App. Div. 43 [1896].)

—— **Case not containing the evidence — review limited to errors of law.**] Where the case on appeal to General Term from a judgment entered upon the report of a referee does not contain the evidence the General Term cannot review the case upon the facts, as they are not before it, and its order of reversal must be based on assumed errors of law, and the right to review in the Court of Appeals is necessarily confined to such errors of law. (Billings v. Russell, 101 N. Y. 226 [1886].)

—— **Appeal heard on judgment-roll — no evidence printed.**] Where an appeal is heard on the judgment-roll, the evidence not being printed, the appellants must show that the trial court could not in any view of the facts found properly order a judgment for respondent. (McCabe v. O'Connor, 4 App. Div. 354 [1896]. See Kincaid v. Kincaid, 85 Hun, 14 [1895]; First Nat. Bk. of Syracuse v. N. Y. C. & H. R. R. R. Co., Id. 160 [1895].)

—— A direction of a nonsuit may be reviewed, though the record does not show that the case contains all the evidence. (Zimmerman v. Union R. Co., 3 App. Div. 219 [1896].)

—— **Failure to print in a case letters objected to — exception to their exclusion unavailing.]** Where letters are objected to as immaterial, and excluded, and are not printed in the case on appeal, the appellate court has nothing from which to determine their materiality, and an exception to their exclusion is unavailing. (Ranson v. Wheelwright, 19 Misc. Rep. 106 [Sup. Ct. App. T. 1897]. See, also, as to postal cards, Reading Braid Co. v. Stewart, 20 id. 86 [Sup. Ct. App. T. 1897].)

—— **What is a sufficient statement of evidence.]** A proposed case and exceptions stating "evidence was offered by the plaintiff tending to prove, etc.," followed by a statement of the evidence received, the objection thereto and the ruling thereon, held to be sufficient within the Code of Civil Procedure, § 997, since the point raised was clearly intelligible, and respondent, if the statement did not conform to the facts as they appeared at the trial and upon which the ruling is based, should propose an amendment. (Hubbard v. Chapman, 28 App. Div. 577 [1898].)

—— **Effect of its failure to state that the case contains all the evidence.]** Failure of the case to state that it contains all the evidence does not preclude the appellate court from considering an exception to a refusal to dismiss at the close of plaintiff's case, as the motion therefor was notice that defendant intended to question the sufficiency of the proof, and it then became plaintiff's duty to see that the case contained all that was necessary to sustain the ruling. (Miner v. Edison Electric Illuminating Co., 26 Misc. Rep. 712, affg. 22 id. 543 [1899]. See Hewett v. Town of Thurman, 41 App. Div. 6 [1899]; Tomlinson v. The Mayor, 44 N. Y. 601 [1871]; Westcott v. Fargo, 6 Lans. 325 [Gen. T. 1872].)

—— Where there is no certificate and no order denying motion for new trial, only questions of law are considered. (Beebe v. N. Y. & N. E. R. R. Co., 91 Hun, 294 [1895]. See, also, McNish v. Village of Peekskill, 91 id. 324 [1895].)

—— **When the case does not contain the evidence.]** If the case embraces no evidence, but only the facts found and the conclusions of law, the presumption is that there was no evidence from which any other facts could be found, and the only question raised on exceptions to the conclusions of law is whether they are justified by the facts found. (Stoddard v. Whiting, 46 N. Y. 627 [1871]; Norton v. Matthews, 11 Misc. Rep. 711 [N. Y. Supr. Ct. 1895]; Drake v. N. Y. Iron Mine, 89 Hun, 280 [1895].)

—— **What will be considered, when the entire record is a bill of exceptions, and the judgment-roll.]** When the whole record is a bill of exceptions annexed to a judgment-roll, all the evidence not being before the court, only the exceptions taken at the trial are to be considered. (Cox v. Davis, 8 App. Div. 491 [1896].)

—— **Errors of law considered when no certificate is made.]** When there is omitted from the case on appeal the certificate that all the evidence is contained therein, the court may review the error of law involved by a verdict without evidence. (Robbins v. Downey, 45 St. Rep. 279 [N. Y. Com. Pl. 1892].)

—— **No review of the facts without such a certificate.]** (Evans v. Howell, 75 Hun, 199 [1894]; Root v. Strang, 77 id. 14 [1894]; Webster v. Kings

County Trust Co., 80 id. 421 [1894]; Levi v. Newhall, 30 St. Rep. 283 [N. Y. Supr. Ct. 1890]; Claflin v. Flack, 36 id. 728 [N. Y. Com. Pl. 1891]; Hinds v. Kellogg, 37 id. 356 [N. Y. Com. Pl. 1891]; Fultz v. Paul, 38 id. 125 [Sup. Ct. 1891]; Clark v. House, 40 id. 956 [Sup. Ct. 1891]; Culliford v. Gadd, 44 id. 22 [N. Y. Supr. Ct. 1892]; Momeyer v. N. Y. Sheep & Wool Co., 49 id. 414 [Sup. Ct. 1892]; Brooker v. Filkins, 9 Misc. Rep. 146 [N. Y. Com. Pl. 1894]; Brown v. James, 9 App. Div. 139 [1896]; Sandiford v. Frost, 9 id. 55 [1896]; Hedges v. Polhemus, 14 Misc. Rep. 309 [N. Y. Com. Pl. 1895]; Murray v. Babbitt, 10 id. 365 [N. Y. Com. Pl. 1894]; Gage v. Lippman, 12 id. 93 [N. Y. Com. Pl. 1895]; Button v. Kinnetz, 88 Hun, 35 [1895]; Brown v. Fishel, 83 id. 103 [1894]; Jagau v. Goetz, 11 Misc. Rep. 380 [N. Y. Com. Pl. [1895]. See CERTIFICATE, *post*, p. 210.)

—— Where there is no certificate, respondent is entitled to assume that no review of questions of fact will be demanded. (West v. Wright, 86 Hun, 436 [1895].)

—— **Questions of law reviewable, though there is no evidence in the case.]** The questions of law are reviewable on the facts found, though no evidence is contained in the case. (Ferguson v. Hamilton, 35 Barb. 427 [Gen. T. 1862]. See Bissel v. Pearse, 21 How. Prac. 130 [Gen. T. 1861]; Dainese v. Allen, 14 Abb. [N. S.] 363 [N. Y. Supr. Ct. Gen. T. 1873].)

—— **Printing report and all findings.]** The referee's report and all findings must be printed upon appeal, so that it may be determined by the court whether the referee has passed upon all the requests to find. (Thompson v. McCaldin, 27 N. Y. St. Rep. 619 [Sup. Ct. 1889].)

—— **Immaterial letters not to be printed in the case.]** It is proper to omit the printing in a case on appeal of immaterial letters. (De Klyn v. Silver Lake Ice Co., 36 N. Y. St. Rep. 84 [Supr. Ct. 1891].) Affirmed, without opinion, in 128 N. Y. 582.

—— **Further findings — proceedings to obtain, may be inserted in the case.]** Upon an appeal from the judgment, the proceedings to obtain further findings can be inserted in the record, and the materiality of the findings asked for can be reviewed at General Term and in the Court of Appeals. (Meacham v. Burke, 54 N. Y. 220 [1873]; Woodhull v. Rosenthal, 61 id. 382 [1875].)

—— **Respondent's exceptions — not to be in case.]** A case should not contain exceptions taken by the respondent, except in peculiar cases. (Dabney v. Stevens, 10 Abb. [N. S.] 39 [Sup. Ct. Gen. T. 1870]; affd., 46 N. Y. 681; Matter of Levy's Will, 91 App. Div. 483; affd., 179 N. Y. 603.)

—— **Respondent's exception — when he may insist that it be disregarded.]** While a respondent can have no benefit from his exception to the admission of incompetent evidence offered by appellant and received by the trial court, he may, on appeal, insist that it be disregarded in considering whether appellant made out a case. (Winne v. Hills, 91 Hun, 89 [1895].)

—— **Judge's charge.]** The judge's charge should not be inserted *in extenso*. (Bulkeley v. Keteltas, 4 Sandf. 450 [Gen. T. 1851].)

—— **The charge not to be put in a case, unless excepted to.]** If no part of the charge is excepted to, the charge should not be included in the case on appeal. (Shook v. O'Neil, 1 Law Bulletin, 38 [N. Y. Com. Pl. Sp. T. 1879].)

—— **Alleged portions of charge stricken out — error cured by stipulation.]** An error, if any, in refusing to resettle a case on appeal by striking out alleged portions of the charge is cured by stipulation that the appeal be heard without reference to the matter sought to be expunged, and that the case be deemed amended so as to conform to the contention of the moving party. (Dearing v. Pearson, 8 Misc. Rep. 277 [N. Y. Com. Pl. 1894].)

—— **Statement as to the time of commencement of the action.]** On the resettlement of a case, even if a point raised at the trial might be affected by a positive statement of the time of the commencement of the action, the words "on or about" may be inserted, and are sufficient to conform to Rule No. 41 of General Rules of Practice. (James v. Work, 51 N. Y. St. Rep. 323 [Sup. Ct. 1893].)

—— **A statement of facts in the opinion, to be printed.]** Statements of facts in the opinion may be required to be printed in the case on appeal, in order that the Appellate Division shall be informed of the view of the facts upon which the trial judge has based his legal conclusions. (McManus v. Western Assurance Co., 40 App. Div. 86 [1899].)

—— **The case must show plainly the erroneous ruling.]** It is the duty of the appellant, in making up his case, to show plainly that an erroneous ruling was made adversely to him, and not leave that fact to appear by inference or conjecture. (Clark v. Donaldson, 49 How. Prac. 63 [Gen. T. 1874].)

—— **Limit imposed upon plaintiff's case on the trial.]** The objection that a plaintiff had so limited his case on the trial as to preclude his adopting one theory of it consistent with his pleadings must, in order to be taken advantage of on appeal, appear affirmatively in the case. (Hazewell v. Coursen, 81 N. Y. 630 [1880].)

—— **Where pleadings do not conform to the evidence.]** Although the pleadings do not conform to the evidence, if the facts in the case prove a good cause of action and no objection is made to the evidence, the case may be disposed of on appeal, as though the pleadings had been amended on trial. (Tisdale v. Morgan, 7 Hun, 583 [1876].) See, also, Howell v. Grand Trunk R. Co., 92 id. 423 [1895].

—— **When a referee's findings of fact are to be reviewed as being against the weight of evidence — as having no evidence to support them.]** Where a party appealing from a judgment, entered upon the report of a referee, desires to raise in the appellate court the question that any finding of fact is against the weight of evidence, he must have the case so prepared as that it shall appear therefrom that all the evidence bearing on the finding of fact sought to be reviewed, is set forth therein. Where, however, he claims that a particular finding of fact is without any evidence to support it, and he has excepted thereto as provided in section 993* of the Code of Civil Procedure, thereby presenting for review only a question of law, it is unnecessary to state in the case that all the evidence bearing on such finding is set forth therein. (Spence v. Chambers, 39 Hun, 193 [Gen. T. 1886].)

—— **When motion for new trial made.]** A motion for a new trial for error in the finding of fact, must be made before the expiration of the time within

* Repealed by chapter 946 of 1895.

which an appeal can be taken from the judgment, *i. e.*, within thirty days after service of a copy of the judgment entered. (Heath v. N. Y. Bldg. Loan Banking Co., 91 Hun, 170 [1895].)

—— **Motion for a new trial of an issue of fact after entry of an interlocutory judgment can only be made upon a case and exceptions.**] A motion at General Term, after the entry of interlocutory judgment, for a new trial of an issue of fact tried by the court without a jury, or by a referee, when exceptions taken to rulings are sought to be reviewed, must be made upon a case and exceptions which must be settled and signed by the judge or referee by or before whom the action was tried, as prescribed by the General Rules of Practice. (Green v. Roworth, 4 Misc. Rep. 141 [N. Y. Com. Pl. 1893].)

—— **Motion for new trial in an equity action — made when application is made for final judgment.**] Where specific issues have been tried in an equity suit, and a motion for a new trial on the minutes has been made and denied, the party moving may again make a motion for a new trial on a case and exceptions, when application is made at Special Term for final judgment. (Anderson v. Carter, 24 App. Div. 462 [1897].)

—— A party moving for a new trial must make a case and procure its settlement. (Bantleon v. Meier, 81 Hun, 162 [1894].)

—— Motion not heard on evidence alone, unless by consent. (Boyd v. Boyd, 11 Misc. Rep. 357 [1895].)

—— A case is necessary, when motion is made on ground of newly-discovered evidence. (Harris v. Gregg, 4 App. Div. 615 [1896].)

—— **Question of fact — how presented at the General Term.**] In order to present a question of fact at the General Term, on appeal from the Special Term, there should either be a finding of fact together with a conclusion of law thereupon, and an exception thereto, or a request to find thereupon, and an exception to a refusal so to find. (Purdy v. Purdy, 9 N. Y. Wkly. Dig. 425 [Gen. T. February, 1880].)

—— **Appellate Division — when cannot reverse on the facts.**] A judgment cannot be reversed on the facts where all the facts are of record and uncontroverted. (Westerfeld v. Rogers, 174 N. Y. 230 [1903].)

—— **What necessary for review in Court of Appeals.**] When there is neither a case made or settled showing that any question was raised nor any exceptions taken, nor a report of a referee or findings of the court with exceptions, the Court of Appeals has no jurisdiction to entertain the appeal. (Smith v. Starr, 15 Alb. Law J. 514 [Court of Appeals, 1877].

—— **When order of Appellate Division reviewable by Court of Appeals.**] An order of the Appellate Division reversing an order of the Surrogate's Court directing the continuation of a proceeding for a compulsory accounting, etc., is a final order and reviewable by the Court of Appeals. (Matter of Fitzsimmons, 174 N. Y. 15 [1903].)

—— **Unanimous approval of a finding of fact by the Appellate Division is conclusive upon Court of Appeals.**] A finding as to the law of a foreign State, if unanimously approved by the Appellate Division, is conclusive upon the Court of Appeals. (Spies v. Nat. Bank, 174 N. Y. 222 [1903].)

—— **Appeal to Court of Appeals from order granting new trial — appellant must attend to exceptions.**] Upon appeal to the Court of Appeals, from an order granting a new trial, the appellant takes the risk of every exception appearing upon the record, and the respondent may sustain the order by showing any legal error upon the part of the trial court. (Foster v. Bookwalter, 152 N. Y. 166 [1897]; Durland v. Durland, 153 id. 67 [1897].)

—— **Contents of case on appeal.**] In a case where a verdict is rendered by direction of the court and a motion to set aside such verdict is subsequently granted and an appeal taken from such order to the Appellate Division, upon which appeal a case and exceptions are settled, it is not necessary upon appeal to the Court of Appeals from the reversal of such order by the Appellate Division to prepare a new case as required by Code of Civil Procedure, section 1339. (South Bay Co. v. Howey, 190 N. Y. 240, revg. 113 App. Div. 382.)

—— **When an appeal will not be considered.**] In an equity suit the court will not consider an appeal when the record discloses no findings signed by the judge, but merely conclusions of law unsigned. (Simis v. McElroy, 38 N. Y. St. Rep. 3 [Sup. Ct. 1891].)

—— **"Minutes of referee" attached to a judgment-roll — not considered on appeal.**] Where, on appeal from a judgment, the papers contain the judgment-roll and what purported to be a copy of a paper indorsed "minutes of referee," but there was no evidence that it had been settled or signed, held, that such paper could not be considered on the appeal. (Albright v. Riker, 11 N. Y. Wkly. Dig. 27 [Gen. T. 1880].)

—— **The clerk's minutes cannot be used to indicate the legal questions raised upon the trial, or the grounds of the decision.**] Where a case as settled stated the grounds upon which a motion to dismiss the complaint was made and granted, held, that this was controlling and that the respondent could not refer to the clerk's minutes, although incorporated in the record, to show that the motion was also based upon other grounds than those stated in the case, but it was held that the respondent had the right, in support of the judgment, to urge any sufficient ground appearing from the record which he might have raised in the court below, provided it could not have been obviated had it been raised on the trial. (Scott v. Morgan, 94 N. Y. 508 [1884].)

—— **Appellant not bound to print matter in the case on appeal to the Court of Appeals disallowed by the trial judge.**] An appellant is simply bound to present his case to the General Term upon the case as settled, and to the Court of Appeals upon the same record; he is not bound to print matter proposed by the respondent as an amendment to the case, but disallowed by the trial judge, who, however, required the appellant to paste certain exhibits in the appeal book if they were furnished by the respondent. (Kilmer v. New York Central & Hudson River R. R. Co., 94 N. Y. 495 [1884].)

—— **Evidence — prima facie, of the facts stated.**] After a case or exceptions has been settled and filed with the clerk it may be taken, in the further progress of the action, as *prima facie* evidence of the facts therein stated. (Van Bergen v. Ackles, 21 How. Prac. 314 [Sp. T. 1861]. See, also, Howell v. Grand Trunk R. Co., 92 Hun, 423 [1895].)

—— **Settlement of case by trial judge.**] The recollection of the trial judge as to a colloquy in the trial is conclusive in the Appellate Division. (Burke v. Baker, 104 App. Div. 36.)

—— **Amendment.**] In settlement of case and exceptions, an amendment is not allowable on the ground that an exception it is proposed to strike out was not worthy of consideration in the appellate court. Such conclusion is not within the province of the trial court. (Brauer v. N. Y. City Inter. Ry. Co., 129 App. Div. 384.)

In a case where trial justice prior to his death settled the case on appeal as stipulated by counsel, court is empowered upon subsequent application to allow an amendment of the same, although different from stenographer's minutes, when the fact is clearly and satisfactorily established to the satisfaction of the court. (McMahon v. D., L., etc., R. R. Co., 116 App. Div. 532.)

CERTIFICATE — Necessary to a case reviewing facts.] In the absence of a certificate in the appeal book that the case contains all the evidence taken at the trial, the respondent is entitled to rely upon the presumption that there was no intention to ask for a review of the rulings on the question of fact. (West v. Wright, 86 Hun, 436 [1895]. See *ante*, pages 205, 206.

—— **It is conclusive.**] The settlement by the trial judge of the case on appeal upon a dispute as to what occurred, is conclusive. (Balz v. Shaw, 11 Misc. Rep. 444 [1895].)

—— **A case should state that it contains all the evidence.**] (Beach v. Yates, 1 Sup. Ct. R. [T. & C.], addenda 21* [Gen. T. 1873].)

—— **Statement that the case contains all the evidence — when proper.**] A statement that it contains all the evidence given upon the trial, will not be inserted unless the object is to move for a new trial upon the ground of a misdirection which was not the subject of an exception. (Magnus v. Trischet, 2 Abb. [N. S.] 175 [Sp. T. 1866].)

—— **Case must purport to contain all the evidence.**] Upon appeal the weight of the evidence or the good faith of the witnesses will not be considered unless the case purports to contain all the evidence. (Schuler v. Third Ave. R. R. Co., 1 Misc. Rep. 351 [N. Y. Com. Pl. 1892]; Hyland v. Anderson, Id. 377 [N. Y. Com. Pl. 1892]; Gaylord v. Gallagher, Id. 328 [N. Y. Com. Pl. 1892]; Davey v. Lohemann, Id. 317 [N. Y. Com. Pl. 1892].) This does not apply to a jury trial. (Rosenstein v. Fox, 150 N. Y. 354 [1896].)

—— **A certificate which covers "all testimony given, all the exhibits of the parties and all the proceedings had upon the trial."**] A certificate attached to a case on appeal, stating that it contains "all testimony given, all the exhibits of the parties, and all the proceedings had upon the trial," is equivalent to a certificate that the case contains all the evidence bearing upon any disputed question of fact. (Orcutt v. Rickenbrodt, 42 App. Div. 238 [1899].)

—— **Certificate that it contains all the material evidence.**] An appeal will not be dismissed for the reason that no certificate is attached to the case stating that it contains all the evidence, when a statement is made that it contains all the material evidence upon the matters therein involved. (Matter of Chapin, 84 Hun, 490.)

—— **When all the material evidence appears a certificate is proper.]** The case on appeal should contain all the evidence material to the questions to be decided by the appellate court, and amendments may be proposed by the respondent, but the appellant should be allowed a certificate that the case contains all the evidence, unless the attention of the judge has been called to the omission of material evidence. (Renwick v. N. Y. Elevated R. R. Co., 36 St. Rep. 682 [Sup. Ct. 1891].)

—— **Where appellant should be allowed to insert a statement.]** Where respondent concedes that in fact the case on appeal contains all the evidence, appellant should be allowed, as a matter of favor, to amend the case by inserting a statement to that effect. (Martin, Bing & Co. v. Baust, 23 App. Div. 234 [1897].)

—— **Certificate does not imply that the evidence is word for word.]** A certificate that all the evidence is contained in the case on appeal means that all the material evidence is presented to the court, and not that the case contains word for word what was given on the trial. (Renwick v. N. Y. Elevated R. R. Co., 36 St. Rep. 682 [N. Y. Sup. Ct. 1891].)

—— In the absence of a statement that a case contains all the evidence upon a question sought to be reviewed, the court, on appeal, may determine that there was no evidence to support any finding of fact duly excepted to. (McEntyre v. Tucker, 5 Misc. Rep. 228 [N. Y. Com. Pl. 1893].)

—— **What is a sufficient certificate.]** A certificate on appeal which recites "the foregoing case contains all the evidence relating to the matters contained in said case and bill of exceptions," held sufficient when, as in the case at bar, only a portion of the cause of action or of the defenses litigated on the trial are brought up for review. (Oaksmith v. Baird, 19 App. Div. 334 [1897].)

—— A stipulation that a case contains all the "oral evidence" is not sufficient. (Matchett v. Lindberg, 2 App. Div. 340 [1896].)

—— **That the case contains all the evidence bearing upon the exceptions.]** On appeal from a judgment entered on the report of a referee the certificate annexed to the case was as follows: "The annexed case contains all the evidence bearing upon the exceptions given (taken) upon the trial." Held, sufficient to bring up for review exceptions to refusals of the referee to find facts as requested. (McEntyre v. Tucker, 5 Misc. Rep. 228 [N. Y. Com. Pl. 1893].)

—— **Minutes of testimony and proceedings on the trial, sufficient.]** The evidence should not be reviewed when upon appeal the case contains no certificate that all the evidence is before the court, but does contain a statement that "the foregoing are the minutes of all the testimony taken and proceedings had on the said trial." (De Mott v. Hendrick, 47 St. Rep. 731 [Sup. Ct. 1892].)

—— When the minutes of trial signed by the clerk are a sufficient certificate. (Sedgwick v. Macy, 24 App. Div. 1 [1897].)

—— *Quære*, whether a certificate that the case contains "all the testimony taken on the appeal" is sufficient. (Zimmerman v. Union Ry. Co., 3 App. Div. 219 [1896].)

—— **What statement is insufficient to constitute a proper certificate.]** The statement in a case that the "foregoing is a complete record of all the testimony taken on the trial of the above-entitled action, and is a true record of all the proceedings thereat," is not equivalent to the statement that the "case contains all the evidence adduced at the trial," and is insufficient to allow of a review of questions of fact. (Hannon v. Gallagher, 19 Misc. Rep. 347 [N. Y. City Ct. 1897].)

—— A certificate that "the foregoing contents are all the testimony and proceedings taken on the trial of said action," held irregular. (Becker v. Fischer, 13 App. Div. 555 [1897].)

—— **Appellant's attorney's affidavit does not supply the place of a certificate.]** An affidavit of the appellant's attorney, annexed to the case, and stating that "the foregoing is all of the evidence given at the trial of the action in question," does not supply the place of the required certificate. (Gorham Mfg. Co. v. Seale, 3 App. Div. 515 [1896].)

—— **Exceptions to findings of fact not necessary where there is a certificate.]** Where there is a certificate that the case contains all the evidence, it is not necessary on appeal to the Appellate Division that appellant file exceptions to the findings of fact. (Watts v. Bd. of Education, 9 App. Div. 143 [1896].)

—— **The Special Term may insert in a case a statement that it contains all the evidence.]** When the statement, "The foregoing contains all the evidence upon the trial" has been omitted from a case on appeal through inadvertence, it is proper for the court at Special Term to permit its insertion for the purposes of a pending appeal to the Court of Appeals. (Barnard v. Gantz, 69 Hun, 104 [1893].)

—— **Upon extent of plaintiff's damages insufficient.]** A statement in a case on appeal that "the foregoing presents all the evidence being upon the extent of the plaintiff's damages" is not equivalent to the statement that "the case contains all the evidence," called for by the rule, and does not authorize the appellate court to review alleged errors of fact. (Katz v. Koster, 6 Misc. Rep. 327 [N. Y. Sup. Ct. 1893].)

—— **Absence of certificate prevents reduction of an exaggerated recovery by the Appellate Division.]** Though the amount of the recovery appears from the evidence in the record to be exaggerated, the Appellate Division cannot reduce it or order a new trial in the absence of a certificate that the case contains all the evidence. (Hunt v. Webber, 22 App. Div. 631 [1897].)

—— **Testimony not equivalent to evidence.]** Where documentary evidence has been omitted from the case on appeal, a statement in the case that it contains all the testimony given on the trial cannot be substituted for a statement that the case contains all the evidence. (Uppington v. Pooler, 47 St. Rep. 30 [Sup. Ct. 1892].)

—— A statement in the record upon an appeal from a judgment that the same "contains all the testimony taken upon the trial in this action" is not equivalent to the statement that the case contains all the evidence, and in the absence of the latter statement the General Term is precluded from reviewing questions of fact. (Randall v. The New York Elevated Railroad Co., 76 Hun, 427 [1894]; Grening v. Malcom, 83 id. 9 [1894]; Bonwell v. Auld,

9 Misc. Rep. 65 [N. Y. Com. Pl. 1894], affg. 7 id. 447; McCarthy v. Gallagher, 4 id. 188 [N. Y. Com. Pl. 1893]; Koehler v. Hughes, 73 Hun, 167 [1893].)

—— The facts found by the trial judge are conclusive where the certificate in the case on appeal simply states that the case contains all the "testimony" given upon the trial. (Hyman v. Friedman, 45 St. Rep. 636 [N. Y. Com. Pl. 1892].)

—— **The case must contain an order denying a new trial and a notice of appeal therefrom.**] Where the papers in a case on appeal from a judgment entered on the verdict of a jury contain no appeal from an order denying a motion for a new trial, and no order is found denying such a motion, and the case does not show that it contains all the evidence given upon the trial, the appeal brings up for review only the exceptions taken upon the trial. (Dexter v. The Village of Fulton, 86 Hun, 433 [1895]; Ropes v. Arnold, 81 id. 476 [1894].)

—— **Appeal from a judgment and not from an order denying a new trial.**] Where there is no appeal taken from the order denying a motion for a new trial, an appeal from the judgment brings up for review only the exceptions taken on the trial. (Wright v. Haskin Wood Vulcanizing Co., 76 Hun, 340 [1894].)

—— Where the appeal is from the judgment alone, the facts are not before the court for review. (Goodwin v. Brennecke, 21 App. Div. 138 [1897].)

—— **In its absence questions as to excessive verdict, etc., not considered.**] Where the case on appeal does not contain a statement that it contains all the evidence taken on the trial, the appellate court cannot inquire as to whether or not the verdict is for excessive damages or against the weight of evidence, but is confined to any alleged errors of law that may have been committed on the trial. (Howe v. Woolsey, 7 Misc. Rep. 33 [N. Y. Com. Pl. 1894]; Whiting v. Standard Gaslight Co., 83 Hun, 4 [1894]; Blaustein v. Guindon, Id. 5 [1894]; Grening v. Malcom, Id. 9 [1894]; Hunt v. Webber, 22 App. Div. 631 [1897].)

—— **Respondent not compelled to add testimony to enable a referee to certify that case contains all the evidence.**] When a case on appeal, as settled by the trial referee after the submission of amendments by the respondent, does not contain all the evidence, and the referee is not then asked to certify that it does contain all the evidence, and the referee, on being thereafter asked by the appellant to order the case on file, is asked to certify that it contains all the evidence, it is improper to compel the respondent to add such testimony as may be necessary to enable the referee to make the desired certificate. (Martin v. Adams, 73 Hun, 122 [1893].)

—— **No particular form required.**] No particular form of words that the case contains all the evidence is required for this statement, and where there is a statement in the record that it contains all the testimony, and both parties proceed to argument without any objection as to the power of the General Term over the whole case, the court is warranted in assuming that all the evidence is in the case and should pass upon the facts. (Dibble v. Dimick, 143 N. Y. 549 [1894].)

—— **Absence of a certificate precludes the appellate court from considering a motion for a new trial.]** An omission from the case on appeal of a statement that it contains all the evidence precludes the appellate court from considering a motion for a new trial on the minutes. (McAvoy v. Cassidy, 8 Misc. Rep. 595 [City Court of Brooklyn, 1894].)

—— There can be no review of evidence by the General Term in the absence of a certificate, and also of an appeal from an order denying a new trial. (Gregor v. McKee, 18 Misc. Rep. 613 [N. Y. City Ct. 1896].)

—— **Absence of certificate in action for negligence — questions not considered by Appellate Division.]** Where there is no certificate, and the case purports only to include the testimony and proceedings necessary to present plaintiff's exceptions, it was held that the Appellate Division would not consider whether the trial court erred in submitting to the jury the questions as to whether plaintiff has sustained any pecuniary injury in consequence of defendant's negligence or as to the contributory negligence of the party injured. (Caven v. City of Troy, 15 App. Div. 163 [1897].)

—— **When facts reviewed without exception to a decision, if case contains all the evidence.]** Where the decision has been made, containing findings of fact and conclusions of law, separately stated, the defeated party is at liberty upon appeal to review the facts without having filed any exceptions to the decision, provided it appears that the case contains all the evidence. (Matchett v. Lindberg, 2 App. Div. 340 [1896].)

—— **Motion to set aside verdict — review of — what the case should contain.]** Where a motion is made to set aside a verdict as against the weight of evidence and is entertained and denied, the decision cannot be reviewed at General Term, unless the case states that it contains all the evidence bearing upon the question. (Cheney v. N. Y. C. & H. R. R. R. Co., 16 Hun, 415 [1879].)

—— Where there is no certificate, a verdict for six cents damages will not be set aside as inadequate, although from what does appear in the case such verdict was inadequate. (Revelski v. Droesch, 6 App. Div. 190 [1896].)

—— **The case must contain all the evidence.]** Where, on the ground that a verdict is not sustained by the evidence, a motion for a new trial is made and denied, or where defendant moves for a nonsuit on the ground of lack of evidence and his motion is denied upon appeal, the case presented to the court should contain all the evidence given upon the trial. (Sloane v. Lockwood Chemical Co., 45 St. Rep. 265 [Brooklyn City Court, 1892].)

—— The record on an appeal from an order confirming the report of a referee, to assess damages, should contain all the evidence. (Williams v. Lindblom, 90 Hun, 370 [1895].)

—— **No review of the direction of a verdict if there be no certificate.]** Where there is no certificate in a case on appeal that it contains all the evidence, there can be no review of a ruling refusing to direct a verdict or of exceptions based upon alleged deficiencies in evidence. (Rosenstein v. Fox, 9 Misc. Rep. 449 [N. Y. Com. Pl. 1894].)

—— Judgment of affirmance by General Term of the City Court is conclusive upon the Court of Common Pleas, in absence of certificate, as to the weight of evidence and the propriety of its submission to the jury, and as

to whether there was any evidence to support the recovery. (Soule v. Veyrac, 13 Misc. Rep. 167 [N. Y. Com. Pl. 1895].)

—— A certificate is not requisite to present an exception to the direction of a verdict where a question for the jury appears. (Brown v. James, 2 App. Div. 105 [1896].)

—— **Case — without evidence.]** Where the case contains only the report of the referee without any of the evidence, the appellate court will not set it aside unless the report contains facts which render its conclusions erroneous. The report must show that facts exist which are inconsistent with its conclusions of law. (Tomlinson v. The Mayor, 44 N. Y. 601 [1871].)

—— **No appeal on the evidence without it.]** The appellate court will not consider an appeal on the evidence where the case fails to show all the evidence adduced on the trial. (Miller v. Wright, 39 St. Rep. 44 [Sup. Ct. 1891].)

—— **When the case should be ordered to be annexed to the judgment-roll.]** When the case is settled and filed, after entry of judgment, the judge, referee or court should make an order directing that the case be annexed to the judgment-roll. (Cornish v. Graff, 36 Hun, 160 [1885].)

—— **Objection that a case does not contain a proper certificate.]** An objection that the case does not contain the certificates required by law must be taken by motion to dismiss the appeal. (Woolsey v. Lasher, 35 App. Div 108 [1898].)

—— **As to certificate on appeal from order of Surrogate's Court.]** (See Matter of Gowdey, 101 App. Div. 275.)

PRESUMPTION — Where the case does not allege that it contains all the evidence.] On the review of a trial before a judge or referee, unless the case shows that it contains all the evidence bearing on a disputed finding of fact, the court will assume that there was no evidence sufficient to sustain the finding. (Porter v. Smith, 35 Hun, 118 [1885].)

—— **Respondent presumed to have had inserted all the testimony necessary to sustain the rulings.]** Upon an appeal from a judgment dismissing a complaint the Appellate Division, in the absence of a certificate that the case contains all the evidence, will assume that the respondent has procured to be inserted therein all the testimony deemed essential to sustain the ruling. (Hewett v. Town of Thurman, 41 App. Div. 6 [1899].)

—— **Presumption that facts were proved to sustain the findings.]** Where a case upon appeal in an action tried by a referee contains only the judgment-roll and none of the evidence, the Court of Appeals will assume that the facts proved on the trial were sufficient to sustain the findings of fact made by the referee, and his conclusions of law are alone the subject for review. (Burrows v. Dickinson, 115 N. Y. 672 [1889].)

—— **When absence of certificate fails to compel presumption that evidence sustained verdict.]** The court is not bound to assume that there must have been evidence to sustain the verdict simply because of the absence of the certificate that all of the evidence is contained in the case.

Where a case contains a fact admitted by both parties, or where the evidence is all one way on a certain question of fact, the court is bound to

regard it, and is not at liberty to assume that there was evidence to the contrary. (Lydecker v. Village of Nyack, 6 App. Div. 90 [1896].)

—— **Presumption that sufficient evidence was given to support the judgment.]** In the absence of the statement that the case contains all the evidence, the court will presume that sufficient evidence was given to support the judgment. (Kissam v. Kissam, 21 App. Div. 142 [1897].)

—— **Presumption — Indulged by appellate court.]** The Appellate Division will assume that a referee has stated all the facts found by him affirmatively and that he negatives those facts litigated on the trial upon which his report is silent. (Manly v. Insurance Co., 1 Lans. 20 [Gen. T. 1869]. See *contra*, Hays v. Miller, 70 N. Y. 112 [1877].)

—— **Presumption by Court of Appeals, where, after three trials, no objection has been taken, and there was no certificate.]** Where the plaintiff's title in ejectment has been upon the fact of the death of her mother prior to the action, and at the trial no point was raised that the mother was not dead, and after three trials of the case and as many appeals no specific objection was taken by defendant to raise that question or to suggest that such a defect existed in the proof, and there was no certificate attached to the case that it contained all the evidence, held, that the Court of Appeals would presume that the fact of the mother's death was expressly or tacitly admitted at the trial or that it was in some way established. (Clason v. Baldwin, 152 N. Y. 204 [1897].)

—— The General Term will not raise presumptions in order to sustain a judgment for the recovery of a statutory penalty. (Conly v. Clay, 90 Hun, 20 [1895].)

—— The decision in Chubbuck v. Vernam (42 N. Y. 432 [1870]), that in such case the cause cannot be questioned in the Court of Appeals, reversed. (Stoddard v. Whiting, 46 N. Y. 627 [1871].)

—— **Uncontradicted evidence.]** When uncontradicted evidence establishes the existence of a fact essential to the plaintiff's right to recover, it will be presumed in support of a judgment in his favor that such fact was found by the referee, though not so stated in his report. (Bancker v. Mayor, 8 Hun, 410 [1896].)

—— **Presumption of consent where evidence is received without objection.]** Where evidence is received without objection, although no basis for it appears in the complaint, and no motion is made to strike it out, the parties are presumed to have consented that the court shall consider it, and it is the duty of the court to consider it the same as any other evidence in the case. (Otten v. Manhattan R. Co., 150 N. Y. 395 [1896].)

—— **Case without findings of fact — presumption.]** When a case comes up for review without any findings of fact, the decision will be presumed to be correct. (Viele v. Troy & Boston R. R. Co., 20 N. Y. 184 [1859].)

—— **Case without certificate — presumption that General Term passed on exceptions.]** The opinion of the General Term, to the effect that that court could not consider the questions of fact on account of the absence of a certificate that the case contained all the evidence, where nothing to that effect appears in the order or the judgment appealed from, cannot be considered by

the Court of Appeals, and it will be presumed that the General Term passed upon all the exceptions appearing in the case. (Rosenstein v. Fox, 150 N. Y. 354 [1896].)

—— Where there is no evidence in the record, there is no presumption that facts were shown other than those stated in the referee's report. (Corner v. Mackey, 147 N. Y. 574 [1895]; Bartlett v. Goodrich, 153 id. 421 [1897].)

—— **Presumption where decision of the court is general, and states no findings.**] Where the decision of the court below is a general one, rendered without expressing the facts found, it is regarded as a general verdict rendered by a jury, and the same presumption arises in its support. (Beardsley v. N. Y., Lake Erie, etc., R. R. Co., 15 App. Div. 251 [1897].)

—— **When statement of facts in complaint assumed to be true.**] On appeal from the judgment dismissing the complaint, all the statement of facts will be assumed to be true. (Reynolds v. Westchester Fire Ins. Co., 8 App. Div. 193 [1896].)

—— **Presumption in favor of referee's report.**] Every presumption is in its favor. It is assumed to be right and to be founded upon proof of every necessary fact. (Tomlinson v. The Mayor, 44 N. Y. 601 [1871]; Westcott v. Fargo, 6 Lans. 325 [Gen. T. 1872].)

—— **To what facts the presumption is confined.**] The presumption indulged by an appellate court in support of a judgment in an action tried by the court or referee that material facts which appear in the case but are not embraced in the express findings were found and considered, applies only to such facts as being found would sustain the special findings. (Armstrong v. Du Bois, 90 N. Y. 95 [1882].)

NEW TRIAL. See notes under Rule 31, *ante*.

TIME — Time of making.] The ten days for making a case begin to run from the entry of judgment and notice and service of a copy thereof. (Schwarz v. Weber, 103 N. Y. 658 [1886]; French v. Powers, 80 id. 146 [1880].)

—— Where the trial is before a jury, the time runs from the time of the trial or the motion for a new trial. (Kenney v. Sumner, 12 Misc. Rep. 86 [1895]; French v. Powers, 80 N. Y. 146 [1880].)

—— Statutory Construction Law — computation of time thereunder. (Aultman & Taylor Co. v. Syme, 91 Hun, 632 [1895].)

—— Computation of time. (People v. Burgess, 153 N. Y. 561 [1897].)

—— **Extension of time to serve exceptions does not extend the time to appeal, or vice versa.**] The extension of the time to file and serve exceptions, or a case with exceptions, does not also extend the time to serve a notice of appeal, nor does the extension of the time to appear *per se* extend the time to file and serve exceptions or to serve a case with exceptions. (Salls v. Butler, 27 How. Prac. 133 [Gen. T. 1863].)

—— Application for an extension of time to serve papers on appeal must be made in the court below. (Matter of Stafford, 21 App. Div. 476 [1897].)

—— Application for relief from default in serving a case should be made to the court from the judgment of which the appeal is taken. (Odell v. McGrath, 16 App. Div. 103 [1897].)

—— **Default in filing a case — what must be shown to open default.]** Where a party makes default in filing his case on appeal without applying for an extension of time, not only good grounds for the delay must be shown, but also for not having procured the extension of time, in the absence of which proof the appeal will be dismissed. (Gamble v. Lennon, 9 App. Div. 407 [1896].)

—— **Omission to make a case.]** See notes under Rule 33.

—— **Notice of entry of judgment — what notice is insufficient.]** A written notice that "the foregoing is a copy of a judgment entered in the clerk's office of the county of St. Lawrence at Canton, N. Y., on the 29th day of June, 1897, at twelve o'clock noon," such copy being neither signed by the clerk nor having inserted therein any amount of costs, is not a sufficient notice of the entry of judgment — section 1236 of the Code of Civil Procedure prescribing that a judgment "shall be signed by the clerk and filed in his office, and such signing and filing shall constitute the entry of the judgment." (Mason v. Corbin, 29 App. Div. 602 [1898].)

—— **As to form of notice of entry of judgment.]** (See Kelly v. Sheehan, 76 N. Y. 325 [1879].)

—— **Abandonment of case — stay until costs of prior action are paid.]** A plaintiff having been nonsuited, with leave to move for a new trial on a case and exceptions, served a notice on the defendant that she abandoned her case and exceptions, and that an order to that effect might be entered without notice, and thereupon commenced another action for the same cause of action; the defendant moved at Special Term that all proceedings on the part of the plaintiff in the second action be stayed until the costs in the first action should be paid; this motion was denied on the theory that the plaintiff's right to review or move for a new trial could not be terminated by notice, and that the case was still pending. The General Term reversed this ruling, and held that the plaintiff's right to move for a new trial was abandoned by the notice, and that the defendant could enter final judgment upon the nonsuit; the costs were then taxed, and the defendant entered final judgment in the first action, and then renewed the motion for a stay in the second action at Special Term, setting forth the proceedings since the first motion, and the motion was granted. (Noonan v. New York, L. E. & W. R. Co., 68 Hun, 388 [1893].)

—— **Default in having case signed and filed within ten days works an abandonment — relief thereafter.]** Default in having a case on appeal signed and filed within ten days after it has been settled works an abandonment of the appeal, and relief can only be had by motion in the court or branch of the court from which the appeal was taken. (Rothschild v. Rio Grande Western R. Co., 9 App. Div. 406 [1896].)

SURROGATE'S COURT — Appeal from a decision admitting a will to probate, disapproved.] An appeal from a surrogate's decree admitting a will to probate is useless, as the same result can be obtained by an action under section 2653a of the Code, and the practice of taking such appeals should be discouraged. (Matter of Austin, 35 App. Div. 278 [1898].)

—— **Surrogate's decision — how reviewed.]** The provisions of the Code of Civil Procedure regulating the method by which a review of errors on a trial

before a surrogate may be secured, and providing for a loss of a right of review unless such methods are regularly pursued, furnish and limit the only remedy against such errors. (In re Hawley, 100 N. Y. 206 [1885].)

—— **Clerical error.**] A surrogate has power, on motion, to correct a clerical error in a decree, where the motion does not involve a review of the decree upon the merits. (Matter of Henderson, 157 N. Y. 423 [1898].)

—— **Questions of law reviewed only upon exceptions taken under Code Civil Procedure, section 2545.**] Where a notice of appeal states that an appeal is taken from every part of the surrogate's decree, though no exception to the decision has been filed, the court may, in a proper case, reverse upon the facts. No question of law can be reviewed upon such an appeal, unless exceptions have been taken as provided by Code of Civil Procedure, section 2545. (Matter of Spratt, 4 App. Div. 1 [1896].)

—— **Findings by Surrogate's Courts — authority to make.**] Section 1023* of the Code of Civil Procedure has no application to a Surrogate's Court, which cannot, therefore, be required to determine particular questions before rendering the decision, but its authority to pass upon proposed findings after such rendition is expressly recognized by section 2545 of said Code. (Tilby v. Tilby, 3 Demarest, 258 [N. Y. Sur. Ct. 1885].)

—— **Case on appeal from — how made.**] The practice upon a trial before a Surrogate's Court of a question of fact and the preparation of papers on which an appeal shall be heard are assimilated to the proceedings on and after the trial of an action by the court, and for this purpose the surrogate's decree is regarded as a judgment in an action. (Hewlett v. Elmer, 103 N. Y. 156 [1886]; Waldo v. Waldo, 32 Hun, 251 [1884].)

—— **General Term and Court of Appeals.**] The provisions of the Code on this subject, including those defining and limiting the questions which may be brought up for review, are applicable to an appeal from the determination of the General Term affirming a surrogate's decree. (Hewlett v. Elmer, 103 N. Y. 156 [1886]; Waldo v. Waldo, 32 Hun, 251 [1884].)

—— **Case upon an appeal from surrogate's decree must be settled.**] To entitle an appellant, on an appeal from a surrogate's decree, to a review of the facts found by the surrogate, a case containing the evidence must be made and settled by the surrogate, as prescribed by section 2576 of the Code of Civil Procedure. (Matter of Walrath, 69 Hun, 403 [1893].)

—— Making of a case on appeal from an informal decision of the surrogate, does not preclude raising the question of jurisdiction. (Matter of Campbell, 88 Hun, 374 [1895].)

—— **Review of surrogate's decision — without any case.**] When the erroneous decision of a surrogate may be reviewed upon an appeal from his decree without any case being prepared and settled. (Matter of Jackson, 32 Hun, 200 [1884].)

—— **Right of a surrogate to extend the time for making a case.**] Sections 2572 and 2577 of the Code of Civil Procedure and Rules 32 and 33 of the General Rules of Practice are entirely independent of each other; the surrogate may after the entry of the decree or order sought to be reviewed extend the

* Repealed by chapter 688 of 1894.

time for making and serving a case, although the appeal has not been perfected, provided that the time for perfecting it is as yet unexpired. (In re Estate of James Tilby, 1 How. Prac. [N. S.] 452 [N. Y. Sur. Ct. 1885].)

—— **Findings of a surrogate on an accounting — how far subject to review in Court of Appeals.]** If an essential finding be made by a surrogate upon the accounting of an executor or an administrator, without the support of any evidence, it is an error of law, which it is the duty of the Court of Appeals to correct. (Matter of Rogers, 153 N. Y. 316 [1897].)

—— **Exceptions and a decision essential to the review of a surrogate's decree.]** An appeal from a decree of the Surrogate's Court upon an accounting cannot be heard where no findings were requested of the court, and there were no exceptions filed to the rulings of the court, and no decision in writing was filed, stating separately the facts found and the conclusions of law; and the mere fact that there was injected into the accounting a motion to set aside previous decrees in no way changes the nature of the proceeding nor obviates the necessity of the findings, exceptions and decisions. (Matter of Account of Perkins, 75 Hun, 129 [1894].)

—— **Exceptions essential to a review of its decree.]** An appeal from a Surrogate's Court brings up for review only questions which were raised by the taking of proper exceptions — a general exception to the surrogate's decree and to each and every part of it is insufficient. (Angevine v. Jackson, 103 N. Y. 470 [1886].)

—— **Exceptions to findings of a referee confirmed by the surrogate, raises what question.]** A surrogate having confirmed the findings of a referee, an exception to the findings raises the question whether there was any evidence to sustain the findings. (Matter of Humfreville, 6 App. Div. 535 [1896].)

—— **Right of a respondent on an appeal from a Surrogate's Court to set up defects in portions of the decree not appealed from.]** In a proceeding pending in the Surrogate's Court, the surrogate disallowed the claim of the mother of the testatrix to a one-sixth interest in the estate, and directed the whole residuary estate to be invested and retained by the executor until an infant child should die or become of age. The mother did not appeal; the executor appealed in 1880 from other parts of the decree; in her answer to the appeal the mother alleged that said portion of the decree disallowing her claim was erroneous. Held, that the General Term had jurisdiction to review and reverse the decision. Rule 42 of Supreme Court of 1878; Code of Civil Procedure, section 2587. (Freeman v. Coit, 96 N. Y. 63 [1884].)

—— **What questions are presented on appeal from surrogate's decree.]** An appeal by administrators from a decree of the Surrogate's Court allowing their accounts as presented, does not bring before the appellate tribunal the question of the right of one of them, as an individual, to recover a claim made by him against the estate. (Matter of Mayer, 84 Hun, 539 [1895].)

—— **On appeal from surrogate's decree, what the court will not assume.]** On appeal from a decree of a surrogate, where the will is not contained in the appeal book, the General Term will not assume that the duties of the defendant-respondent, as executor and trustee, were so blended as to render a single account proper. (Matter of Hammond, 92 Hun, 478 [1895].)

—— **Error must be shown to cause prejudice.]** An appellate court should not reverse a decree of a surrogate for an error in admitting or rejecting evidence, unless it appears that the expectant was necessarily prejudiced thereby, and it is at liberty to disregard such an error if it could have had no influence upon the determination of the case. (Matter of Miner, 146 N. Y. 121 [1895]. See, also, Matter of Seagrist, 1 App. Div. 615 [1896].)

—— **Vacating decree for fraud, when justified.]** A decree of the Surrogate's Court should not be vacated for fraud, unless the facts would justify setting aside a judgment of the Supreme Court, in which case the fraud must be clearly established. (Matter of Richardson, 81 Hun, 425 [1894].)

—— **Appeal from a surrogate's decree confirming a referee's report — on what heard.]** An appeal from a surrogate's decree confirming the report of a referee must be heard on the testimony on which the surrogate acted, and the case cannot be amended by the Appellate Division so as to change the transcript of testimony which was filed; the remedy of a party dissatisfied with such transcript is by objection in the Surrogate's Court before the motion to confirm is made. (Matter of Dietzel, 36 App. Div. 300 [1899].)

It is the duty of one appealing from a decree of a surrogate to insert the testimony in the case and also to furnish the pleadings and the citations. (Simpson v. Maney, 100 N. Y. Supp. 620. See, also, Matter of Goldsticker, 54 Misc. Rep. 175.)

—— **Appeal from surrogate's order fixing appraisers' fees.]** An order of a Surrogate's Court fixing the fees of appraisers of the estate of a deceased testator is a final order affecting a substantial right and so is appealable to the General Term of the Supreme Court. (Matter of Harriot, 145 N. Y. 540 [1895].)

CRIMINAL CASE — Expense of preparing the case.] When the expense of preparing the case in a criminal cause will be charged upon the county. (People v. Jones, 34 Hun, 626 [1885]. See § 485 of the Code of Civil Procedure.)

ARBITRATORS — Appeal from the decision of arbitrators — upon what papers heard.] Appeal from an order confirming the report of arbitrators, or from the judgment entered thereon; upon what papers it must be heard; no case can be proposed or served. (Matter of Poole v. Johnston, 32 Hun, 215 [1884].)

SETTLEMENT — Before what judge — presumption that it was correct.] While a bill of exceptions in a criminal action ought regularly to be settled by the judge before whom the indictment was tried, the parties may consent that the settlement be had at a subsequent term before the judges then composing the court, although not the ones who sat upon the trial. A bill of exceptions so settled was returned upon the writ of error. It did not appear that there was any objection to the settlement at the time it was made, or that any application was made to correct the record upon the ground that the bill of exceptions was improperly inserted. Held, that the presumption was that the settlement as made was consented to, and an objection to the regularity thereof upon the argument of the case in the Court of Appeals would not be entertained. (Wood v. People, 59 N. Y. 117 [1874].)

—— **Stenographer's minutes to be produced.]** Where the proposed amendments seek to strike out a large quantity of testimony actually taken, the court should refuse to settle the case unless the minutes of the official stenographer are submitted to him. (Kamermann v. Eisner & Mendelson Co., 25 Misc. Rep. 405 [1898].)

—— **Power of the trial judge to strike out evidence.]** Upon the settlement of a case on appeal the trial judge has no power to strike out evidence which the appellant regards as material where facts are not or cannot be disputed, but the certificate of a trial judge is conclusive as to the occurrences at the trial when the facts are disputed. (Healey v. Terry, 26 N. Y. St. Rep. 929 [N. Y. City Ct. 1889].)

—— **Power of a justice to strike out exceptions from a case as filed.]** A justice out of court has no power to make an order striking out exceptions to the findings, and refusals to find, of the court in an equity case from the judgment-roll and a case on appeal as filed. (Pettit v. Pettit, 20 Wkly. Dig. 154 [Sup. Ct. 1884].)

—— **Judge's decision conclusive.]** The settlement by the trial judge of the case on appeal upon a dispute as to what occurred is conclusive. (Balz v. Shaw, 11 Misc. Rep. 444 [1895].)

—— Unless the denial of a substantial right is apparent, the decision of the trial judge in settling a case on appeal is conclusive. (James v. Work, 51 N. Y. St. Rep. 323 [Supr. Ct. 1893].)

—— **When trial judge will not settle case.]** The trial judge will not settle a case which does not comply with the rule requiring the evidence to be reduced to narrative form, and the rulings excepted to, to be formally stated, followed by a formal statement that the same was excepted to. (Donai v. Lutjens, 20 Misc. Rep. 221 [Sup. Ct. Sp. T. 1897].)

—— **Case and amendments — when legally settled.]** Cases and amendments upon appeal are not legally settled under the rules of court until they have been approved and ordered on file by the trial judge, and that whether the parties have agreed upon the settlement or not. (Gelinka v. Kranskopf, 3 N. Y. Wkly. Dig. 426 [N. Y. Marine Ct. 1876].)

—— **Omission of stenographer to note an exception — remedy.]** Where a stenographer omits to note an exception, the remedy is by moving to resettle the case, and not by vacating the judgment. (Tonert v. Mayor, 1 Abb. N. C. 302 [Chamb. 1876].)

—— **Omission in stenographer's minutes.]** It is no answer to a motion to correct a case by inserting matters alleged to have taken place on the trial, that they do not appear in the stenographer's minutes. It is the trial judge's, and not the stenographer's, duty to settle a case. (Foster v. Standard Nat. Bank, 21 Misc. Rep. 8 [1897].)

—— **Failure to settle a case.]** Where a case upon appeal has never been settled nor ordered on file by any one who participated in any portion of the proceedings it must be stricken from the calendar. (Williams v. Lindblom, 87 Hun, 303 [1895].)

—— **Failure to renotice case for settlement, after death of attorney — dismissal of appeal refused.]** Where a case on appeal had been served, and re-

spondent's attorney died and another attorney was substituted, and no proceedings were taken to have the case settled, held, that while the appellant was chargeable with laches in failing to renotice the case for settlement, an absolute dismissal of the appeal would not be ordered, no order directing the case to be filed or declaring it abandoned having been procured by respondent. (N. Y. Land & Improvement Co. v. Chapman, 14 Misc. Rep. 187 [N. Y. Supr. Ct. 1895].)

—— **An appeal should not be dismissed for failure to settle case.]** An appeal should not be dismissed for failure to procure the case to be settled and signed, since the appellant may appeal upon the judgment-roll alone. (Brush v. Blot, 11 App. Div. 626 [1896].)

—— **Appeal not considered on a case not settled.]** An appeal from a judgment entered on the report of a referee will not be heard when the case contains neither the certificate of the clerk required by section 1353 of the Code of Civil Procedure nor evidence that it has been settled. (Dwight v. Elmira, Cortland, etc., R. R. Co., 29 St. Rep. 250 [Sup. Ct. 1890].)

—— **Referee's certificate cannot be waived.]** A stipulation contained in a case signed by the attorneys for the respective parties, waiving certification of the case and exceptions, and consenting that the same be filed, does not cure the defect arising from the failure to have the case and exceptions settled by the referee before whom the action was tried. (Bonnefond v. DeRussey, 73 Hun, 377 [1893].)

—— **Mandamus to compel settlement.]** A mandamus is the proper mode of compelling a referee to settle a case. (People v. Baker, 14 Abb. 19 [Sp. T. 1861]; S. C., 35 Barb. 105.)

—— **Remedy — by motion.]** If a referee refuses to insert proper matter in the case, the remedy is not by appeal, but by motion in the court below to compel him to do so. (Lefler v. Field, 47 N. Y. 407 [1872]; Van Slyke v. Hyatt, 46 id. 259 [1871], dismissing appeal from S. C., 9 Abb. Pr. [N. S.] 58.)

—— **Exceptions need not be signed or sealed by judge.]** The exceptions taken need not be signed or sealed by the justice before whom the trial was had. (Zabriskie v. Smith, 11 N. Y. 480 [1854].)

—— **A case in a criminal cause cannot be settled by stipulation.]** Practice on appeal in criminal cases — the case cannot be settled by stipulation of the attorneys. It must be settled by the judge and filed with the court. (People v. Bradner, 44 Hun, 233 [1887].)

RESETTLEMENT — Motion, where to be made.] An application for a resettlement of a bill of exceptions must be made to a justice at Special Term, notwithstanding an appeal is pending in the Court of Appeals; and it is not necessary to apply first to that court to have the cause remitted to the Supreme Court. (Whitbeck v. Wayne, 8 How. Prac. 433 [Gen. T. 1853]; Talcott v. Rosenberg, 3 Daly, 203–213 [Gen. T. 1870]; S. C., 8 Abb. [N. S.] 287; Gould v. Glass, 19 Barb. 179 [Gen. T. 1855]; Luysten v. Sniffen, 1 id. 428 [Sp. T. 1847]; S. C., 3 How. Prac. 250; Graham v. The People, 63 Barb. 468–474 [Gen. T. 1872]; *contra*, Adams v. Bush, 2 Abb. [N. S.] 118 [Gen. T. 1865].)

—— **Power of court to resettle case, not exercised to insert a memorandum of trial judge.]** The power of the court to resettle a case on appeal, after a hearing and reversal in furtherance of justice, held not to be exercised to insert a memorandum of the trial judge, where a new trial was in any event desirable. (Hix v. Edison Electric Light Co., 12 App. Div. 627 [1896].)

—— **Where exceptions should be noted in the record on resettlement.]** Upon resettlement the appellant is entitled only to have the exceptions noted in the exact place on the record at which they were taken, and where the stenographer's notes show that they were taken at the close of the body of the requests to charge, held, that they should be inserted there and not elsewhere. (Zimmer v. Met. St. Ry. Co., 28 App. Div. 504 [1898].)

—— **Order to recite that it was made on a private stenographer's minutes.]** Where a motion to resettle a case is made on a private stenographer's minutes, the order must recite, although the court rejects them. (Deutermann v. Pollock, 38 App. Div. 493 [1899].)

—— **Argument suspended to allow motion for resettlement.]** An argument may be suspended by the Court of Appeals in order to allow a motion to be made for a resettlement of the case. (Rice v. Isbane, 1 Keyes, 44 [1863].)

—— **City Court of New York — power of its Special Term to order resettlement.]** The Special Term of the New York City Court may direct a case on appeal to be sent back to the trial justice for resettlement, if it deems it proper, but it cannot direct that it be resettled in a specified manner. (Mason v. Tietig, 22 Misc. Rep. 557 [188].)

—— **On motion for a new trial, the judge may amend the case.]** On the argument of a motion for a new trial on a case, the judge can amend it so as to agree with his minutes. (Toplitz v. Raymond, 10 Abb. 60 [N. Y. Com. Pl. Sp. T. 1859].)

—— **After decision of appeal, too late.]** After the decision of an appeal it is too late to move for a resettlement of the case (Fish v. Wood, 2 Abb. 419 [Gen. T. 1856]; Kettle v. Turl, 14 Misc. Rep. 637 [1895]; nor can a bill of exceptions be altered after argument and judgment. (Fitch v. Livingston, 7 How. Prac. 410 [Court of Appeals, 1853].)

—— **After decision of General Term, and appeal to Court of Appeals.]** After a cause has been heard and determined by the General Term, and an appeal taken to the Court of Appeals, it is too late to send the case back for an entire resettlement. Specific errors and omissions may, however, be corrected and supplied. (Catlin v. Cole, 19 How. Prac. 82 [Sp. T. 1860]; S. C., 10 Abb. 387.)

—— **Effect of not entering order made on motion for resettlement.]** Until the entry of another order upon the judge's decision on the application for a resettlement, there is no order remaining in force or effect. This, although the judge in deciding the application for a resettlement refuses to disturb the first order. (Star Insurance Co. v. Godet, 2 Jones & Spencer, 359 [Gen. T. 1872].)

—— **Appeal from order denying a resettlement of a case.]** No appeal will lie from an order denying a motion to resettle the case on appeal. (Klein v. Second Avenue Railroad Co., 53 Supr. Ct. [J. & S.] 531 [1886].)

—— **When an order denying a motion for a resettlement is appealable.]** Upon the trial of an action the court excluded all evidence to be offered by the defendant in support of a counterclaim set up in his answer. A motion to have the case resettled and to have the ruling of the court excluding such evidence and the exception of the defendant thereto inserted, was denied. Held, that this was error. That as the right of the party to review the action of the court below was absolute, so also was his right to have a complete and accurate statement of the matters determined against him set forth in the case; and as this was a substantial right, an order affecting it was appealable. (Gleason v. Smith, 34 Hun, 547 [1885].)

—— When appeal lies from order denying resettlement, and resettlement is ordered. Place for noting exceptions. (Zimmer v. Met. St. Ry. Co., 28 App. Div. 504 [1898].)

—— **Rule on review of an order denying a resettlement.]** The appellate court should not reverse an order denying the resettlement of a case where it is apparent that the result would not be affected by inserting the additional matter, although it should not, simply to sustain the order, assume that the trial judge had other proof as to the matter in question than that contained in the affidavits upon which the order of denial was made, and in which affidavits the statements of both sides agree in respect to the point in controversy. (Green v. Shute, 27 St. Rep. 816 [N. Y. Com. Pl. 1889], affg. Id. 69].)

—— **Narrative form — resettlement.]** The court may send a case back for resettlement when the testimony has not been changed to narrative form, as required by Rule 34 of the General Rules of Practice. (Shaw v. Bryant, 47 St. Rep. 227 [Sup. Ct. 1892].)

—— **Resettlement — to insert argument of counsel.]** A resettlement of the case will not be ordered to permit the insertion of an argument of counsel indicating the possible interest of a witness who has testified only to the execution of the assignment of the cause of action, which has been admitted without objection, and is admitted to be valid between the parties. (Levy v. Dennett, 25 Misc. Rep. 307 [1898].)

—— **Resettlement in a particular way, not ordered.]** The Special Term cannot compel a referee to settle a proposed case on appeal in a particular way, but may, under proper circumstances, send it back to the referee for resettlement. (Ross v. Ingersoll, 35 App. Div. 379 [1898].)

—— **Resettlement ordered on account of absence of papers.]** All papers read or used upon a motion upon either side must be specified in the order resulting; and in the case of apparent absence of a paper on a hearing of the appeal from the order, the Appellate Division will order its resettlement. (Farmers' National Bank of Annapolis v. Underwood, 12 App. Div. 269 [1896].)

—— **Recollection of judge.]** In settling a case on exceptions, when it does not appear that the action of the trial justice in striking out from the case a ruling and exception thereto deemed material, was based upon his own recollection, the appellant's motion for a resettlement should be granted when the affidavits are clear and specific that such ruling was made and the stenographer's affidavit is that the minutes furnished by him were a correct transcript of his stenographic notes. (Jenkins v. Bishop, 133 App. Div. 517.)

As to settlement of case on appeal in the first department, see Henry v. Interurban St. Ry. Co., 115 App. Div. 352. See, also, Volhard v. Volhard, 115 id. 548; Knobloch v. Taube, 53 Misc. Rep. 543.

CORRECTION — Power of judge to correct his charge.] A judge has a right to correct his charge as presented by a case, even though the parties may have agreed upon it. (Root v. King, 6 Cow. 569 [1827]; Walsworth v. Wood, 7 Wend. 483 [1832].)

—— When appellant should be allowed to amend case as a matter of favor.] Where respondent concedes that in fact the case on appeal contains all the evidence, appellant should be allowed, as a matter of favor, to amend the case by inserting a statement to that effect. (Martin, Bing & Co. v. Baust, 23 App. Div. 234 [1897].)

—— A judge may correct a case after it has been filed.] A trial judge who has ascertained that a case does not state the occurrences upon the trial in accordance with the facts, has authority, upon notice to the parties, or their counsel, to correct such case, even after it has been filed pursuant to a stipulation of the attorneys. (McManus v. Western Assurance Co., 40 App. Div. 86 [1899].)

—— Respondent not to serve a new case by way of amendment.] Where a proposed case is served, it is irregular for the adverse party to serve a case drawn by himself as a substitute, by way of amendment. (Stuart v. LaFarge, 4 Bosw. 616 [Sp. T. 1859]; S. C., 3 id. 657.)

—— Where no facts were found by trial court.] On appeal from a judgment in an action tried by the court without a jury, in which no findings of fact had been made, held, that the hearing should be suspended until such findings were supplied. (Watson v. Barker, 16 Abb. 203 [Gen. T. 1863].)

—— Omission of referee's findings — appeal dismissed.] When a case omitted the referee's findings the appeal was dismissed by the Court of Appeals. (Bissell v. Hamlin, 13 Abb. 22 [Gen. T. 1860].)

—— The General Term in such a case suspended the argument until they could be supplied. (Watson v. Barber, 16 Abb. 203 [Gen. T. 1863].)

—— Omission of referee's opinion — argument postponed.] When a referee's opinion was omitted, the argument of the appeal was postponed in order to enable the party to bring it before the court. (Warren v. Warren, 22 How. Prac. 142 [Gen. T. 1861].)

—— Defective case, when sent back for correction.] A case will be sent back for correction when it is so imperfect that the question in dispute cannot be properly examined. (Matter of Strasburger's Estate, 27 St. Rep. 509 [Sup. Ct. 1889].)

—— Where an exception by defendant puts upon the plaintiff the responsibility of adding by amendment to the case.] Where there is no statement that the case on appeal contains all the evidence, but an exception appears to the denial of the motion to dismiss the complaint, the exception is a notice to the plaintiff of an intention to raise the question of the sufficiency of his proof, and puts upon him the responsibility of adding to the case, by amendment, any needed proof in support of the ruling excepted to. (Wynne v. Haight, 27 App. Div. 7 [1898].)

—— **Errors in the printed case disregarded — unless corrected on motion.]** Errors in the printed case will be disregarded unless corrected by motion at Special Term, before the case is brought on for argument. (Hackley v. Draper, 2 Hun, 523 [1874].)

—— **Correction is the proper remedy where different papers are used on appeal.]** If the printed papers to be used on appeal were not the papers on which the order below is granted, the remedy is to move in the appellate court to correct the printed papers filed and served, not to strike out from the appeal papers an affidavit which varied from that used below. (People ex rel. Mulligan v. Collis, 8 App. Div. 618 [1896].)

—— **Jurisdiction of the Supreme Court over a case in the Court of Appeals — power to make amendment to case.]** Although a copy of the record has been filed with the clerk of the Court of Appeals, on appeal to it, the court below so far retains jurisdiction of the case as to enable it to make such amendment as it shall deem proper, and to order the amendment to be duly certified to, and filed with the said clerk, and, when duly filed, is to be regarded as part of the original return. A motion, therefore, to remit for the purpose of permitting the court below to amend the record, if it should desire to do so, is necessary and should be denied. (Peterson v. Swan, 119 N. Y. 662 [1890].)

—— **Appeal to Court of Appeals — power of Trial Term to amend case.]** Upon an appeal to the Court of Appeals, the Trial Term may not amend the case used at General Term, without the approval of the latter. (Clendenning v. Lindner, 64 St. Rep. 623 [1895].)

—— **Case not corrected by Court of Appeals.]** Where a case is made for the purpose of an appeal to the General Term and findings are improperly or incorrectly contained therein, a motion for correction of such case must be made in the Supreme Court. The Court of Appeals cannot correct such a case, as it has only to do with the case presented. (Binghamton O. H. Co. v. City of Binghamton, 156 N. Y. 651 [1898].)

—— **Not for the purpose of reversing a judgment.]** The pleadings will not be amended on appeal for the purpose of reversing a judgment. (Volkening v. De Graaf, 81 N. Y. 268 [1880].)

—— **Amending record pending an appeal to the General Term — Special Term cannot.]** After an appeal is taken to the General Term of the Supreme Court from a judgment of a County Court reversing a judgment of a justice of the peace, the Special Term of the Supreme Court has no power or jurisdiction to make an order requiring an amendment of the justice's return, nor to amend the printed papers on appeal to the County Court, nor to add to the record papers not contained in the printed case. The application to perfect an alleged defective record should be made to the court whose record is sought to be reviewed, and the appellate court may stay the argument of appeal until the party applies to the court below to have the record corrected. (Pratt v. Baker, 88 Hun, 301 [1895].)

—— **At General Term — not proper.]** There is no practice which will justify the court at General Term in correcting the case as settled on motion. (Porter v. Parks, 2 Hun, 675 [1874].)

—— **Case not corrected at General Term.]** A case which has been settled on motion will not be corrected by the court at General Term. (Porter v. Parks, 2 Hun, 675 [1874].)

—— **Amendment by appellate court.]** A change of judges does not prevent the General Term from amending its record. (Buckingham v. Dickinson, 54 N. Y. 682 [1874].)

—— **Not to obtain a reargument.]** The court at General Term will not allow a case to be amended and a reargument to be had thereon. (Wright v. Terry, 24 Hun, 228 [1881].)

—— **Amendments by Appellate Division.]** The Appellate Division has no authority to entertain, as an original application, a motion to have amendments to a proposed case on appeal, allowed by the referee, disallowed, and to have certain other proposed amendments granted. (Ross v. Ingersoll, 35 App. Div. 379 [1898].)

—— **When a case should be sent back for amendment.]** In the absence of a stipulation amending the return of a case on appeal, it should be sent back to the trial judge for amendment upon a motion of the court itself, where it is apparent that an erroneous statement has been made as to the date of the judgment. (Baldwin v. Thibaudeau, 39 St. Rep. 54 [N. Y. Com. Pl. 1891].)

—— **Of case after argument not allowed.]** (People v. Board of Apportionment, 1 Hun, 123 [1874]; Hackley v. Draper, 2 id. 523 [1874].)

—— Motion to amend is the proper remedy when the return of the court below does not include the judgment *in extenso*. (Gates v. Williams, 10 Misc. Rep. 403 [1894].)

—— **Of case after final decision in Court of Appeals, not allowed.]** An amendment of the record *nunc pro tunc*, on an application to the Supreme Court after a final decision in the Court of Appeals, will not be allowed. (Drake v. New York Iron Mine, 38 App. Div. 71 [1899].)

—— **On motion for a new trial.]** On the argument of a motion for a new trial on a case, the judge can amend it so as to agree with his minutes. (Toplitz v. Raymond, 10 Abb. 60 [N. Y. Com. Pl. Sp. T. 1859].)

—— **Amendment after argument and decision.]** A case may be amended, even after argument and decision, in the appellate court. (O'Gorman v. Kamak, 5 Daly, 517 [Gen. T. 1875].)

—— **Amendment, when not allowed after decision of appeal at General Term.]** A case will not be amended after a decision at the General Term, on the ground that such amendment would show that a point decided against the party seeking such amendment has been waived. (People ex rel. Baker v. Board of Apportionment, 1 Hun, 123 [1874].)

—— **Statement of facts under Code of Procedure, § 333 — where corrected.]** Where a judgment is rendered by the General Term, upon a verdict taken, subject to the opinion of that court, and a statement of facts is prepared in accordance with section 333 of the Code of Civil Procedure, which statement is defective, it must be sent back to the Supreme Court for correction. (Jaycox v. Cameron, 49 N. Y. 645 [1872]; Smith v. Grant, 17 How. Prac. 381 [Gen. T. 1859].)

—— **Amendment to case, where the fact was in dispute.]** When upon the trial, there was an issue as to whether an action was first commenced as an equity suit, and the plaintiff thus prevented from bringing an action for fraud, the defendant cannot amend his case upon appeal, by inserting in the summons the words "in equity suit." (James v. Work, 51 St. Rep. 323 [Sup. Ct. 1893].)

—— **Amendment will not be made to show statement of counsel.]** The case will not be amended to show a simple statement of counsel, merely an assertion of his view of the law as applicable to the facts. (Matter of Levy's Will, 91 App. Div. 483; affd., 179 N. Y. 603.)

EXCEPTIONS — Necessary for review.] When a point not taken on the trial cannot be raised on appeal. (Hecla Powder Co. v. Sigua Iron Co., 157 N. Y. 437 [1899]; Fallon v. Lawler, 102 id. 28 [1886]. (See Gernon v. Hoyt, 90 id. 631 [1882]; Wellington v. Morey, Id. 656 [1882]; McKean v. Adams, 11 Misc. Rep. 387 [N. Y. Com. Pl. 1895]; German American Bank v. Daly, 88 Hun, 608 [1895]; Kingston Carriage Co. v. Hutton, 69 St. Rep. 190 [Ulster County Ct. 1895].)

—— **Requisites to objections and exceptions.]** An objection to the admission of evidence is not available in the absence of an exception to the ruling made. An exception following an objection which did not state the grounds thereof is nugatory. (Strong v. The Prentice Brown Stone Co., 10 Misc. Rep. 380 [N. Y. Com. Pl. Gen. T. 1894].)

—— An objection taken to the admission in evidence, upon the trial of an action, of the assignment of a claim executed by a corporation under its seal and signed by its president and duly acknowledged, and the authority to sign and the genuineness of the seal sworn to by him, on the ground that it is incompetent and immaterial, is not sufficient to present the question that the assignment is inadmissible in evidence on the ground that it is a void instrument, because it has not been shown to have been the act of the corporation by proof of the resolution which authorized it. (Eder v. Gildersleeve, 85 Hun, 411 [1895].)

—— An objection taken after the question has been answered should not be considered in the absence of anything to show that it could not have been taken in time. (Perkins v. Brainard Quarry Co., 11 Misc. Rep. 328 [1895].)

—— **Necessity of objection and exception.]** Where, upon the trial of an action, after a response has been made to a question asked of a witness, an objection is made to the admission of such testimony by the attorney for one of the parties, no question is presented thereby to be reviewed upon appeal if no ruling be made upon the objection, no exception be taken and no motion be made to strike out the testimony given. (Brand v. Newton, 82 Hun, 550 [1894].)

—— The conclusions of law cannot be reviewed in the absence of an exception. (Matchett v. Lindberg, 2 App. Div. 340 [1896].)

—— **To present questions of law for review by City Court.]** Upon appeal from the City Court of New York a reversal can be had only for an error of law presented by due exception. (Western National Bank v. Flannagan, 14 Misc. Rep. 317 [1895].)

—— **To the review by the Appellate Term of a judgment by the General Term of the City Court.]** An exception taken to the denial of a motion to dismiss the complaint, at the close of plaintiff's case, is unavailing if the motion is not renewed at the end of the entire case. (Scott v. Yeandle, 20 Misc. Rep. 89 [Sup. Ct. App. T. 1897].)

—— The Appellate Term can review facts and grant new trials only on exceptions taken in proper form and at the right time. (Manning v. West, 19 Misc. Rep. 481 [Sup. Ct. App. T. 1897].)

—— An appellate court will not review points not raised by a proper exception. (Rheinfeldt v. Dahlman, 19 Misc. Rep. 162 [Sup. Ct. App. T. 1897].)

—— **On appeal from an order denying a new trial.]** Upon an appeal from an order denying a motion made for a new trial of an action an appellate court will disregard the failure of the party against whom the judgment was rendered to take exceptions to portions of the charge of the trial court, if it is satisfied that injustice has been done. (Raven v. Smith, 87 Hun, 90 [1895]; Interstate Steamboat Company v. First National Bank of Syracuse, 87 id. 93.)

—— **Not to be first raised on appeal.]** Objections not raised below cannot be first raised on appeal. (Dey v. Prentice, 90 Hun, 27 [1895]; Sheehy v. Utah, etc., Stage Co., 15 Misc. Rep. 21 [N. Y. Supr. Ct. 1895]; Hoff v. Coumeight, 14 id. 314 [N. Y. Com. Pl. 1895]; Stevenson Co. v. Tucker, Id. 297 [N. Y. Com. Pl. 1895]; Side v. Brenneman, 7 App. Div. 273 [1896]; Thelberg v. Nat. Starch Mfg. Co., 2 id. 173 [1896].)

—— Failure to file exceptions to the conclusion of the referee, and the decision of the court as to costs, prevents raising the question upon appeal. (Wildey v. Robinson, 85 Hun, 362 [1895].)

—— **Necessity of exceptions to a decision of fact.]** Where a finding of fact is made by the court without evidence to support it, an exception is necessary to bring the case up for review, as the question whether there was evidence to support the finding is one of law, and if in such case no exception is taken to the ruling of the trial court and filed as required by the Code of Civil Procedure, and no exception is taken to the conclusion of law that the complaint be dismissed, the judgment entered upon such decision will be affirmed on appeal. (Smith v. Moulson, 88 Hun, 147 [1895]; Code of Civ. Pro., § 994.)

—— Where the parties appealing from a judgment fail to serve or file exceptions to the decision of the Special Term upon which the judgment was entered they are not, upon appeal, in a position to challenge the findings of fact or conclusions of law of that court. (Miller v. Larmer, 85 Hun, 313 [1895].)

—— An exception to a decision of a Special Term, made under Code of Civil Procedure, section 1022, is necessary to present the question for review, and in the absence thereof the judgment entered upon the decision must be affirmed. (Price v. Levy, 26 App. Div. 620 [1898].)

—— **Referee's decision not reviewable without exceptions.]** A referee's decision cannot be reviewed by the Appellate Division in the absence of exception. (Van Vleck v. Ballou, 40 App. Div. 489 [1899]; Goldstein v. Guedalia, Id. 451 [1899].)

—— **What reviewable where no exceptions are filed to a decision.**] An appeal from a judgment entered upon a decision stating separately the facts found and the conclusions of law, to which decision no exception has been filed, brings up for review only the rulings to which exceptions were taken on the trial. (Lanier v. Hoadley, 42 App. Div. 6 [1899].)

—— **Evidence taken on a reference — objection to, on another trial**] When, upon the trial of an action, one of the parties thereto seeks to read evidence taken before a referee in a manner not provided by law, the adverse party, although he has appeared and participated in such examination before the referee, has the right to object to its introduction, and the overruling of an objection thus taken is erroneous. (Crumbie v. The Manhattan Railway Co., 83 Hun, 1 [1894].)

—— **Must be taken to determination of officer having power to decide.**] Exceptions to a report, made pursuant to a reference to take evidence and report it to the court with the opinion of the referee thereon, are unavailing. The exceptions can be taken only to the determination of some court or officer having power to decide the question, the decision of which is challenged. Doremus v. Doremus, 76 Hun, 337 [1894].)

—— **Failure to file — effect of.**] If a party neglects to except to a referee's report for eight days after notice of its filing, it becomes absolute, although it be defective on its face. (Catlin v. Catlin, 2 Hun, 378 [1874].)

—— Unless exceptions be taken to the report of a referee appointed to take proof of title in a partition suit no appeal can be taken to the Court of Appeals. (Platt v. Platt, 105 N. Y. 488 [1887].)

—— When a failure to take exceptions prevents raising conclusion of law. (Smith v. Moulson, 88 Hun, 147 [1895].)

—— **Appeal from a judgment entered on a verdict.**] An appeal from a judgment entered on a verdict must be determined solely upon exceptions taken on the trial. (Third Ave. R. R. Co., v. Ebling, 100 N. Y. 98 [1885]; People v. Boas, 92 id. 560 [1883]; People v. McGloin, 91 id. 241 [1883].)

—— **Exceptions to findings of fact — when good.**] Under the Code of Civil Procedure no exception lies to a finding of fact unless it be wholly unsupported by evidence, nor does any exception lie to a refusal to find a fact as requested. (Porter v. Smith, 35 Hun, 118 [1885].)

—— Failure to request a finding of fact precludes a review of the evidence, but an exception to a finding of fact, unsupported by proof, raises a question of law. (McEntyre v. Tucker, 10 Misc. Rep. 669 [N. Y. Com. Pl. 1895].)

—— **Failure to except to findings of fact, and conclusions of law.**] Where the case was tried by the court and there was no exceptions to the findings of fact or conclusions of law, the trial being before the statute dispensed with findings, held, that an appeal should be dismissed. (Baird v. Spence, 10 Misc. Rep. 772 [N. Y. Com. Pl. 1894].)

—— **The findings of fact must sustain the judgment — otherwise an exception to the legal conclusion is good.**] It is essential to the support of a judgment in an action tried by the court, that the findings of fact establish a legal right on the part of the successful party to the relief granted, and when they do not, and there is nothing in the evidence to show such right, an exception to the legal conclusion of the court, directing judgment, presents the question on appeal. (Moores v. Townshend, 102 N. Y. 387 [1886].)

—— **Exception to a conclusion of law sustained by the finding of fact.]** An exception in terms to the referee's conclusion of law cannot avail the party excepting, if such conclusion was required by the findings of fact on which it was based. (Daniels v. Smith, 130 N. Y. 696 [1892].)

—— Exceptions to the decision of the referee present errors of law only. (Miller v. Altieri, 13 Misc. Rep. 220 [N. Y. Com. Pl. 1895].)

—— Where there are no exceptions to a conclusion of law of a referee, but only to certain findings of fact, his decision cannot be reviewed. (Talbert v. Storum, 7 App. Div. 456 [1896].)

—— **Exceptions to findings of fact and conclusions of law.]** Where the trial is without a jury, and the trial judge has filed findings of fact and conclusions of law, and the judgment is destitute of evidence to support it, exceptions to the findings of fact and conclusions of law, present questions of law which the Appellate Term may review. (La Pasta v. Weil, 20 Misc. Rep. 554 [Sup. Ct. App. T. 1897].)

—— **Exceptions to findings of fact — improper.]** Exceptions need not be taken to findings of fact. (Mead v. Smith, 28 Hun, 639 [1883]; Metropolitan Gas Light Co. v. Mayor, 9 id. 706 [1877]; Roe v. Roe, 14 id. 613 [1878].)

—— **Failure to except to conclusion of law.]** Where, at the trial, certain personal property was determined, as a matter of law, not to be fixtures, and no exception or request for submission to the jury appeared from the record, held, that the conclusion reached at the Circuit must be accepted on appeal. (Scobell v. Block, 82 Hun, 223 [1894].)

—— **In absence of exceptions, an appeal presents no question to the court.]** In the absence of exceptions an appeal from a judgment presents no question for the consideration of the court, and must be dismissed. (Smith's Exrs. v. Starr, 4 N. Y. Wkly. Dig. 498 [Court of Appeals, 1877]; Standard Oil Co. v. Amazon, 9 id. 465 [Court of Appeals, 1880].)

—— **To incompetent evidence — as effective in equitable action, as in actions at law.]** There is no distinction between legal and equitable actions, or between actions tried by a jury or a court, in respect to the availability of exceptions taken upon the trial upon the admission of incompetent evidence. In any case an error in receiving such evidence, if properly excepted to, can only be disregarded when it can be seen that it could do no harm. (Foote v. Beecher, 78 N. Y. 155 [1879]; People v. Strait, 154 id. 165 [1897].)

—— **Equity cases — when an error is not available.]** In an equity case a new hearing will not be granted, nor will a judgment be reversed, on the ground that evidence was improperly rejected on the trial if the court is satisfied that its reception would not have changed the result. (In re N. Y. C. & H. R. R. R. Co., 90 N. Y. 342 [1882]; Wyse v. Wyse, 155 id. 367 [1898].)

—— **Exception to evidence in equity causes, when disregarded.]** In equity causes exceptions to evidence should be disregarded unless the appellant can show that injustice has been done upon the whole case, or that the rulings complained of may have affected the result. (Tuerk Hydraulic Power Co. v. Tuerk, 92 Hun, 65 [1895].)

—— **Exceptions to evidence on trial of issues in an equity case — when not available on appeal.]** Where, in an equity action, issues are tried by a jury

and exceptions taken to the admission of evidence and a case containing the evidence, given on such trial of the issues, is received in evidence without objection before the judge deciding the case, on an appeal from his judgment the exceptions taken to the admission of evidence before the jury are not available. (Arnold v. Parmelee, 97 N. Y. 652 [1885].)

—— **Mode of reviewing questions of fact and of law, after a trial by the court without a jury.**] The only way in which questions of law and fact can be brought up for review after a trial by the court without a jury, is by filing exceptions to the decision, and an appeal from an order denying a motion for a new trial, assuming to be made upon the judge's minutes, which motion is only permissible after a jury trial, raises no question for review. (Waydell v. Adams, 23 App. Div. 508 [1897]. See, also, May v. Menton, 21 Misc. Rep. 321 [Sup. Ct. App. T. 1897].)

—— **Exception to a direction of a verdict, after the close of the trial.**] In order to obtain a review under sections 994 and 1185 of the Code of Civil Procedure, the unsuccessful party must, within ten days after service of a copy of the decision of the court upon him, file a notice of exception. Failure to do this and to appeal from an order denying a new trial, prevents the appellate court from reviewing the determination of the trial court in directing a verdict, and only the exception taken on the trial can be considered. (Elliott v. Van Schaick, 26 App. Div. 587 [1898].)

—— **When there is nothing to review.**] The appellate court has nothing to review when no valid exception is contained in the record, nor an order denying a new trial, nor an appeal from an order of denial. (Cohen v. Mayor, etc., of N. Y., 35 St. Rep. 555 [Sup. Ct. 1890]; affirmed, 128 N. Y. 594; Tallmadge v. Whitman, 11 Hun, 367 [1877].)

—— **Exceptions — failure to file to a referee's report.**] An objection that a referee's report cannot be impeached because no exceptions were filed thereto, is not available on appeal, where the motion based thereon was made upon an order to show cause, of less than eight days, which makes no reference to a failure to file exceptions, and it does not appear that such objection was raised on the hearing. (Nichthauser v. Lehman, 17 Misc. Rep. 336 [1896]. See Catlin v. Catlin, 2 Hun, 378 [1874].)

—— **Evidence excepted to, subsequently stricken out — effect.**] Where improper evidence has been received under objection and exception which subsequently on motion of the party against whom it was offered is stricken out, this is to be deemed an abandonment of the exception and such party may not have the benefit of it on appeal. (Price v. Brown, 98 N. Y. 388 [1885]; People v. McCarthy, 110 id. 309 [1888].)

—— **A motion to strike out evidence, not one of legal right.**] A party who has permitted the reception of improper evidence without properly objecting thereto has not a legal right to thereafter object to the same and have it stricken out. (In re Morgan, 104 N. Y. 74 [1887].)

—— **Exception to denial of motion to amend answer on trial, unavailing.**] After the close of his case, defendant moved for leave to amend his answer by the allegation of facts constituting a separate and distinct offense. His motion was denied and he took an exception. Held, that this was a matter

within the discretion of the trial court, and that the exception was of no avail before the Appellate Term. (Frischman v. Zimmermann, 19 Misc. Rep. 53 [Sup. Ct. App. T. 1896]. See, however, Quimby v. Claflin, 77 N. Y. 270 [1879].)

—— **Error, to justify reversal, must prejudice exceptant.]** An exception to an erroneous ruling of a surrogate on the trial by him of an issue of fact is not a ground for reversal where it does not appear that the exceptant was necessarily prejudiced thereby. (In re Morgan, 104 N. Y. 74 [1887].)

—— As to the sufficiency of exceptions taken on a murder trial, to raise questions on appeal; when the refusal to strike out erroneous testimony is not ground for reversal, where it could not have harmed the defendant. (People v. Chacon, 102 N. Y. 669 [1886].)

—— **Power of court to review errors without exception.]** This is a power that will not ordinarily be exercised and will only be resorted to when it is apparent that grave injustice has been done, and where it is necessary for the purpose of correcting an injustice that cannot otherwise be corrected. (McMurray v. Gage, 19 App. Div. 505 [1897].)

—— **Motion for a nonsuit.]** Where there was no motion for a nonsuit or for the direction of a verdict and no exception was taken which presented the question as to whether there was sufficient evidence to sustain the verdict, the Court of Appeals cannot give relief. (Schwinger v. Raymond, 105 N. Y. 648 [1887].)

—— The General Term may set aside a verdict as contrary to evidence. (*Ib.*)

—— **To review a motion for nonsuit the case must show a ruling and an exception thereto.]** The case as settled by the referee before whom this action was tried, stated that a motion to dismiss the complaint was made on the ground that no case had been proven against the defendant, but he did not state how he disposed of the motion, or that any exception was taken by either party. The referee subsequently found that the plaintiff had no title to the note upon which the action was brought, and directed the complaint to be dismissed. Held, that the case did not present for review any question as to the ruling of the referee on the motion for a nonsuit. (Pritchard v. Hirt, 39 Hun, 378 [1886].)

—— **Effect of exceptions to refusal to grant nonsuit.]** The effect of exceptions to refusals to grant a nonsuit, is to raise only the question whether there was sufficient evidence to sustain the verdict. There can be no review in the Court of Appeals from unanimous judgment of affirmance, where it was found that the evidence sustained the verdict. (Szuchy v. Hillside Coal & Iron Co., 150 N. Y. 219 [1896].)

—— **Motion for nonsuit — when exception based on general grounds fails.]** When defendant moves to dismiss, without stating the grounds, he cannot maintain his exception to a denial provided any requisite proof could be supplied; but if he specify the grounds that plaintiff had not established a cause of action, the sufficiency of the evidence will be considered on appeal. (McNish v. Village of Peekskill, 91 Hun, 324 [1895].)

—— **Exception to denial of motion for nonsuit — review of evidence.]** While the Appellate Term cannot disturb a judgment as against the weight of evidence, it will, where a motion for a nonsuit has been denied and an exception taken, review the evidence to see if there is sufficient to sustain a verdict for the plaintiff, since that presents a question of law. (Divver v. Hall, 21 Misc. Rep. 452 [Sup. Ct. App. T. 1897].)

—— **Motion for a new trial, when necessary for a review.]** Where a party has not moved for a new trial no question affecting the merits or the sufficiency of the evidence to support the verdict can be raised. (Third Ave. R. R. Co. v. Ebling, 100 N. Y. 98 [1885].)

—— **Exceptions necessary, where a motion for a new trial is denied.]** Where it is alleged that a verdict is perverse, excessive in amount and contrary to the law and the evidence, and a motion for a new trial is made and judgment is entered upon the verdict, such judgment cannot be reviewed in the Court of Appeals unless an exception be taken. This rule has not been changed by section 999 of the Code of Civil Procedure. (Standard Oil Co. v. Amazon Ins. Co., 79 N. Y. 506 [January, 1880]; Boss v. World Mut. Life Ins. Co., 64 id. 236–242 [1876].)

—— Exception to the denial of the motion for a new trial does not enable defendant to argue, on an appeal to the Court of Appeals, a point not taken upon the trial. (Werner v. City of Rochester, 149 N. Y. 563 [1896].)

—— **Appeal from judgment only.]** On appeal from the judgment alone, no appeal being taken from the order denying a new trial, only the exceptions taken on the trial can be considered. (Mosheim & Co. v. Schwartz, 15 Misc. Rep. 439 [N. Y. City Ct. 1896].)

—— **Denial of a motion for new trial — not the subject of exception — there must be an appeal from the order of denial.]** A denial of a motion for a new trial, made upon the judge's minutes, is not the subject of an exception, and such an exception presents no question of fact for review upon appeal from the judgment.

—— The office of an exception is to point out errors committed by the court during the progress of the trial.

—— To bring up the case for review upon the facts there must be an appeal from the order denying the motion for a new trial. (Matthews v. Meyberg, 63 N. Y. 656 [1886]; Gregg v. Howe, 5 Jones & S. 420 [Supr. Ct. 1874]. See, also, May v. Menton, 45 N. Y. Supp. 1047 [N. Y. City Ct. 1897].)

—— **When the order is not appealable to the Court of Appeals.]** The Court of Appeals has no jurisdiction to entertain an appeal from an order granting or refusing a new trial upon the facts, in a case tried by a jury. (Baldwin's Bank v. Butler, 133 N. Y. 564 [1892].)

—— **An appeal from an order denying a new trial necessary — an exception not sufficient.]** In order that a case may be reviewed upon the facts, an appeal must be taken from the order denying a motion for a new trial; an exception cannot be taken simply to the denial of the motion. (Momeyer v. N. J. Sheep & Wool Co., 49 St. Rep. 414 [Sup. Ct. 1892].)

—— **Denial of new trial — order must be entered.]** Where no order denying a motion for a new trial has been entered, there is nothing brought up before the appellate court by an attempted appeal from the ruling upon

the trial. (Niles Tool Works Co. v. Reynolds, 4 App. Div. 24 [1896]; Jagau v. Goetz, 11 Misc. Rep. 380 [N. Y. Com. Pl. 1895]; Chaimson v. Menshing, 12 id. 651 [N. Y. City Ct. 1895]; Ringle v. Wallis Iron Works, 85 Hun, 279 [1895].)

—— **Appeal from an order denying new trial — what exceptions appellant need not show.]** Upon appeal from an order denying motion for a new trial on the minutes, to the General Term of the same court, it is not necessary for the appellant to show an exception to the denial of a motion for a nonsuit, at the close of the case, or for the direction of a verdict. (Hopkins v. Clark, 14 Misc. Rep. 599 [N. Y. Com. Pl. 1895].)

—— No question for review is presented to the court by a simple exception to the order denying a motion for a new trial when the order itself is omitted from the case on appeal. (La Societa Italiana Di Beneficenza v. Sulzer, 47 St. Rep. 292 [N. Y. Supr. Ct. 1892].)

—— Where no order is entered, denying a motion for a new trial, the appellate court is limited to considering the exceptions taken at the trial; it cannot consider questions of fact. (Gibson v. Denton, 4 App. Div. 198 [1896]. See, also, Hatch v. Spooner, 1 id. 408 [1896].)

—— City Court of New York. Appellate Term cannot review an order thereof refusing a new trial. It is limited to the questions presented by the exceptions. (Stock v. Le Boutillier, 19 Misc. Rep. 112 [Sup. Ct. App. T. 1897]; Ebenreiter v. Dahlman, 19 id. 9 [Sup. Ct. App. T. 1896]; Jennings v. Kosmak, 20 id. 300 [1897].)

—— As to further powers of the Appellate Term on appeal from the City Court, see Briscoe v. Litt, 19 Misc. Rep. 5 [Sup. Ct. App. T. 1896]; Geitelsohn v. Citizens' Savings Bank, 20 id. 84 [Sup. Ct. App. T. 1897]; Machauer v. Fogel, 21 id. 637 [Sup. Ct. App. T. 1897].)

—— **Power to grant a new trial in the absence of exceptions.]** The General Term of the Supreme Court has power to grant a new trial although the counsel has failed to take a proper exception on the trial to the judge's charge, but this power will not be exercised unless it is manifest that injustice has been done. (Ryan v. Conroy, 85 Hun, 544 [1895].)

—— **Court of Appeals — jurisdictional questions.]** When objections to jurisdiction may be taken on appeal to the Court of Appeals in the first instance. (Fiester v. Shepard, 92 N. Y. 251 [1883].)

—— **On appeal from the affirmance of the decree of a surrogate, on the trial of an issue of fact.]** An appeal to the Court of Appeals from the affirmance by the General Term of a surrogate's decree upon the trial of an issue of fact, brings nothing up for review not presented by the appeal to the General Term, and upon the appeal to the General Term no finding or decision can be reviewed which was not excepted to. (In re Kellogg, 104 N. Y. 648 [1887].)

—— **Objections — when to be made.]** Objection should be made to improper evidence when it is offered; if received without objection the court is not bound to charge the jury to disregard it. (Bradner v. Strang, 89 N. Y. 299 [1882].)

—— **Proper practice in taking.**] For a statement of the proper practice in taking exceptions, etc., see the notes of N. C. Moak, Esq. (People v. A. & S. R. R. Co., 57 Barb. 210. See, also, Innes v. Manhattan R. Co., 3 App. Div. 541 [1896]; Clarke v. Westcott, 2 id. 503 [1896].)

—— **Failure to except on a trial cannot be remedied.**] The failure to take exceptions to rulings at the time they are made at the trial, cannot be cured by an amendment of the case on appeal. (Fifth Ave. Bank v. Parker, 15 N. Y. Supp. 734 [N. Y. Supr. Ct. 1891]; Fifth Ave. Bank v. Webber, 27 Abb. N. C. 1 [N. Y. Supr. Ct. Sp. T. 1891].)

—— **Exception lies only to evidence admitted against a party's objection.**] An exception to the admission of evidence may only be taken when it is received against the party's objection. (Third Ave. R. R. Co. v. Ebling, 100 N. Y. 98 [1885].)

—— **Appellant's exceptions, not reviewed.**] Rulings on questions relating to a claim as to which appellant prevailed are not reviewable. (Neier v. Looschen, 25 Misc. Rep. 430 [1898].)

—— **Objection, by the party benefited by an error.**] An appellant cannot object to an error that was advantageous to him. (People v. Bauer, 37 Hun, 407 [1885]; Greene v. Smith, 13 App. Div. 459 [1897].)

—— **Ground on which objection is sustained.**] An objection to evidence admitted, must be sustained on appeal, if at all, upon the ground upon which it was placed at the trial. (Eisert v. Brandt, 10 Misc. Rep. 393 [1894].)

—— **How objections to the reception of evidence should be made — erroneous admission of evidence — when the decision will not be reversed therefor.**] Where evidence is admitted by a referee against the objections of either party, and it does not appear that upon the hearing before the Special Term, any motion was made by the party aggrieved to strike out or expunge the evidence so objected to, or that the judge was called upon to pass upon its admissibility, or that he made any ruling in regard to it, the objections will be deemed to have been waived and the ruling of the referee thereon cannot be reviewed upon appeal. The admission of irrelevant and immaterial evidence will only be treated as error when it can be seen to have worked harm to the party objecting to it. (The People ex rel, Railroad Company v. Keator, 36 Hun, 592 [1885].)

—— **When a general objection is sufficient.**] When evidence is, upon its face, apparently admissible, the party objecting thereto is bound to state the grounds of his objection; but where upon its face it appears inadmissible, a general objection to it as improper, is sufficient to call upon the party offering to show the grounds of its admissibility. (Childs v. DeLaney, 1 Sup. Ct. [T. & C.] 506 [Gen. T. 1873].)

—— **Exception to a general finding that one party was entitled to recover — effect of.**] Upon a trial before a court or referee an exception to a general finding of law, holding that one party is entitled to recover against the other, raises the question as to whether upon all the facts found the successful party was entitled to judgment. (Hemmingway v. Poucher, 98 N. Y. 281 [1885]; Petrie v. Trustees of Hamilton College, 158 id. 458 [1899].) Presumption where the report is general. (*Ib.*)

—— **When the difficulty could not be obviated.]** How far a general objection and exception is available, where the difficulty could not be obviated by evidence. (Thayer v. Marsh, 19 Alb. Law J. 56 [Court of Appeals, 1878]; Quinby v. Strauss 90 N. Y. 664 [1882].)

—— Where evidence is received under a general objection, the ruling will not be held erroneous unless there are grounds of objection, which could not have been obviated had they been specified, or unless the evidence is in its essential nature incompetent. (Bergmann v. Jones, 94 N. Y. 51 [1883]; Turner v. City of Newburgh, 109 id. 301 [1888]; Stouter v. Manhattan R. Co. 127 id. 661 [1891].)

—— **Evidence inadmissible for any purpose.]** A general objection to evidence is sufficient where the evidence is in its nature inadmissible for any purpose. (Tozer v. N. Y. C. & H. R. R. R. Co., 105 N. Y. 659 [1887].)

—— **When a general objection is insufficient.]** A general objection to all the findings of a referee, and to each and every one of them, is of no avail on appeal. (Ward v. Craig, 87 N. Y. 550 [1882]; Hepburn v. Montgomery, 97 id. 617 [1884]; Drake v. N. Y. Iron Mine, 156 id. 90 [1898].)

—— Objections that the evidence is defective must point out the specific defect. (Sheridan v. Mayor, 4 N. Y. Wkly. Dig. 507 [Sup. Ct. 1877].)

—— **Effect of specific objections.]** Where evidence is excluded upon a specific objection, the ruling cannot be sustained on appeal upon another ground. (Eisert v. Brandt, 10 Misc. Rep. 393 [1894].)

—— **On refusal of judge to submit specific question of fact to jury — must be specific.]** On the refusal of the judge to submit a specific question of fact to a jury, there must be a specific exception to the refusal. A general exception to the direction of the court to the jury to find a verdict for the defendant is not good. Moore v. Bristol, 2 N. Y. Wkly. Dig. 293 [Sup. Ct. 1876]; Jordan v. Bowen, 11 id. 72 [Gen. T. 1880].)

—— **Exceptions to a report as to an account — should be specific.]** Exceptions to a referee's report, so far as they relate to matters of account, should be specific, and point out alleged error. (Jagger v. Littlefield, 8 Wkly. Dig. 170 [Gen. T. 1879].)

—— **Exception too indefinite.]** Upon a trial before a referee defendant presented requests to find, which were refused. He thereupon excepted as follows: Defendant separately excepts "to the refusal of the referee to find each of the several seventeen conclusions submitted to the referee by the said defendant so far as the referee's conclusions are not in conformity therewith." Held, that such exception was not sufficiently definite and specific to present a question for review. (Daniels v. Smith, 130 N. Y. 696 [1892]; Turner v. Weston, 133 id. 650 [1892].)

—— **Objection that finding does not conform to facts — too general.]** A general objection and exception to a refusal of a judge to make his findings conform to the facts proved is too vague. (Krekeler v. Thaule, 17 Alb. Law J. 347 [Court of Appeals, 1878].)

—— **Insufficiency of exceptions to present questions on appeal.]** In this case the appellants claimed that the contract in question was to a certain effect. They excepted simply to the finding of the referee that it was in

writing; the court held that as they did not request the referee to find the contract as claimed by them, nor except to the finding that the contract was as claimed by the defendant, the case contained no exception that would enable plaintiffs to avail themselves of the parol agreement claimed by them. (Keogh v. Westervelt, 66 N. Y. 636 [1876].)

—— **Must disclose real ground.**] An exception to evidence must disclose the real ground of objection. (Chester v. Dickerson, 54 N. Y. 13 [1873]; Goldenson v. Lawrence, 16 Misc. Rep. 570 [1896].)

—— The appellate court will not review exceptions merely upon the statement that "the defendant hereby excepts to the findings of fact and to the conclusions of law of the referee herein," such a statement being too general. (Thompson v. Hazard, 120 N. Y. 634 [1890]; Drake v. N. Y. Iron Mine, 156 id. 90 [1898].)

—— **Effect of a general exception to a referee's conclusions of law.**] A general exception to a referee's conclusions of law is not available, unless all the rulings embraced in them are erroneous. (Riley v. Sexton, 32 Hun, 245 [1884].)

—— An exception to a finding is too general to be available unless it specifically states the ground of error relied upon, in order that attention being called to the fact an opportunity may be offered to correct the same. [Hunter v. Manhattan Raliway Co., 141 N. Y. 281 [1894]; Baily v. Hornthal, 154 id. 648 [1898]; Drake v. N. Y. Iron Mine, 156 id. 90 [1898].)

—— **Strictness as to taking exceptions to conclusions of law.**] A party excepting to conclusions of law of a court or referee, is not held to the same strict rule as on excepting to a charge. (Newlin v. Lyon, 49 N. Y. 661 [1872].)

—— **Necessity of specific objections.**] The complaint in an action alleged that the payments sought to be recovered were due February 1 and May 1, 1891; by the contract the payments were not due in advance. The testimony on the part of the plaintiff was to the effect that the payments unpaid were for the quarter from February 1 to May 1, and from May 1 to August 1. The trial court found that defendant had not made the payment for the quarter ending February 1, 1891.

Held, that while there was no proof to sustain this finding, yet as it appeared that two quarterly payments were in fact due and unpaid it was incumbent on defendant to raise the specific objection on the trial, and as this was not done it could not be raised upon appeal. (Mayor, etc., v. New York Refrigerating Construction Co., 146 N. Y. 210 [1895].)

—— **Sustaining ruling excluding evidence on general exceptions.**] Where evidence is excluded on an objection which stated no grounds and none were called for by the adverse party, he may be supposed to have understood them, and if any ground in fact existed it will be assumed that the exclusion was based thereon. (Miner v. Stolts, 11 Misc. Rep. 338 [1895].)

—— **When exclusion of material evidence, under a general objection, cannot be sustained.**] The exclusion of material evidence, under a general objection, cannot be sustained on appeal, upon the ground that the questions were leading. (People v. Nino, 149 N. Y. 317 [1896].)

—— **General objection to evidence — when overruling thereof sustained on appeal.]** When it appears that there is some ground of objection, which could not have been obviated if it had been specified, or unless the evidence in any aspect of the case is incompetent, the overruling of a general objection to evidence will be sustained on appeal. (Ackley v. Welch, 85 Hun, 178 [1895].)

—— **General objection as to damages, when not good on appeal.]** Where questions as to damages are objected to generally, the defendant objecting cannot object on appeal that the complaint was not specific enough to authorize proof of special damage. (Bergmann v. Jones, 94 N. Y. 51 [1883].)

—— **Cured by proper answer.]** Where, although a question is too broad, the answer is limited to the point at issue, there is no error. (Wright v. Cabot, 89 N. Y. 570 [1882].)

—— **Irresponsive answer.]** An exception to a ruling admitting a question is not available on appeal, where such question was not responsively answered. (Miller v. Erie R. R. Co., 34 App. Div. 217 [1898].)

—— **General objection — applies to the competency of the evidence, and not to that of the witness.]** A general objection to a question can only be considered as applying to the competency or materiality of the point sought to be proved, and not to the competency of the witness to testify upon the subject. (Stevens v. Brennan, 79 N. Y. 254 [1879].)

—— **Distinction between cases where evidence is received and excluded under.]** Where evidence is excluded upon a mere general objection, the ruling will be upheld, if any ground in fact existed for the exclusion, but where the objection is overruled and the evidence is received, the ruling will not be held erroneous unless there be some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature be incompetent. (Tooley v. Bacon, 15 Alb. Law J. 515 [Court of Appeals, 1877]; Langley v. Wadsworth, 9 N. Y. 61 [1885].)

—— **Objection to conclusion of trial judge, how raised.]** The question whether the trial judge's conclusion was correct can only be raised by an exception duly taken and filed, prescribed by Code of Civil Procedure, sections 994 and 1022, and a note in the extract from the clerk's minutes of the trial that "defendant's attorney excepts" to the court's direction of a judgment for plaintiff, is not sufficient and raises no question of law. (Hedges v. Polhemus, 14 Misc. 309 [1895].)

—— If evidence, objected to as incompetent and immaterial, might, in any event become competent, the question is one of order of proof and discretionary. (Decker v. Gaylord, 35 Hun, 584 [1885].)

—— A general objection to a question which is proper in part cannot be sustained. (Simson v. Chadwick, 20 N. Y. Wkly. Dig. 35.)

—— A general objection to a question will not make it error to admit it merely on the ground that it called for matter of opinion from the witness not shown to be qualified. (Amadon v. Ingersoll, 34 Hun, 132.)

—— **To a portion of a charge.]** A general exception to a portion of a charge is of no avail unless all the propositions laid down therein are erroneous. (People v. Guidici, 100 N. Y. 503 [1885].)

—— **General objection not sustained by specific one.**] A general objection taken at the trial cannot be sustained on appeal by a specific one. (Hoopes v. Auburn Water Work Company, 37 Hun, 568 [1885].)

—— **General objection to evidence — when not available on appeal.**] If the specific ground had been stated at the trial, and it could have been met by conforming the pleadings to the proof, the general objection to evidence is not available. (Vilas v. Allentown Rolling Mills, 84 Hun, 21 [1895].)

—— **Failure to take objection — rulings still reviewable.**] The Appellate Division may, in a proper case, review the ruling of the trial court in excluding evidence, although a technical exception was not taken. (Meyer v. Hart, 23 App. Div. 131 [1897]. See, also, Murray v. Babbitt, 10 Misc. Rep. 365 [1894].)

—— **Immaterial error — not a ground for reversal.**] Error in receiving evidence objected to, which is entirely immaterial, and which could not have prejudiced the party objecting, is not a ground of reversal. (Tenney v. Berger, 93 N. Y. 524 [1883]; McGean v. Manhattan R. Co., 117 id. 219 [1889].)

—— **Immaterial exceptions.**] Objections and exceptions to the admission of evidence as to rental or past damages in an action to restrain the operation of an elevated railroad are not available on appeal where no past damages were awarded in the judgment. (Missionary Society of St. Paul v. The N. Y. Elevated R. R. Co., 12 Misc. Rep. 359 [1895].)

—— **Frivolous exceptions in Court of Appeals.**] To sustain a motion in the Court of Appeals to dismiss an appeal because the exceptions are frivolous, the exceptions must be so obviously frivolous on their face as to require no argument to demonstrate it, and where an examination of the record discloses a number of exceptions that can only be disposed of after argument, the motion will be denied. (Bachrach v. Manhattan R. Co., 154 N. Y. 178 [1897].)

—— **Reservation of an objection — duty of the party objecting.**] Where an objection interposed to evidence is reserved without dissent and the evidence received, the party objecting must procure the court or referee to pass upon the question in some form or the objection will be unavailing on appeal. (Matter of Yates, 99 N. Y. 94 [1885].)

—— **Duty of referee to decide at the time when an exception is taken.**] It is the duty of a referee to decide as to the admissibility of evidence at the time it is offered and an exception is taken, and not to reserve his decision until the final disposition of the case. (Smith v. Kobbe, 59 Barb. 289 [Gen. T. 1871]; Lathrop v. Bramhall, 3 Hun, 394 [1875]; Sharpe v. Freeman, 45 N. Y. 802 [1871]; Clussman v. Merker, 3 Bosw. 402 [Gen. T. 1858]; Wagner v. Finch, 65 Barb. 493 [Gen. T. 1873]. See Van Derlip v. Keyser, 68 N. Y. 443 [1877].)

—— An exception must be taken to the reservation by a referee of his decision on an objection taken during the trial. (Holden v. N. Y. & Erie Bank, 72 N. Y. 286 [January, 1878].)

—— **Reservation by referee of decision on exception.**] When it is not an error for a referee to reserve a question as to the admissibility of evidence. (Trimmer v. Trimmer, 90 N. Y. 675 [1882]; Smith v. Kobbe, 59 Barb. 289 [Gen. T. 1871]; Lathrop v. Bramhall, 3 Hun, 394 [1875]; Sharpe v. Freeman,

45 N. Y. 802 [1871]; Clussman v. Merker, 3 Bosw. 402 [Gen. T. 1858]; Wagner v. Finch, 65 Barb. 493 [Gen. T. 1873]; Van Derlip v. Keyser, 68 N. Y. 443 [1877]; Holden v. N. Y. & Erie Bank, 72 id. 286 [January, 1878].)

—— **Filing exceptions nunc pro tunc.**] The court has power to allow exceptions to be filed *nunc pro tunc* after the ten days have elapsed. (Coe v. Coe, 14 Abb. 87 [Gen. T. 1861]; Bortle v. Mellen, 14 id. 228 [Chamb. 1862]; Sheldon v. Wood, 14 How. Prac. 18 [N. Y. Supr. Ct. Sp. T. 1857].)

—— **Exceptions filed nunc pro tunc — when.**] When exceptions to findings will be allowed to be filed *nunc pro tunc*. (Douglass v. Douglass, 7 Hun, 272 [1876].)

—— Decision on appeal suspended to allow application to the Special Term to file exception *nunc pro tunc*. (Stiefel v. N. Y. Novelty Co., 12 App. Div. 266 [1896].)

—— **Objection to argument of counsel before jury.**] An objection overruling an exception must appear from the papers in order to procure a review of the action of the court at the trial, in refusing to check counsel in arguing before the jury, or in striking out parts of the opening or summing up. (Niles v. N. Y. C. & H. R. R. R. Co., 13 App. Div. 549 [1897].)

—— **Statement of counsel, in an action for libel, of the recovery in other actions.**] Repetition by an attorney, in summing up an action for libel, of a statement as to the amount of the verdict in other cases of libel, after the court has ruled it to be improper, is ground for reversal, although the attorney subsequently withdraws the statement and the court charges that the jury are not to consider it. (Bagully v. Morning Journal Assn., 38 App. Div. 522 [1899].)

—— **Waiver of — proof to show waiver of exception must appear in case.**] Where the judge ruled that the plaintiff in ejectment had made out a *prima facie* title in G., under whom he claimed, to which ruling defendant excepted; and subsequently defendant proved that he himself claimed under G., held, that defendant's proof should be inserted in the bill of exceptions, so that plaintiff might insist upon it as a waiver of the exception. (Hills v. Tuttle, 7 Cow. 364 [1827].)

—— **When not stated in points or argued.**] Exceptions, not noticed in counsel's points or argued, are deemed waived. (Sutherland v. Rose, 47 Barb. 145 [Gen. T. 1866]; Cummings v. Morris, 3 Bosw. 560 [Gen. T. 1858]; Pratt v. Strong, 3 Keyes, 54 [1866].)

—— **No exception lies to evidence, addressed to the court, upon the question of admitting dying declarations.**] An exception does not lie to evidence, addressed to the judgment of the court, bearing upon the question whether or not the declarations of one alleged to have been murdered were made under a conviction of approaching and imminent death, the jury being simply spectators and, being in no way called upon to act upon such preliminary testimony. (People v. Smith, 104 N. Y. 491 [1887].)

—— **Exception — proper way to review order of referee amending a pleading.**] The proper mode of reviewing the decision of a referee, on a motion to strike out an amendment of a complaint, is by excepting thereto and appealing from the judgment. (Quimby v. Claflin, 77 N. Y. 270 [1879]. See, however, Frischman v. Zimmerman, 19 Misc. Rep. 53 [Sup. Ct. App. T. 1896].)

—— **Objection to evidence — need not be repeated.]** After objecting three times to the same class of evidence, the objection being on each occasion overruled, plaintiff neglected to object to evidence of like character given by a witness. Held, that the evidence must be treated as being received under the previous rulings and a new objection was not necessary. (Dilleber v. Home Life Ins. Co., 69 N. Y. 256 [1877]; Carlson v. Winterson, 147 id. 652 [1895].)

—— **Objection once taken is sufficient.]** Where evidence on a particular subject is inadmissible, an objection taken when the subject is entered upon should be held to relate to all evidence on such subject. (Montignani v. E. V. Crandall Co., 34 App. Div. 228 [1898].)

—— An exception to an admission of a certain class of evidence is available where the grounds of objection were fully stated when the question was first raised, although the subsequent objections thereto were general in character. (Gray v. Brooklyn Union Pub. Co., 35 App. Div. 286 [1898].)

—— **Verdict, subject to opinion of General Term — exceptions first heard at General Term.]** When a verdict is ordered subject to the opinion of the court at General Term, without qualification, the only question at General Term is, which party is entitled to judgment upon the uncontroverted facts; exceptions cannot be heard. Where exceptions are ordered to be heard at General Term, if the exceptions are sustained, a new trial may be ordered. (Durant v. Abendroth, 69 N. Y. 149 [1877]; Cowenhoven v. Ball, 118 id. 231 [1890].)

—— **Exceptions to be first heard at General Term — objection thereto cannot be first made in the Court of Appeals.]** Where, upon a trial, exceptions are without objection ordered to be heard in the first instance at the General Term, the party succeeding at General Term cannot object to a review of its decision in the Court of Appeals, on the ground that the case was not one proper to be so heard. (Wyckoff v. De Graff, 98 N. Y. 134 [1885].)

—— **Exception necessary to raise objection to the failure to submit case to jury.]** Where the trial court directs a verdict in favor of the defendant, and orders the exceptions to be heard in the first instance at General Term, an exception to the direction of a verdict is necessary to enable the plaintiff to take the objection into the Court of Appeals, that the case should have been submitted to the jury. (Curtis v. Wheeler & Wilson Mfg. Co., 141 N. Y. 511 [1894].)

—— **Order that exceptions be first heard at General Term — when unauthorized.]** In case a motion for a new trial is made and denied under section 999 of the Code of Civil Procedure, and an order is entered, it can be reviewed only by an appeal therefrom. If a motion for a new trial is made on the minutes on exceptions taken, which is denied and an order is entered, an order directing that the exceptions be heard in the first instance at General Term is unauthorized by the Code of Civil Procedure, and the motion will not be heard by the General Term of the Supreme Court. (Schram v. Werner, 81 Hun, 561 [1894].)

—— Oral direction that exceptions be heard in the first instance at General Term, is insufficient. (Fifth Ave. Bank v. Forty-second St. & Grand St. Ferry R. R. Co., 6 App. Div. 567 [1896].)

—— **Exceptions to be first heard at the Appellate Division — complaint cannot be dismissed on merits.**] Where the court directed a verdict for plaintiff, and ordered defendant's exceptions heard in the Appellate Division in the first instance, the latter court cannot, upon sustaining such exceptions, direct a dismissal of the complaint on the merits, but has power only to award a new trial. (Matthews v. Amer. Cent. Ins. Co., 154 N. Y. 449 [1897].)

—— **Exceptions to be first heard at Appellate Division — what is a sufficient certification.**] The minutes of the trial, signed by the clerk, containing a statement that defendant's exceptions are to be heard in the first instance by the Appellate Division, and that entry of the judgment be suspended in the meantime, constitutes part of the record, and is a sufficient certification of the entry of the necessary order for hearing the exceptions within Code of Civil Procedure, section 1000. (Sedgwick v. Macy, 24 App. Div. 1 [1897].)

—— **Review, without formal objection to the dismissal of the complaint.**] Where a complaint is dismissed upon the trial, and the exceptions are ordered to be heard at the Appellate Division in the first instance, the latter court will review the ruling, although no formal exception was in fact taken to the dismissal of the complaint. (Deane v. City of Buffalo, 42 App. Div. 205 [1899].)

—— **Exception to nonsuit, to be first heard at Appellate Division, implied.**] An exception to a nonsuit will be implied where leave to go to the Appellate Division in the first instance is given. (Woolsey v. Lasher, 35 App. Div. 198 [1898].)

—— **Neglect to except to order directing verdict and exceptions to be heard at General Term.**] If a defendant neglects to except to an order directing a verdict below, and that the exceptions be heard at General Term, the General Term can only order a new trial on the ground that there has been a mistrial. (Westervelt v. Westervelt, 10 N. Y. Wkly. Dig. 265 [Gen. T. 1880].)

—— **Exception to a denial of a nonsuit — when waived.**] An exception to a denial of a motion for a nonsuit at the close of plaintiff's evidence is waived where the defendant introduces evidence and fails to renew his motion to dismiss, or to ask the direction of a verdict at the close of the whole case. Fraser v. Alpha Combined Heating & Lighting Mfg. Co., 25 Misc. 422 [1898].)

—— **Objection based on pleadings, not taken below.**] An objection that the defense of usury was not pleaded cannot be raised for the first time on appeal. (Orvis v. Curtiss, 12 Misc. Rep. 434 [1895].)

—— **Objections not raised on the trial.**] In an action brought against a sheriff to recover certain chattels taken and sold by him under an execution issued upon a judgment, the trial judge charged the jury to assess the value of the property as they deemed it to be established by the evidence, and that they could take into consideration anything that was in evidence upon the subject. The point that the jury under such charge fixed the value of the property as of the date of the levy made by the sheriff upon such property, and not as of the date of the trial, was not taken by the unsuccessful party at the trial. Held, that he could not raise such objection for the first time upon an appeal. (Brackeleer v. Schwabeland, 86 Hun, 143 [1895].)

—— A claim that the credibility of witnesses should have been submitted to

the jury cannot be raised for the first time on appeal. (Kerley v. Mayer, 10 Misc. Rep. 718 [1895].)

—— **When objection to lack of exceptions to a referee's report taken for the first time on appeal, is unavailing.]** Where the record did not show that the exceptions were not filed, and the motion, based on a referee's decision, was brought up on an order to show cause, on less than eight days' notice, indicating a waiver of the filing of exceptions, an objection to the lack of exceptions to a referee's report is unvailing when taken for the first time on appeal. (Nichthauser v. Lehman, 17 Misc. Rep. 336 [Sup. Ct. App. T. 1896].)

—— **Questions not raised below.]** An objection that there was an adequate remedy at law cannot be taken on appeal where the appellant did not plead such defense or take the point on the trial, although some other defendant set up such defense. (Nickerson v. Canton Marble Co., 35 App. Div. 111 [1898].)

—— An objection that the check mailed in payment of premiums was not a good one cannot be taken for the first time on appeal. (Guilfoyle v. Nat. Life Assn., 36 App. Div. 343 [1899].)

—— **Objection to award of damages will not be considered first on appeal.]** The objection that the sum awarded for damages is in excess of the sum demanded in the complaint will not be considered on appeal where no point of that kind is raised at the trial. It will be deemed that the complaint is amended to cover the amount awarded, and that it was founded upon proof substantially without conflict or contradiction. (Clason v. Baldwin, 152 N. Y. 204 [1897].)

—— **Negligence, as conclusion of law — review in Court of Appeals.]** Where a referee found negligence as a conclusion of law, held, that though negligence is usually a question of fact, yet that if there was evidence sufficient to sustain a finding that the defendant was negligent, the manner in which the referee stated his conclusion would not authorize the Court of Appeals to reverse the conclusion of the referee and decide as a question of law whether, upon the facts found, the defendant was negligent. (Hays v. Miller, 70 N. Y. 112 [1877].)

—— As to power of Court of Appeals on appeal. (Levy v. People, 80 N. Y. 337 [1880].)

—— As to verdict against the weight of evidence in criminal cases. (See Code of Criminal Procedure, §§ 527, 528.)

—— Exceptions to the denial of a motion for a new trial on the ground of newly-discovered evidence. (Leighton v. People, 10 Abb. N. C. 261 [Gen. T. 1881].)

—— As to bill of exceptions in criminal cases. (See Code of Criminal Procedure, §§ 455–461.) Settlement of bill of exceptions will not be compelled in the case of an escaped prisoner. (People v. Genet, 59 N. Y. 80 [1874].)

—— As to the sufficiency of exceptions to raise questions on appeal. (Hayes v. B. & D. M. Co., 102 N. Y. 648 [1886]; Bigelow v. Legg, Id. 652 [1886].)

—— **Failure to show that exceptions were filed.]** The fact that appellant's papers do not show that his exceptions were duly filed is not sufficient to allow respondent to strike them from the case on appeal; he must prove appellant's failure to file them. (Young v. Young, 133 N. Y. 626 [1892].)

—— **Not waived by offering evidence in rebuttal.]** A party does not waive his objection to the admission of evidence by offering evidence in rebuttal thereof. (Woods v. Buffalo R. Co., 35 App. Div. 203 [1898].)

—— **Motion to amend by inserting — where made.]** Motion to amend the case by inserting exceptions must be made before the judge who tried the cause, and not at General Term. (Ropes v. Arnold, 85 Hun, 619 [1895].)

—— **Objection not raised below.]** An objection that a contract is void as violating the provisions of the act of Congress known as the Anti-Trust Act, cannot be considered by the Court of Appeals, where it was not raised below. (N. Y. Bank Note Co. v. Hamilton B. N., etc., Co., 180 N. Y. 280.)

SUFFICIENCY OF — What reviewable under.] An exception to a finding in the report of a referee will not be sufficient to bring up the question of admissibility under the pleadings of the evidence upon which such finding was based. (Gibson v. Stetzer, 3 Hun, 539 [1875].)

—— **Where none are taken to the dismissal of the complaint or the referee's conclusions of law — but only to the admission of evidence on the trial.]** Where the case contains no exception to the dismissal of the complaint in the action, or to the referee's conclusion of law, the court, nevertheless, has power to review the rulings of the referee upon the questions of evidence which arose upon the trial, and are presented by the exceptions taken at the time, and to reverse the judgment and grant a new trial if it is found that the referee has erred in any of these particulars to the prejudice of the plaintiff. (Dainese v. Allen, 45 How. Prac. 430 [Gen. T. 1873].)

—— **Where a case contains none of the evidence.]** Exceptions to conclusions of law may be reviewable although the printed case does not contain any of the evidence. On such an appeal the question is, has the judge or referee drawn a correct conclusion from established facts? (Frost v. Smith, 7 Bosw. 108 [1860]; Ferguson v. Hamilton, 35 Barb. 427 [1862].)

—— **To a sum allowed, raises question whether the entire sum is proper.]** Where a referee finds, as a legal conclusion, that one party is entitled to recover of the other a specified sum, an exception thereto raises the question whether the successful party is entitled to recover the entire sum. (Briggs v. Boyd, 56 N. Y. 289 [1874].)

—— **Single exception — when sufficient.]** In a case where no questions of fact arise upon the evidence, and no interlocutory questions of law are raised on the trial, the decision of the referee will disclose all the facts, and a single exception to this decision is proper, and will present the whole question. (Brewer v. Irish, 12 How. Prac. 481 [Gen. T. 1856].)

—— **Stated together.]** In a bill of exceptions it is no objection that the statement of the exceptions is all contained in one sentence, so long as it shows distinctly that each offer or request was separately made and ruled upon, and each ruling excepted to. (Dunckel v. Wiles, 11 N. Y. 420, 428 [1854].)

—— **Report of interlocutory referee — review of.]** Where the court makes an order upon exceptions to the report of an interlocutory referee and renders judgment in accordance with the order, upon appeal from the judgment the court will not review such order, unless the exceptions to the final con-

clusions of law bring up for review some question affected by it. (Russell v. Duflon, 4 Lans. 399 [Gen. T. 1871].)

—— **Exceptions proper to a report on a receiver's account.]** Exceptions are properly filed to a report of a referee on the accounts of a receiver. (Matter of Guardian Savings Inst., 9 Hun, 267 [1876]. See Darling v. Brewster, 55 N. Y. 667 [1874].)

STIPULATION — That exceptions were taken — not equivalent to exceptions.] A stipulation to the effect that the finding and decision of the judge, in a cause tried without a jury, "shall be considered as having been duly excepted to," will not be regarded as equivalent to an exception. (Stephens v. Reynolds, 6 N. Y. 454 [1852]; People v. Buddensieck, 103 id. 487 [1886].)

WHEN NO EXCEPTIONS LIE — To review errors on trial, exceptions need not be taken to report.] When a party relies exclusively upon erroneous decisions made during the trial, it is not necessary to make and serve formal exceptions to the conclusions of law or to the final decision. (Cowen v. The Village of West Troy, 43 Barb. 48; The Mayor v. Erben, 24 How. Prac. 358; Dainese v. Allen, 45 id. 434 [Gen. T. 1873].)

—— **To refusal to find the particular facts making up the general finding.]** No exception lies to the refusal of a referee to find the particulars which go to make up his general conclusions of fact. (Avery v. Foley, 4 Hun, 415 [1875].)

—— **To referee's findings of fact.]** Findings of fact need no exception. (Hatch v. Fogarty, 7 Robt. 488; Lefler v. Field, 50 Barb. 407; Mayor, etc., v. Erben, 24 How. Prac. 358; Magie v. Baker, 14 N. Y. 435; Garfield v. Kirk, 65 Barb. 464.)

—— **Who cannot except to referee's report.]** The party in whose favor all the issues of law are decided by the referee, cannot except to the report of the referee. (Greene v. Smith, 13 App. Div. 459 [1897].)

ERROR, CURED — By instruction to disregard evidence.] An error in the reception of evidence will be cured by an instruction to the jury to disregard it entirely. (Geneva, Ithaca, etc., Railroad Co. v. Sage, 35 Hun, 95 [1885].)

—— **Improper statement of counsel.]** An improper statement of counsel to the jury as to the result of a former trial of the action is eliminated and cured by a charge directing the jury to disregard it and explaining fully why it should not be considered. (Cole v. Fall Brook Coal Co., 159 N. Y. 59, affg. 87 Hun, 584 [1899].)

—— **Remark of the judge — the jury directed to disregard it.]** Error of the court in remarking while excluding evidence, that "You have evidence of the injury sufficient for a big verdict, if the jury believe it," is cured where the court instructs the jury to disregard it and charges that they were the sole judges of the facts. (Reilly v. Eastman's Co., 27 Misc. Rep. 32 [1899].)

—— Error in admitting incompetent evidence is cured by subsequently making it competent. (Kraus v. J. H. Mohlman Co., 18 Misc. Rep. 430 [Sup. Ct. App. T. 1896].)

EXCEPTIONS TO THE CHARGE — To the jury.] A general exception to a charge is not necessarily an exception to every word in it, and, therefore, bad if there be one word of truth in the whole charge (Schenck v. Andrews, 57 N. Y. 149 [1874].)

—— To enable the Appellate Term to pass upon a charge or request to charge, or upon the admission of evidence, an exception must be taken. (Frischmann v. Zimmermann, 19 Misc. Rep. 53 [Sup. Ct. App. T. 1896].)

—— Error cannot be predicated to the judge's charge, without an exception. (Schaff v. Miles, 10 Misc. Rep. 395 [N. Y. Com. Pl. 1894]; Ryan v. Conroy, 85 Hun, 544 [1895].)

In a case where a request to charge embodies a false proposition, it is not the duty of the court to separate the good and charge that by itself. (Lee v. Sterling Silk Mfg. Co., 134 App. Div. 133.)

Where a request to charge involves a repetition of what the court has already charged, and the court refuses to so charge, an exception is unavailing. (Meltzer v. Straus, 61 Misc. Rep. 250; Lilley v. Uvalde Asphalt Co., 127 App. Div. 310. See, also, Murray v. Narwood, 192 N. Y. 172; Woolsey v. Brooklyn Heights R. R. Co., 123 App. Div. 631; Jacobson v. Fraade, 56 Misc. Rep. 631; Clark v. N. Y. Cent. R. R. Co., 191 N. Y. 416; Colwell v. Allen Foundry Co., 123 App. Div. 601; Hanley v. Brooklyn Heights R. R. Co., 127 id. 355; People v. Hummel, 119 id. 153; Amballan v. Barcalo Mfg. Co., 118 id. 547; Bambace v. Interurban St. Ry. Co., 188 N. Y. 288; Fulton v. Sewell, 116 App. Div. 744; People v. Waters, 114 id. 669; Regling v. Lehmaier, 50 Misc. Rep. 331; Twaddell v. Weidler, 109 App. Div. 444; Gurski v. Doscher, 112 id. 345.)

—— **Error in charge — judgment reversed where no exception is taken.]** Where the jury was evidently guided in rendering the verdict by an error in the charge, judgment will be reversed, though no exception thereto was taken. (Levy v. Klepner, 15 Misc. Rep. 643 [N. Y. City Ct. 1896]. See, also, Griebel v. Rochester Printing Co., 8 App. Div. 450 [1896].)

—— An error in the charge, not explicitly excepted to, which might have been obviated by correction, is not a sufficient ground for reversal. (Hess & Co. v. Baar, 14 Misc. Rep. 286 [N. Y. Com. Pl. 1895].)

—— The court may reverse a judgment for a misdirection to the jury, even though no exception was taken at the trial. (Gruhn v. Gudebrod Bros. Co., 21 Misc. Rep. 528 [N. Y. City Ct. 1897].)

—— **Case submitted to jury on erroneous theory — new trial granted without exceptions.]** If the case has been submitted to the jury, and decided upon a wholly erroneous theory, the Appellate Division may grant a new trial, though there is no exception to such submission. (Leach v. Williams, 12 App. Div. 173 [1896]; Vorce v. Oppenheim, 37 id. 66 [1899].)

—— **Power of General Term to reverse without exceptions.]** The power of the General Term to reverse a judgment, although an exception be not taken to an error committed by the trial court, is never exercised in a civil action when the error complained of is one that could have been cured on the trial if the attention of the court and opposing counsel had been brought to it. (Currier v. Henderson, 85 Hun, 300 [1895].)

—— Adoption of improper rule of damages is not sufficient ground for reversal, where no exception was taken and no injustice resulted. (Smith v. Foote, 81 Hun, 128 [1894].)

—— **Right to require a charge upon propositions of law.]** Counsel have the right to submit propositions of law to the court, and it is the duty of the

court to instruct the jury upon each proposition. (Chapman v. McCormick, 86 N. Y. 479 [1881]; O'Neil v. Dry Dock, etc., R. R. Co., 129 id. 125 [1891].)

—— **Right of counsel to call the attention of the court to particular requests to find.]** At the close of the testimony the counsel for the defendant submitted to the court an unnecessary and unreasonable number of requests to charge, and upon the failure of the court to embody all these requests in its charge, said: "I desire to call your Honor's attention to certain propositions embodied in the written requests to charge which I have submitted." The court here said: "I decline to charge further than I have already," to which the defendant excepted. Held, that the exception was well taken; that the counsel was entitled to distinguish and point out the specific propositions he desired to have charged. (Debost v. Albert Palmer Co., 35 Hun, 386 [1885].)

—— **General exceptions to a number of refusals to charge, untenable.]** A general exception to a number of refusals to charge is not tenable, unless all the requests should have been granted. (Barker v. Cunard Steamship Co., 91 Hun, 495 [1895].)

—— **Attention of the court to be called to the precise point.]** The attention of the court must be called to the precise point upon which a charge is asked or an exception will not lie. (Schile v. Brokhahus, 80 N. Y. 614 [1880].)

—— **Sufficient exception.]** A statement by the court, "I understand counsel to except to my failure to charge all the requests not charged," does not raise any question for the appellate court. To make an available exception the party must point out the objectionable language, and interpose thereto an exception. The language of the court giving a party an exception must be clear. (Henderson v. Bartlett, 32 App. Div. 435 [1898].)

—— **When a portion of a charge is correct.]** When a portion of a charge excepted to is admitted to be correct, such exception will not be sustained. (Doyle v. N. Y. Eye & Ear Infirmary, 10 N. Y. Wkly. Dig. 3 [Ct. of Appeals, 1880].)

—— **When only a portion of the request to charge is correct.]** The court is not bound to separate the good portion of the request from the bad, and charge the former. (Hamilton v. Eno, 81 N. Y. 116 [1880]; Davis v. Leopold, 87 id. 620 [1881]; Koehler v. Hughes, 148 id. 507 [1896].)

—— **To the whole charge — when too broad.]** Where a portion of a charge excepted to is proper, an exception to the whole charge is ineffective, and does not raise the question whether the charge was correct. (Groat v. Gile, 51 N. Y. 431 [1873]; O'Leary v. Walter, 50 id. 683 [1872].)

—— **Objection to certain phrases of a charge must be taken specifically.]** Where counsel believes that the charge is misleading, through certain phrases inserted in the proposition, which is otherwise correct, it is necessary for him to take specific exception to the proposition objected to, in unmistakable language. A single objection to the several propositions of the charge, if one of them is correct, will not avail. (Ensign v. Hooker 6 App. Div. 425 [1896].)

—— **Exception to charge — need not repeat the portion objected to.]** It is not essential to an exception to a portion of a charge to repeat the lan-

guage excepted to, although this is strictly the more accurate practice; it is sufficient if the portion objected to is pointed out with such accuracy that there can be no misapprehension as to the application of the exception. (People ex rel. Daily v. Livingston, 79 N. Y. 279 [1879]. See, also, Schmalz v. Hauseman, 7 Civ. Proc. R. 414 [New York City Ct. 1885]; McGinley v. U. S. Life Ins. Co., 77 N. Y. 495 [1879].) It is not necessary to suggest an amendment or change. (Freund v. Paten, 10 Abb. N. C. 31 [N. Y. Com. Pl. Gen. T. 1882].)

—— **Request to charge, which simply repeats or separates the charge already given.]** Where the requests to charge merely repeat in different language what has already been charged, or separate propositions already charged, the refusal to charge as requested is not error. (Raymond v. Richmond, 88 N. Y. 671 [1882].)

—— **Grounds thereof need not be stated.]** In an exception to a judge's charge, counsel is not bound to state the grounds of his exception. (Goldman v. Abrahams, 10 N. Y. Wkly. Dig. 108 [Gen. T. April, 1880]. See Jordan v. Bowen, 11 N. Y. Wkly. Dig. 72 [Gen. T. 1880].)

—— **Where the error in the charge is harmless.]** Where the court charges that the jury may infer a certain thing and errs in so doing, but the error is harmless, the fact being immaterial, the judgment will be affirmed notwithstanding an exception to such charge. (Ginna v. Second Ave. R. R. Co., 67 N. Y. 596 [1876]; Vorce v. Oppenheim, 37 App. Div. 69 [1899].)

—— **A statement by the judge of his recollection of the testimony.]** The trial judge has no right to state his recollection of what a witness had sworn to on a former trial, as it is not legal evidence of the fact. (People v. Corey, 157 N. Y. 332 [1898].)

—— **Statement by the judge of his intention to throw the case out of court.]** A statement made by the court to counsel in ruling on the admission of evidence, that he meant to throw the action out of court at the first opportunity, constitutes reversible error, although the jury are instructed not to pay any attention to it. (Swan v. Keough, 35 App. Div. 80 [1898].)

—— **Comment by the court upon the testimony.]** The fact that the trial court, in the charge of the jury, comments upon the testimony is not a ground of objection, provided the jury are instructed that they are the sole judges of the facts. (Sindram v. People, 88 N. Y. 196 [1882].)

—— **An expression of its opinion by the court.]** An expression of an opinion by the court as to a question of fact, if no direction be given to the jury to follow it, is not the ground of an exception. (Massoth v. Del. & H. Canal Co., 64 N. Y. 524 [1876].)

—— **Expression of an opinion in a charge — when ground for a new trial.]** When a new trial should be granted, because of the expression of an opinion by the judge which is calculated to influence the jury. (Richardson v. Van Nostrand, 43 Hun, 299 [1887].)

—— Exception to specific proposition or remark of the trial judge must be clear. (Lindheim v. Duis, 11 Misc. Rep. 16 [N. Y. Supr. Ct. 1895].)

—— **Ambiguous charge — exception to.]** When a charge is made in ambiguous language to a jury, and the counsel except, stating their understanding

of the charge, if the judge does not intend to lay down the rule as suggested by the counsel, he must disclaim the interpretation of the counsel and state the rule accurately; and if he does not do so he will be assumed to have adopted the interpretation suggested by the counsel. (Price v. Connor, 15 Alb. Law J. 256 [Court of Appeals, 1877].)

—— **Exception to the direction of a verdict sufficient — not necessary to demand submission of facts to the jury.]** An exception to a direction of a verdict for plaintiff is sufficient to present the point on appeal that there were questions of fact for the jury; it is not necessary to request the submission of any such facts. (First Nat. Bk. v. Dana, 79 N. Y. 108 [December, 1879]; Trustees of East Hampton v. Kirk, 13 Alb. L. J. 233 [Court of Appeals, 1877].)

—— **General exception to the direction of a verdict — when insufficient.]** To justify a reversal, the exceptions must present the specific point for review, and a general exception to the direction of a verdict is not sufficient to raise the objection that the proper judgment, if against appellant, was nonsuit. Law v. Pemberton, 10 Misc. Rep. 362 [N. Y. Com. Pl. 1894].)

—— **A single exception to adverse rulings on several requests for a verdict — when unavailing.]** Where plaintiff moves for a verdict on the whole case, and on a counterclaim, and on the question of damages, uniting the several requests and taking but one exception to an adverse ruling, if he is not entitled to have all granted the single exception is unavailing. (Myers v. Rosenback, 14 Misc. Rep. 638 [1895].)

—— **Exceptions to direction of verdict — when new trial ordered.]** Where the case goes up to the General Term on a verdict directed subject to its opinion without qualification, exceptions cannot be heard, the facts being uncontroverted; but if exception to the direction of a verdict for the defendant is taken, it raises the question of plaintiff's right to go to the jury, and if the court finds that there is a question of fact, it will order a new trial. (Clarkson v. Western Assurance Co., 92 Hun, 527 [1895].)

—— **Exception to direction of a verdict — question raised.]** On an exception taken to the direction of the court to the jury to find a verdict for the plaintiff, the question is raised whether there is any question to be submitted to the jury on conflicting evidence. (Rauth v. Scheer, 20 Misc. Rep. 689 [N. Y. City Ct. 1897].)

—— Excepting to the direction of a verdict merely raises the question whether any issue of fact should have been submitted to the jury. (Walker v. Phœnix Ins. Co., 89 Hun, 333 [1895].)

—— Question of special damages raised without exception to the direction of the verdict. (Sheldon v. Baumann, 19 App. Div. 61 [1897].)

—— **Request to court to direct a verdict — effect of.]** When a defendant requests the court to direct a verdict in his favor he thereby assumes that there is no dispute as to the facts, and allows the justice presiding to be substituted in the place of the jury, and is concluded by his findings. He cannot, therefore, upon appeal under a general exception to the subsequent direction of a verdict in favor of the plaintiff, insist that there were questions in the case which should have been submitted to the jury. (Strong v. The N. Y.

Laundry Manuf. Co., 6 Hun, 528 [1876]. See Ormes v. Dauchy, 11 N. Y. Wkly. Dig. 142 [Court of Appeals, 1880].)

—— **Result of requests by both parties for the direction of a verdict.]** Where both parties ask the direction of a verdict, the court determines the facts as well as the law. A direction in favor of plaintiff, where defendant was the sole witness in his own behalf, is conclusive of the issues of fact against him. (Guilford v. Mulkin, 85 Hun, 489 [1895]; Schram v. Werner, 81 id. 561 [1894].)

—— **Exception to denial of request to direct a verdict, which fails to specify the ground thereof.]** In such a case defendant cannot maintain his exception on appeal on showing that the facts found did not authorize the verdict, provided the failure of proof might have been supplied if the attention of the opposite party had been called to the defect. (Haines v. N. Y. C. & H. R. R. R. Co., 145 N. Y. 235 [1895].)

—— **Failure to except to a direction of judgment — only exceptions reviewed.]** In the absence of an exception to the direction of a judgment for plaintiff, the correctness of the decision cannot be reviewed, but only the exceptions taken on the trial. (Foulke v. Thalmessinger, 1 App. Div. 598 [1896].)

—— **Error in a charge based upon a fact assumed by all the parties to exist.]** An exception to an error in the charge of a court as to the measure of damages will not be sustained on appeal when the charge was based upon a fact the existence of which was assumed by the court and both parties upon the trial. (Vail v. Reynolds, 42 Hun, 647 [1886].)

—— **Instruction to the jury in the absence of defendant's counsel.]** If the court has no right to instruct the jury in the absence of defendant's counsel, the point is available without an exception. If the right exists but is abused, the point can be raised on a motion for a new trial which has been made on a case, and the appeal from the order denying a new trial brings the question before the appellate court. (Cornish v. Graff, 36 Hun, 160 [1885].)

—— **Objection to improper matter in a verdict — when to be taken.]** Objections to improper matter in a verdict should be urged at the time the verdict comes in and before it is recorded, so that the jury may then be sent back to reconsider and correct it, as they see fit, either in form or substance; otherwise the objection will, on appeal, be deemed to have been waived. (Brigg v. Hilton, 99 N. Y. 517 [1885].)

REVERSAL WITHOUT NEW TRIAL — Judgment for appellant without new trial.] When the General Term may order a judgment for the appellant without directing a new trial. (Price v. Price, 33 Hun, 432 [1884].)

EVIDENCE ON APPEAL — When the court will, on appeal, receive a document imperfectly described in the case.] Where one of the conditions of a lease was very imperfectly shown upon the hearing of a motion, the General Term may, upon the appeal from the order, receive such lease for the purpose of ascertaining the fact. (Moller v. Duryea, No. 2, 21 Wkly. Dig. 459 [Sup. Ct. 1885].)

—— **Documentary evidence on appeal — when allowed.]** The practice of allowing documentary evidence to be given on appeal is confined to supply-

ing defects in proof already given on the trial of the same facts. Independent and additional evidence is not allowed, especially if other counter evidence might have been given had the question been raised at the trial. (Hall v. The United States Reflector Company, 21 Wkly. Dig. 37 [Gen. T. 1885].)

—— **Production of record of certificate of tax sale on appeal.]** A record may be produced on the hearing of an appeal from a judgment to sustain the judgment as a record of the certificate describing the property sold on the tax sale. (Toole v. Bd. of Supervisors of Oneida, 13 App. Div. 471 [1897].)

—— **Receiving a decree on appeal to sustain a judgment.]** Where no question was raised at the trial as to the appointment of plaintiff as administrator, though the pleadings put it in issue, held, that to sustain a judgment in his favor a certified copy of the decree appointing him could be filed on appeal. (Hewett v. Chadwick, 8 App. Div. 23 [1896].)

—— A record may be produced for the first time before an appellate court. (Harlem B. M. & F. R. Co. v. Town Board, 87 Hun, 276 [1895].)

—— **Admissions.]** Admissions not received in evidence upon the trial, not received on appeal. (People ex rel. Manhattan R. Co. v. Barker, 146 N. Y. 304 [1895].)

—— **Court of Appeals — confined to findings of fact by referee.]** The Court of Appeals is confined to the findings of fact made by a referee and is not permitted to look into the record for additional facts. (Sweet v. Henry, 175 N. Y. 268 [1903].)

—— **Court of Appeals cannot entertain appeal involving nothing but a question of costs.]** (Matter of Croker v. Sturgis, 175 N. Y. 158 [1903].)

STATEMENT ON APPEAL — To Court of Appeals.] When a judgment is rendered by the General Term upon a verdict taken subject to the opinion of the court, and a statement of facts with the questions or conclusions of law thereon is prepared as required by section 333 (subd. 2) of the Code of Procedure and is made part of the record, the facts presented in the statement are the only ones which can be considered upon appeal. (Jaycox v. Cameron, 49 N. Y. 645 [1872].)

—— **Verdict subject to opinion of the court — statement required.]** On appeal to the Court of Appeals from a judgment entered at General Term, "upon a verdict subject to the opinion of the court," the return must contain a "statement of the facts, of the questions of law arising thereupon, and of the determination of those questions by the General Term," as required by the Code of Civil Procedure (§ 1339); without such a statement the appeal may not be heard. (Cowenhoven v. Ball, 118 N. Y. 231 [1890].)

—— Where a verdict is taken subject to the opinion of the court at General Term, the judgment of the General Term thereon cannot be reviewed in the Court of Appeals unless a statement of the facts and conclusions of law is prepared and filed with the judgment-roll, as prescribed by the Code of Procedure, section 333. (Reinmiller v. Skidmore, 59 N. Y. 661 [1875].) A statement of facts is essential to a review in the Court of Appeals. (Bridger v. Weeks, 30 N. Y. 328 [1864]; Leland v. Cameron, 31 id. 115 [1865]; Doty v. Carolus, Id. 547 [1865]; Essex County Bk. v. Russell, 29 id. 673 [1864].)

GENERAL TERM — Review of facts by.] Where the General Term has a right to review the facts on appeal from a judgment entered upon the report of a referee, it is its duty to pass upon them from the evidence. (Godfrey v. Moser, 66 N. Y. 250 [1876].)

APPELLATE DIVISION — Review of facts by.] The Appellate Division has power on appeal from a judgment of the Municipal Court of the city of New York to review the facts and reverse the judgment. (Blumenthal v. Levy, 82 App. Div. 536 [1903].)

—— When order of, reviewable by Court of Appeals.] An order of the Appellate Division reversing, solely upon questions of law, an order denying an application by a purchaser at a partition sale to be relieved of his purchase is reviewable by the Court of Appeals. (Parish v. Parish, 175 N. Y. 181 [1903].)

—— When Court of Appeals concluded by unanimous decision of.] When a judgment upon a decision of the trial court is unanimously affirmed by the Appellate Division, the Court of Appeals is concluded thereby. (Hutton v. Smith, 175 N. Y. 375.)

COUNTY COURT — Judgment on the report of a referee.] In an action commenced in a Justice's Court and retried, how reviewed. Motion for new trial need not be made in the County Court. (Cook v. Darrow, 22 Hun, 306 [1880].)

STENOGRAPHER'S MINUTES — Use of — disapproved.] The practice of using the stenographer's minutes as the evidence in the "case" condemned. (Howland v. Woodruff, 60 N. Y. 73 [1875]; Jewell v. Van Steenburgh, 58 id. 85 [1874]; Ryan v. Wavle, 4 Hun, 804 [1875].)

—— When they control.] Where in the settlement of a case there is a dispute as to words, the stenographer's minutes must control. (Nelson v. N. Y. C. & H. R. R. R. Co., 1 Law Bull. 15 [Com. Pl. Sp. T. 1878].)

—— How corrected.] The remedy for a stenographer's neglect to note an exception is by moving to resettle the case. (Toner v. Mayor, 1 Abb. N. C. 302 [Chamb. 1876].)

—— Matter not appearing in minutes.] It is the duty of the trial judge, and not of the stenographer, to settle a case, and it is no answer to a motion to correct a case by inserting matters alleged to have taken place on the trial that they do not appear in the stenographer's minutes. (Foster v. Standard Nat. Bank, 21 Misc. 8 [1897]. See Code of Civil Procedure, § 1007.)

—— Copy of stenographer's minutes; when the amount paid for them will not be allowed as a disbursement.] The plaintiff procured from the stenographer a copy of his minutes taken on a trial and paid therefor $40, which was allowed as a disbursement. The trial judge made a certificate in which he stated that on the trial he desired the stenographer's minutes to be furnished to the court and that the stenographer's fees be taxed as a disbursement. Held, that as it did not appear that the plaintiff's copy was procured or used for that purpose, the item should have been disallowed. (Pfandler Barm Extracting Company v. Pfandler, 39 Hun, 191 [1886].)

—— When allowed as a disbursement.] In the First Department the cost of a copy of the stenographer's minutes obtained to prepare amendments to

a case on appeal is a taxable disbursement, since by Rule 32 a party proposing amendments to a case must refer at the end of each amendment to the proper page of such minutes, and this compels the party proposing such amendments to procure a copy of the minutes. (Ridabock v. Metropolitan El. R. Co., 8 App. Div. 309 [1896]; Park v. N. Y. C. & H. R. R. Co., 57 id. 569 [1901].)

—— **Stenographer's minutes in capital cases.]** Upon an appeal in a capital case it is the duty of the county clerk to cause the stenographer's minutes to be printed literally as filed, without change or alteration of any kind made after that date. As to whether the power exists in the court to correct errors or make changes in the minutes after they have been filed, upon due notice to the defendant to be heard, *quære*.

Where changes have been made in the record by the county clerk, the Court of Appeals has jurisdiction, upon an application of the defendant, to direct the clerk to make and print the record required by statute. (People v. Conroy, 151 N. Y. 543 [1897].)

ACTS AND GESTURES OF WITNESSES — Not presented by case.] Evidence consisting of acts and gestures of witnesses is not presented to the appellate court by a bill of exceptions, and where it does not present a portion of the evidence, the court must assume that such evidence was sufficient to authorize the charge by the judge below. (Mahoney v. The People, 3 Hun, 202 [1874].)

—— **View of premises by a referee.]** Effect on an appeal of the fact that a referee has by consent of the parties inspected certain premises and acted upon the knowledge so acquired. (Claflin v. Meyer, 75 N. Y. 266 [1878].)

As to points, see notes under Rule 41.

RULE 33.

Omitting to Make a Case or Serve Amendments — Effect of.

If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the judge or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed.

Rule 35 of 1858. Rule 42 of 1871. Rule 42 of 1874. Rule 33 of 1877, amended. Rule 33 of 1880. Rule 33 of 1884. Rule 33 of 1888, amended. Rule 33 of 1896.

See notes under Rule 32.

CODE OF CIVIL PROCEDURE.

§ 997. Case on appeal or on a motion for a new trial — when necessary.
§ 998. When not necessary.

FAILURE TO SERVE A CASE — Practice on.] This court will no longer allow judgments to be affirmed on the call of the calendar at General Term if the case has not been settled and filed (36 How. Prac. 366 [1869]); nor can the respondent move to dismiss the appeal upon a certified order of the Special Term declaring the appeal abandoned and upon the judgment-roll on file. He should apply for an order putting the case on the General Term calendar, and, upon an affidavit of the nonservice of the appeal papers and on notice to the appellant for the earliest motion day in term, move to strike the cause from the calendar and for judgment of affirmance. (Carraher v. Carraher, 1 J. & S. 502 [Gen. T. 1871]; S. C., 11 Abb. [N. S.] 338; 42 How. Prac. 458; Phelps v. Swan, 2 Sweeny, 696 [Gen. T. 1870]; Ward v. Central Park, North & East R. R. R. Co., Id. 701 [Gen. T. 1870]; Sun Mut. Ins. Co. v. Dwight, 1 Hilt. 50 [Gen. T. 1856]; *contra*, Oeters v. Groupe, 15 Abb. 263 [Gen. T. 1862]; S. C., 9 Bosw. 638.)

—— Appeal cannot be dismissed for.] An appeal cannot be dismissed because of the failure of the appellant to serve a case and exceptions within the time prescribed therefor; the only effect of the omission is to compel the party to argue his appeal on the judgment alone. (Berger v. Dubernet, 7 Rob. 1 [Gen. T. 1867]; Phelps v. Swan, 2 Sweeny, 697 [Gen. T. 1870]; Brown v. Hardie, 5 Rob. 678 [Gen. T. 1867]; Rankin v. Pine, 4 Abb. 309 [Gen. T. 1857].)

—— Appeal not dismissed for failure to procure the settling and signing of a case.] An appeal should not be dismissed for failure to procure the case to be settled and signed, since the appellant may appeal upon the judgment-roll alone. (Brush v. Blot, 11 App. Div. 626 [1896].)

—— Case — not necessary for a review in all cases.] A party desiring to appeal from a judgment entered upon a decision of the court is not obliged to prepare a case to be settled, but he may file exceptions to the findings of the trial court upon questions of law and have his appeal heard upon those exceptions. (Schwartz v. Weber, 103 N. Y. 658 [1886].)

—— Failure to settle case or order it on file.] Where a case on appeal has never been settled nor ordered on file by anyone who participated in any portion of the proceedings, it must be stricken from the calendar. (Williams v. Lindblom, 87 Hun, 303 [1895].)

—— Failure to serve a case.] The Rules of Practice alone make the preparation of the case on appeal necessary, and failure to serve a case does not fall within the provisions of Code of Civil Procedure (§ 1303) relative to mistakes or defects in perfecting an appeal. (Odell v. McGrath, 16 App. Div. 103 [1897].)

—— Motion to dismiss — what to be shown on.] What should be shown on motion to dismiss an appeal for not serving papers. (Phelps v. Swan, 2 Sweeny, 696 [Gen. T. 1870].)

—— **Default — when opened.]** A judgment by default, at a General Term, dismissing an appeal for not serving copies of the case in due time, will, on application to the Special Term, be opened, where the appellant shows that the action and all the proceedings therein were wholly neglected by his attorney and counsel in consequence of his being rendered by his habits incompetent to take charge of them. (Elston v. Schilling, 7 Rob. 74 [Sp. T. 1868].)

—— Application for relief from default in serving a case should be made to the court from the judgment on which the appeal is taken. (Odell v. McGrath, 16 App. Div. 103 [1897].)

—— **What must be shown to open default.]** Where a party makes default in filing his case on appeal, without applying for an extension of time, not only good grounds for the delay must be shown, but also for not having procured an extension of time, in the absence of which proof the appeal will be dismissed. (Gamble v. Lennon, 9 App. Div. 407 [1896].)

—— **Abandonment of the appeal — default in having a case signed and filed.]** Default in having a case on appeal signed and filed, within ten days after it has been settled, works an abandonment of the appeal, and relief can only be had by motion in the court or branch of the court from which the appeal was taken. (Rothschild v. Rio Grande Western Ry. Co., 9 App. Div. 406 [1896].)

—— **Surety — liability of.]** Where an appeal to the General Term is dismissed for a failure to serve the printed case and exceptions required by Rule 50 of the Supreme Court, the sureties on the undertaking on appeal given under sections 334 and 335 of the Code of Procedure are liable to the same extent as if the judgment had been affirmed. (Wheeler v. McCabe, 5 Daly, 387 [N. Y. Com. Pl. 1874].)

—— **Time to make case.]** The time to make a case runs from the time of the trial before a jury or of the motion for a new trial. (Kenney v. Sumner, 12 Misc. Rep. 86 [N. Y. Com. Pl. 1895].)

—— **Failure to serve as to one defendant.]** Where case and exceptions was not served on one in whose favor a judgment had been rendered, the appeal as to him brought up only the judgment-roll for review. (McIlvaine v. Stevenson, 90 App. Div. 77.)

RULE 34.

Case and Bill of Exceptions; Contents; Resettlement; Exhibits.

A bill of exceptions shall contain only so much of the evidence as may be necessary to present the questions of law upon which exceptions were taken on the trial; and it shall be the duty of the judge upon settlement to strike out all the evidence and other matters which shall have been unnecessarily inserted.

A case or exceptions shall not contain the evidence in *haec verba*, or by question and answer, unless ordered by the judge or referee by or before whom the same shall be settled. But the facts of the case, together with the rulings on the trial, shall be

stated in a narrative form, except that where it is claimed by either party that any particular testimony should be given in *haec verba,* the judge or referee who settles the case shall determine whether or not a proper presentation of the case for review requires such portion of the evidence to be so stated in *haec verba,* whereupon the case shall be made accordingly. With the proposed case the appellant may serve his stipulation that he desires to review only the conclusion of the jury, court or referee upon certain specified questions of fact; in which case, the case as settled shall contain all the evidence bearing upon such questions of fact and so much of the evidence as may be necessary to present the questions of law raised by exceptions taken at the trial; and it shall be the duty of the judge or referee settling the case to strike out all other evidence and to certify that all the evidence relating to the questions of fact which the appellant desires to raise has been included in the case as settled; and upon appeal the Appellate Division shall not review any question of fact not specified in such stipulation.

If any case or bill of exceptions does not conform to this rule, the court before which the same shall be brought for review may order the same back for resettlement.

Exhibits shall not be printed at length unless the judge or referee so direct.

When, upon nonenumerated motions, voluminous documents have been used which are material only as to the fact of their existence, or as to a small part of their contents, the parties may, by stipulation, or the court or judge below may, upon notice, settle a statement respecting the same, or the parts thereof to be returned upon the appeal from the order, to be used in place of the original documents.

Rule 36 of 1858. Rule 43 of 1871, amended. Rule 43 of 1874. Rule 34 of 1877, amended. Rule 34 of 1880. Rule 34 of 1884. Rule 34 of 1888, amended. Rule 34 of 1896. Rule 34, as amended, 1910.

See notes under Rule 32.

BILL OF EXCEPTIONS — Contents of.] A bill of exceptions should only contain a concise statement of facts, presenting the points intended to be relied upon as ground of error, or simply so much of the evidence as may appear to be requisite for that purpose. (Tweed v. Davis, 1 Hun, 252 [1874].)

—— **Settlement of — the court above cannot determine what occurred on the trial — mandamus.]** The court cannot determine whether any particular thing occurred on the trial. That is necessarily within the province of the justice settling the case or bill. He cannot be compelled by mandamus to change his decision. (Tweed v. Davis, 1 Hun, 252 [1874].)

—— **One exception on the same point, sufficient.]** If an exception be taken on substantially the same state of facts, and on the same point more than once, a single statement of it is all that is proper in a bill of exceptions. (Tweed v. Davis, 1 Hun, 252 [1874]; Dilleber v. Home Life Ins. Co., 69 N. Y. 256 [1877]; Carlson v. Winterson, 147 id. 652 [1895].)

—— **Exceptions — to be clearly stated.]** It is the duty of an appellant, in preparing a bill of exceptions, to see that the points and exceptions upon which he relies are correctly and clearly stated. (Jewell v. Van Steenburgh, 58 N. Y. 85 [1874]; Colby v. Town of Day, 75 App. Div. 211 [1902].)

—— **An escaped prisoner cannot have a bill of exceptions settled.]** A prisoner who has escaped cannot compel the court to settle a bill of exceptions. (People v. Genet, 50 N. Y. 80 [1872].)

—— **Settled at subsequent term — presumption.]** A bill of exceptions settled at a term subsequent to the trial, where there was no objection made at the time of the settlement, or application made to correct the record, upon the ground that the bill of exceptions was improperly inserted, will be presumed to have been made by consent, and an objection first taken on the argument of the case in the Court of Appeals will not prevail. (Wood v. The People, 59 N. Y. 117 [1874].)

—— **When questions of law only presented — insertion of all the evidence is improper.]** On the settlement of a case presenting only questions of law the insertion therein of all the evidence is improper. (Markwell v. Oceanic Steam Nav. Co., 8 Hun, 547 [1876].)

—— **Not sufficient — where evidence consists of acts.]** Upon the trial of the plaintiff in error for robbery in the first degree, the complainant described the alleged robbery, not only by words but by acts, exhibiting to the jury the manner and mode of its commission. The judge charged that the evidence of the complainant was sufficient, if believed, by the jury, to justify the conviction of the prisoner. Upon a writ of error, held, that, as the bill of exceptions did not present a portion of the evidence, viz., the acts exhibited to the jury, the court must assume that such evidence was sufficient to authorize the charge. (Mahoney v. The People, 3 Hun, 202 [1874].)

—— **Separation of exceptions from the case.]** Separation of exceptions from a case and exceptions, to be made in the manner prescribed by the General Rules of Practice. (Code of Civil Procedure, § 997.)

—— **Form of a case and exceptions intended to review rulings upon testimony only.]** Under such circumstances the case should contain so much of the evidence and proceedings as is material to present the questions and exceptions sought to be reviewed, and it is not material whether the evidence be set out in terms or a statement of its effect be made. (Hubbard v. Chapman, 28 App. Div. 577 [1898].)

—— **Failure to reduce evidence to narrative form, precludes settlement by trial judge.]** The trial judge will not settle a case which does not comply with the rule requiring the evidence to be reduced to narrative form, and the rulings excepted to to be formally stated, followed by a formal statement that the same were excepted to. (Donai v. Lutjens, 20 Misc. Rep. 221 [Sup. Ct. Sp. T. 1897].)

—— **Duty of attorney.]** Attorneys must not shirk labor that tends to concise records, and court may impose costs of printing records on the plaintiff where he refused to settle a statement as to the contents of certain judgment-rolls which were used by them in opposition to motion to vacate judgment on appeal, but insisted on printing them in full. (Holl v. Builders' Construction Co., 127 App. Div. 727.)

RULE 35.

Case to be Signed and Filed.

Rule 35 repealed, 1910.

CODE OF CIVIL PROCEDURE.

§ 1280. Controversy submitted without action — on filing of papers it becomes an action.

See notes under Rule 32.

ORIGINAL PAPERS — Must be filed.] Under this rule the moving party must, within ten days after the settlement of the case, file with the clerk of the court a copy of the case as settled, and the original papers; that is, the case and amendments as they came from the judge or referee, with the corrections or allowances made by him. (Parker v. Link, 26 How. Prac. 375 [Sp. T. 1864].)

EXTENSION OF TIME — To file case.] The court has power to enlarge the time to file exceptions and serve a case, notwithstanding the prescribed period for so doing has elapsed. (Strong v. Hardenbergh, 25 How. Prac. 438 [Gen. T. 1862]; Sheldon v. Wood, 14 id. 18 [Sp. T. 1857]; Bortle v. Mellon, 14 Abb. 228 [Sp. T. 1862]. See Beach v. Gregory, 3 id. 78 Gen. T. 1856]; S. C., 2 id. 204.)

—— **Does not extend time to appeal.]** An extension of the time to file and serve exceptions, or to serve a case with exceptions, does not extend the time to serve a notice of appeal; nor does an extension of the time to appeal, *per se*, extend the time to file and serve exceptions, or a case with exceptions. (Salls v. Butler, 27 How. Prac. 133 [Gen. T. 1863].)

—— **Failure to file case — remedy of respondent.]** Where the appellant fails to file the case in accordance with Rule 33, the respondent should take an order to file the same, and should move to strike the cause from the calendar, and for judgment; his remedy is not a motion that the appeal be dismissed. (Davidge v. Coe, 30 St. Rep. 793 [N. Y. Supr. Ct. 1890].)

—— **Failure to file case — remedy of appellant.]** Where appellant's attorney has failed to obtain the signature of the judge, and file the case within ten days after its settlement, his proper course is a motion to open his default, when, if the application is granted, he will be in a position to have his case regularly filed. (Rothschild v. Rio Grande R. Co., 9 App. Div. 406 [1896].)

—— **Default in filing case — excuses necessary to prevent dismissal of appeal.]** Where a party makes default in filing his case on appeal, without applying for an extension of time, not only good grounds for the delay must be shown, but also satisfactory reasons why an application for extension of time was not made before the time expired, in the absence of which proof the appeal will be dismissed. (Gamble v. Lennon, 9 App. Div. 407 [1896].)

—— **Default in procuring, signing and filing of case — relief.]** Default in having a case on appeal signed and filed within ten days after it has been settled works an abandonment of the appeal, and relief can only be had by motion in the court or branch of the court from which the appeal was taken. (Rothschild v. Rio Grande Western Ry. Co., 9 App. Div. 406 [1896].)

See notes on page 238.

—— **Power to compel the filing of a case after its abandonment.]** A plaintiff having been nonsuited, her attorney made a case and exceptions, which were settled and ordered filed. He, however, neglected to file them, and served the defendant with a notice that the case and exceptions had been abandoned, and ten days later began a new action. The defendant then procured an order requiring the plaintiff to file the case and exceptions. Held, that the court had no power to grant the order. (Noonan v. N. Y., L. E. & W. R. R. Co., 63 Hun, 600 [1892].)

Where the trial justice enters an order declaring the appeal abandoned, a motion will not lie in the Appellate Term to open his default in having failed to file and serve his printed case. (Baylor v. Levy, 113 N. Y. Supp. 802.)

EVIDENCE — A case is prima facie evidence of the facts stated in it.] After a case or exception shall have been settled and filed with the clerk, it may be taken, in the further progress of the action, as *prima facie* evidence of the facts therein stated. (Van Bergen v. Ackles, 21 How. Prac. 314 [Sp. T. 1861].)

DISMISSAL OF APPEAL — Failure to procure settlement and signing of case.] An appeal should not be dismissed for a failure to procure a case to be settled and signed, since the appellant may appeal upon the judgment-roll alone. (Brush v. Blot, 11 App. Div. 626 [1896].)

—— **Failure to renotice case for settlement, after substitution of attorneys.]** Where, after a case on appeal was settled, respondent's attorney died, and another attorney was substituted, but no proceedings were taken to have the case settled, held, that while the appellant was chargeable with laches in failing to re-notice the case for settlement, an absolute dismissal of the appeal would not be ordered, no order directing the case to be filed or declaring it abandoned having been procured by respondent. (N. Y. Land & Improvement Co. v. Chapman, 14 Misc. Rep. 187 [N. Y. Sup. Ct. 1895].)

RULE 36.

Issue of Fact — Neglect to Bring to Trial — Causes Where an Attachment Has Issued or the Defendant is Under Arrest Preferred — Calendar Practice.

Whenever an issue of fact in any action pending in any court has been joined, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant, at any time after younger issues shall have been tried in their regular order, may move at Special Term for the dismissal of the complaint, with costs.

If it be made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court may permit the plaintiff, on such terms as may be just, to bring the said action to trial at a future term.

Whenever in any action an issue shall have been joined, if the defendant be imprisoned under an order of arrest, in the action, or if the property of the defendant be held under attachment, the trial of the action shall be preferred.

Every cause placed upon the calendar of the Trial Term or Special Term for the trial of equity cases shall be moved for argument or trial when reached in its order, and shall not be reserved or put over except by the consent of the court unless otherwise permitted by special rule; and if passed without being so reserved or put over, it shall be entered on all subsequent calendars as of date when passed, and no term fee shall be taxed thereon for any subsequent term.

Rule 45 of 1874. Rule 36 of 1877, amended. Rule 36 of 1880. Rule 36 of 1884. Rule 36 of 1888, amended. Rule 36 of 1896, amended.

CODE OF CIVIL PROCEDURE.

§ 791, subd. 10. Preference on calendar given wherever it is authorized by the General Rules of Practice or by special order.

§ 792. Preference in the case of mandamus or prohibition.

§ 793. Where the preference depends upon faces which do not appear — order on notice necessary.

§ 821. Dismissal of complaint for failure to serve summons upon codefendant of applicant.

§ 822. Where plaintiff unreasonably neglects to proceed in the action.

§ 978. Arrangement on calendar and disposition of issues.
§ 979. Disposition of the issues when no jury is present.
§ 980. Either party may bring the issues to trial.

FAILURE TO PROSECUTE — Dismissal — as to rule in districts other than the first.] In an action in which there is but one defendant, his only remedy for the failure of the plaintiff to bring the cause to trial is to notice it for trial on his part and take judgment of dismissal if the plaintiff fail to appear when called. (Winchell v. Martin, 14 Abb. Pr. [N. S.] 47 [Sp. T. 1872], and note. See Society for Ref., etc., v. Newberger, 2 Law Bulletin, 93 [1880].)

—— What not sufficient delay to defeat a motion for a dismissal.] What is not such delay in moving to dismiss for want of prosecution as will defeat the motion. (Hawley v. Seymour, 8 How. Prac. 96 [C. and Sp. T. 1853].)

—— Cause reserved for three years — motion to dismiss denied.] Where a cause has been reserved generally for a period of nearly three years, a motion to dismiss should be denied upon the offer of plaintiff to try the case the first day of the next term. (Clare v. Crittenden, 34 St. Rep. 120 [Sup. Ct. 1890].)

—— Failure to proceed for two years — not a ground for the dismissal of the complaint.] A complaint should not be dismissed nor an injunction order vacated in an action to enforce liability of stockholders, simply for a failure to proceed with the suit for two years. (Cochrane v. American Opera Co., 30 St. Rep. 13 [Sup. Ct. 1890].)

—— Failure to proceed.] A cause should not be treated as a live issue solely for the attorney's protection, as his rights accrued when he had notice of the settlement. (Crisenza v. Auchmuty, 121 App. Div. 611.)

—— When plaintiff has done nothing to bring action to trial for three years after issue joined, a *prima facie* case of laches is established, the plaintiff is under the burden of showing a good excuse. (Regan v. Milliken Bros., 123 App. Div. 72. See Andrews v. Hedden & Sons Co., 116 App. Div. 231.)

—— When laches of defendant will bar order dismissing complaint for unreasonable delay. (Jacob v. Marks, 26 Misc. Rep. 670.) When plaintiff fails to do anything for three years, *prima facie* case of unreasonable neglect is made out. (Fisher Malting Co. v. Brown, 92 App. Div. 251.)

—— When defendant estopped to charge plaintiff with laches. (McHugh v. Met. St. Ry. Co., 52 Misc. Rep. 588.)

—— When defendant has not served notice he cannot move case for trial. (Haberstitch v. Fischer, 67 How. Prac. 318.)

—— Failure to proceed for nearly six years, is prima facie case of unreasonable delay.] A *prima facie* case of unreasonable delay in prosecuting action is presented, where it has remained at issue for nearly six years without any step being taken by plaintiff to bring it to trial, where younger issues have been tried. (Seymour v. Lake Shore & M. S. R. Co., 12 App. Div. 300 [1896]; Zafarano v. Baird, 80 App. Div. 144 [1903].)

—— Failure of defendant to notice the case for trial, and other circumstances, justify denial of motion to dismiss the complaint on conditions — reasonable conditions.] Where, though an action of ejectment had been pending for three years, without steps being taken to bring it to trial, defendant

did not put it on the calendar and no case against another defendant might be brought as a test case, held, that a motion to dismiss the complaint for want of prosecution might properly be denied on condition of the payment of costs of the motion and stipulating to proceed before a referee. (Graham v. Ackley, 21 App. Div. 416 [1897].)

—— **Dismissal for failure to prosecute when properly denied — what are unreasonable conditions of relief.]** Plaintiff neglected for three years to bring an action of ejectment to trial, and meanwhile younger issues on the calendar were reached and tried. Defendant had the option of putting the case on the calendar and moving it for trial, but failed to do so. Held, that a motion to dismiss for want of prosecution might properly be denied upon reasonable conditions, but that conditions that plaintiff should consent to the creation of a lien in favor of the defendant upon the land, for a large sum, in addition to paying costs, were unreasonable. (Graham v. Ackley, 41 App. Div. 416 [1897].)

—— **What laches justify dismissal.]** Where a motion is made in November, 1898, to dismiss for want of prosecution, the complaint in an action which was at issue in March, 1894, and the plaintiff, upon an affidavit, stating that he had forgotten the pendency of the action, and that he was desirous of going to trial, and that if the motion were denied, he would immediately place the cause on the calendar for trial, obtains an order denying the motion on condition that he serve notice of trial and place the cause on the calendar for the next term, and pay the costs of the motion, it is incumbent upon him promptly to enter the order, and to comply with the conditions imposed, and, upon his unexcused failure so to do, the Appellate Division considered that upon a renewal of the motion made in March, 1899, the Special Term should have dismissed the complaint. (Silverman v. Baruth, 42 App. Div. 21 [1899].)

—— **Laches of defendant who has set up counterclaim.]** Where a defendant has imposed a counterclaim and has demanded thereon affirmative relief in an action triable by a jury, his motion to dismiss the complaint for the plaintiff's conceded unreasonable delay in the prosecution will be denied where the defendant himself has never tried to bring the case to trial as he also is an actor in the case and should make at least a reasonable effort to try it. (Jacot v. Marks, 26 Misc. Rep. 670 [N. Y. Sp. T. 1899].)

—— **Direction of judgment for a counterclaim, improper.]** The court has no power in dismissing an action for want of prosecution, to direct judgment for the amount of a counterclaim to which a reply has been interposed. (Vessell v. Marks, 10 Misc. Rep. 46 [City Ct. of N. Y. Gen. T. 1894].)

—— **Discharge from jail of a defendant who fails to pay alimony.]** In an action for separation, it rests with the discretion of the court to grant a motion to discharge defendant, who, having failed to pay alimony as ordered, has been in jail for seven months, unless the plaintiff, who, during that time, has not noticed the case for trial or put it on the calendar, agrees to try it at the next term. (Tabor v. Tabor, 42 St. Rep. 16 [N. Y. Supr. Ct. 1891].)

—— **Remedy where the case is not at issue.]** Remedy where the case is not at issue as to all the defendants. (Morris v. Crawford, 16 Abb. 124 [Gen. T. 1863].)

—— **Dismissal for laches of plaintiff, discretionary.]** Where a motion to dismiss an action is predicated upon the laches of the plaintiff therein, which the plaintiff endeavors to explain upon the motion, the determination whether such explanation is sufficient rests in the discretion of the court in which the motion is made, and its conclusion will not, ordinarily, be disturbed. (Moffett, Hodgkins & Clarke Co. v. Peoria Water Co., 83 Hun, 73 [1894].)

—— **Motion therefor may be noticed before the filing of a note of issue.]** A cause need not be placed upon the calendar by the filing of a note of issue, before a notice of trial and a notice of motion for a preference can be served, although the motion cannot be granted until the case is upon the calendar. So held in a case where the preference was on the ground of an attachment issued. (Warden v. Post Steamboat Co., 39 App. Div. 543 [1899].)

MOTION TO DISMISS — Proper although the defendant has served a cross notice of trial.] Although the defendant serves a cross notice of trial, but the cause is never put upon the calendar, he is at liberty to move at Chambers to have the cause dismissed for want of prosecution. (Chilcott v. Waddingham, 1 Law Bulletin, 50 [Sp. T. 1879]. See, however, Miller v. Ring, 18 Abb. 244 [Sp. T. 1864]; Fuller v. Sweet, 9 How. Prac. 74 [Sp. T. 1853]; Thompson v. Krider, 8 id. 248 [Sp. T. 1853]; Moeller v. Bailey, 14 id. 359 Sp. T. 1855].)

—— **Right to move to dismiss — not waived.]** Defendant's right to move to dismiss the complaint for failure to prosecute, is not waived by his service of a notice of trial, where the cause is not put upon the calendar, nor is he required to place the cause on the calendar before making the motion. (Israel v. Voight, 12 Misc. Rep. 206 [1895].)

—— **Defendant may move without giving notice of trial.]** Defendant may move to dismiss without being himself bound to give notice of trial. (Roy v. Thompson, 8 How. Prac. 253 [Sp. T. 1852].)

—— **Where both parties notice for trial — neither can move.]** Neither party can move to dismiss where both notice the cause for trial. (Thompson v. Krider, 8 How. Prac. 248 [C. and Sp. T. 1853]; Moeller v. Bailey, 14 id. 359 [Sp. T. 1855].)

—— **The granting of the motion is in the discretion of the court.]** It is discretionary with the court to grant or refuse an application to dismiss the complaint for want of prosecution. (Moffett, Hodgins & Clarke Co. v. Peoria Water Co., 83 Hun, 73 [1894]; Osborne v. Sellick, 5 Wkly. Dig. 589 [Sp. T. 1878]; Perkins v. Butler, 42 How. Prac. 102 [Sp. T. 1871].)

—— **One of several defendants may move to have the complaint dismissed as to him.]** Where there are several defendants and the plaintiff fails to prosecute his action, one defendant may move to have the complaint dismissed as to him. (Ward v. Dewey, 12 How. Prac. 193 [Sp. T. 1854]; Salters v. Pruyn, 15 Abb. 224 [Sp. T. 1862].)

—— **What the defendant must show on the motion.]** The defendant on the motion must show that the cause was at issue, so that it could have been noticed, and that younger issues were tried. (Roy v. Thompson, 8 How. Prac. 253 [Sp. T. 1852].)

—— **A dismissal is a judgment for defendant.]** A dismissal for want of prosecution is a judgment in favor of the defendant. (Tillspaugh v. Dick, 8 How. Prac. 33 [Sp. T. 1853].)

—— **Motion not proper, pending a stay of plaintiff's proceedings.]** A motion to dismiss for want of prosecution cannot be made pending a stay of plaintiff's proceedings until the payment of the costs of a former action. (Unger v. Forty-second St. R. R. Co., 30 How. Prac. 443 [N. Y. Supr. Ct. Sp. T. 1866].)

—— **Effect of one of several defendants dying.]** Effect of the death of one of several defendants. (See Chapman v. Foster, 15 How. Prac. 241 [Sup. Ct. Sp. T. 1859]; Code of Civil Procedure, §§ 755–766.)

—— **That plaintiff is dead, and no representatives can be found, no excuse.]** It is no excuse, on a motion to dismiss for want of prosecution, that the plaintiff is dead and no representative can be found. (Crawford v. Whitehead, 1 Code Rep. [N. S.] 355 [Sp. T. 1851].)

—— **Refusal of referee to proceed unless his fees are paid — a ground for dismissal.]** Where a referee refused to proceed with the trial unless his fees were secured to him, the defendant, after two years, moved to dismiss for want of prosecution, and the motion was granted unless the plaintiff should proceed within ninety days. (Ellsworth v Brown, 16 Hun, 1 [1878].)

PREFERENCE — Plaintiff may obtain preference on the ground of the defendant's arrest or attachment.] The preference of a cause on the ground of the defendant's imprisonment under an order of arrest in the action or the attachment of his property is available, not merely to the defendant who is under arrest or whose property has been attached, but also to the plaintiff, and the plaintiff may move to obtain such preference. (Knox v. Dubroff, 17 App. Div. 290 [1897].) And this right does not depend upon the value of the property attached. (McCloskey v. Bridge Company, 26 App. Div. 628 [1898].)

—— **Definition of "trial" or "hearing."]** For the meaning of the word "trial" or "hearing" in section 791 of the Code of Civil Procedure, see Hoffman v. Connor (New York Daily Register, June 12, 1878).

—— **By Rule 36, not only the defendant, who is under arrest, or whose property has been attached, but also the plaintiff, is entitled to make a motion that the cause be referred.]** (Knox v. Dubroff, 17 App. Div. 290 [1897]. Calendar practice discussed in Ward v. Smith, 103 App. Div. 375.)

—— When party waives right to preference in First Department. (Eckhart v. Jones, 45 App. Div. 562.)

—— Party entitled to preference may withdraw former notice and serve new one. (Gilbert v. Finch, 46 App. Div. 75.)

—— Statement at foot of notice of trial that motion will be made to place case on short cause calendar not sufficient. (Williamson v. Standard Structural Co., 48 App. Div. 186.)

Section 793, as amended by chap. 173, Laws 1904, held unconstitutional in 181 N. Y. 531.

RULE 37.

Notice for Argument and of Motions; Order to Show Cause; Where Returnable; Effect of Order Staying Proceedings When Made Within Ten Days of Trial Term; Irregularities to be Stated; Judgment by Default in Divorce Cases.

All questions for argument, and all motions made at Special or Trial Terms shall be brought before the court on notice, of not less than eight days, unless a shorter time is prescribed by a judge or court, under section 780 of the Code, by an order to show cause, except that where the attorneys for the respective parties reside or have their offices in the same city or village, such notice may be a notice of five days; if the opposite party shall not appear to oppose the party making the motion shall be entitled to the order or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the court shall otherwise direct. If the party making the motion shall not appear, the court shall deny the motion on the filing of the copy notice of motion, or order to show cause.

Such order to show cause shall in no case be granted unless a special and sufficient reason for requiring a shorter notice than eight days shall be stated in the papers presented, nor unless, in a case where the attorneys for the respective parties reside or have their offices in the same city or village, a special and sufficient reason for requiring a shorter notice than five days shall be stated in the papers presented, and the party shall, in his affidavit, state the present condition of the action, and whether at issue, and, if not yet tried, the time appointed for holding the next Special or Trial Term where the action is triable. An order to show cause shall also (except in the first judicial district) be returnable only before the judge who grants it, or at a Special Term appointed to be held in the district in which the action is triable.

No order, except in the first judicial district, served after the action shall have been noticed for trial, if served within ten days of the Trial Term, shall have the effect to stay the proceedings in the action, unless made at the term where such action is to be tried, or by the judge who is appointed or is to hold such Trial Term, or unless such stay is contained in an order to show cause

returnable on the first day of such term, in which case it shall not operate to prevent the subpœnaing of witnesses or placing the cause on the calendar.

When the motion is for irregularity, the notice or order shall specify the irregularity complained of.

This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to an action for a divorce, or limited separation, or to annul a marriage.

In the first judicial district, all motions must be noticed to be heard at and all orders to show cause must be returnable at the Special Term for hearing of litigated motions, except in cases where the special rules of the first judicial district shall require such motion to be made at some other term of the court.

If a notice of motion is served ten days before the return day thereof, it may, immediately after the prayer for relief and before the signature, contain the following statement: "Answering affidavits must be served five days before the return day," in which case answering affidavits, in order to be used upon the motion, must be so served. The moving party, upon receiving such answering affidavits, may serve affidavits in reply at least two days before the hearing. Such replying affidavits shall be limited strictly to matters in reply. Affidavits in answer and reply cannot be read upon the motion if not so served, unless the court in its discretion, for good cause shown, may otherwise order.

Rule 39 of 1858. Rule 46 of 1871, amended. Rule 46 of 1874, amended. Rule 37 of 1877. Rule 38 of 1880, amended. Rule 37 of 1884, amended. Rule 37 of 1888, amended. Rule 37 of 1896, amended. Rule 37 of 1900, amended. Rule 37, as amended, 1910.

CODE OF CIVIL PROCEDURE.

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§ 768. A motion defined.
§ 769. Where motions in the Supreme Court should be heard.
§ 770. In first district, motions which elsewhere must be made in court may be made to a judge out of court — exception.
§ 771. Transfer of motion from one judge to another.
§§ 772, 773. What judges may make orders out of court.
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§§ 1380, 1381. Motion for leave to issue execution after death of judgment-debtor.
§ 1564. Motion for payment of money in partition.
§ 1997. Provisions relating to motions and orders in proceedings instituted by State writ — same as in actions.
§ 2075. Motion to set aside mandamus.
§ 2097. Motion to quash, etc., writ of prohibition.
§ 2373 *et seq.* Motion to confirm, etc., award of arbitrators.
§§ 3236, 3251. Costs of motion.
§ 3277. Motion for judgment for not filing security for costs.

MODE OF SERVICE OF NOTICE — It must, as a rule, be served personally, if not otherwise prescribed.] Where the law requires a notice to be given and does not prescribe the mode of service, it must, as a rule, be served personally. (Mitchell v. Clary, 20 Misc. Rep. 595 [Sup. Ct. App. T. 1897].)

—— Service may be made on Saturday afternoon. (Nichols v. Kelsey, 13 Civ. Proc. R. 154.)

—— When service made by mail on last day, what must be shown. (Green v. Warren, 14 Hun, 434.)

—— When service by mail deemed complete. (Vassar v. Camp, 14 Barb. 341.)

—— Attempted service of answer and demand for bill of particulars by depositing in attorney's letter-box without inclosing in envelope and without addressing to anyone not valid service. (Fitzgerald v. Dakin, 101 App. Div. 261.)

—— Not applicable to service of papers upon nonresidents. (Gottleid v. Kurlander, 52 Misc. Rep. 89.)

—— Service must be personal. (Boland v. Sasloski, 56 Misc. Rep. 333; Matter of Smith, 58 id. 493.)

—— When time extended. (Borsuk v. Blauner, 93 App. Div. 306.)

—— When party has appeared, attorney entitled to notice thereof. (Rice v. Ebele, 55 N. Y. 518.)

NATURE OF NOTICE OF MOTION — It cannot be vacated or quashed on an independent motion.] A notice of motion, whether by order to show cause or a notice signed by an attorney, is not a writ or process which can be vacated or quashed upon an independent motion therefor. (Matter of Van Ness, 21 Misc. Rep. 249 [Sup. Ct. Sp. T. 1897].)

—— When entry in clerk's minutes is in order. (Gerrity v. Seeger & Guernsey Co., 163 N. Y. 119.)

—— Motion defined. (Matter of Jetter, 78 N. Y. 601.)

—— As to relief under application "for such other and further relief." (Myers v. Rosenback, 58 St. Rep. 513.)

—— Motion to modify judgment of absolute divorce — where made. (Matter of Howorth, 59 App. Div. 393.)

—— Motion for appointment of referee to ascertain damages. (Wilson v. Dreyer, 65 Misc. Rep. 240.)

—— Power of County Court to grant order staying proceedings. (Strickland v. Henry, 52 How. Prac. 130.) Power of justice of City Court of New York. (Margolles v. Ernst, 34 Misc. Rep. 405.)

APPLICABLE TO TRIAL TERMS ONLY — The stay of proceedings prevented by Rule 37 applies only to Trial Terms, and does not embrace Special Terms.] Oakley v. Cokalete, 20 Misc. Rep. 206 [Sup. Ct. Sp. T. 1897].)

ORDER TO SHOW CAUSE — Requisites of order to show cause.] An objection to an order to show cause, that the affidavit upon which the order was granted contained no special reason why a shorter time than eight days was required for the hearing of the motion is not to be regarded as too technical. Such an affidavit should also state the condition of the action and the next term or Circuit at which the motion could be heard. (Proctor v. Soulier, 82 Hun, 353 [1894].)

—— Does not indicate any opinion on the part of the court.] An order to show cause is, in effect, merely a short notice of motion, and is not to be regarded as an indication of any opinion by the court upon the merits of the application. (Thompson v. Erie R. R. Co., 9 Abb. [N. S.] 233 [Sp. T. 1870].)

—— Powers of county judge, considered.] Power of the county judge of the county in which the attorney for the applicant resides, to grant an order to show cause, returnable at Special Term, why an order appointing a receiver in supplementary proceedings should not be vacated, considered. (Vandeburgh v. Gaylord, 7 Wkly. Dig. 136 [Sp. T. 1878]. See Code of Civil Procedure, § 773.)

—— County judge — when he cannot grant it.] Where a county judge granted an order to show cause why an *ex parte* order previously made by him, should not be modified, and after hearing counsel for both parties granted the modification, held, that the modification was ineffectual, because ordered on a contested motion. (Parmenter v. Roth, 9 Abb. [N. S.] 385 [Ct. of App. 1870].)

—— County judge can grant an order to show cause, only on eight days' notice.] A county judge should not grant an order to show cause which is

returnable at a Special Term of the Supreme Court, except on the usual notice of eight days. (Brown v. Supervisors of Herkimer, 3 How. Prac. [N. S.] 241 [Sup. Ct. Sp. T. 1885].)

—— **Surrogate's Court — not applicable to.]** The requirement that the moving affidavit shall disclose a reason for granting an order to show cause does not apply to the Surrogate's Court. (In re Harris, 1 Code Proc. R. 162 [Sur. Ct. 1881].)

—— **Order of surrogate exempting an estate from transfer tax.]** The surrogate cannot make an order exempting an estate from payment of the transfer tax without notice to the State Comptroller. (Matter of Collins, 104 App. Div. 184.)

—— **By whom it may be made].** Such an order to show cause may be made by a judge or Special Term in any part of the State of New York, provided it is made returnable at a Special Term held in the judicial district embracing the county wherein an issue of fact joined upon the alternative writ of mandamus which may be granted on the return of the order to show cause would be triable (*Ib.*)

—— **Order to show cause may be granted by the judge.]** An order to show cause in proceedings instituted under section 27 of chapter 687 of the Laws of 1892 may be granted by a justice of the Supreme Court out of court. (Matter of Petition of Argus Co., 138 N. Y. 557 [1893].)

—— **Rule applicable only to incidental applications.]** It seems, the rule applies to those incidental applications which are made during the progress of an action or special proceeding, not to an application which is the foundation of a statutory remedy. (*Ib.*)

—— **Rule not binding on the court.]** This rule, however, simply prescribes a rule of conduct for the guidance of attorneys; it does not exclude a judge at Special Term, who is engaged at the same time in holding a Circuit from entertaining a motion notice for such term, if, in his judgment, the circumstances and the rights and interests involved render it proper to do so. (*Ib.*)

—— **Where returnable — by whom made.]** An order to show cause, returnable at Special Term, must be granted at Special Term; and one returnable before a judge out of court must be made by the judge before whom it is returnable. (Hasbrouck v. Ehrich, 7 Abb. 76 [Sp. T. 1858]; Merritt v. Slocum, 6 How. Prac. 330 [Sp. T. 1851].) These cases were decided prior to the adoption of the above rule, and of Rule 39 of 1858, and would seem to be in conflict with the last sentence of its second paragraph.

—— **Returnable at Special Term held with Circuit.]** Such an order may be made returnable at a Special Term, held with a Circuit. The proceeding is not "a contested motion" within the meaning of the Supreme Court Rule (38) prohibiting the noticing of contested motions or the bringing of them to a hearing at a Special Term held at the same time and place with a Circuit. (*Ib.*)

—— **When made — within what time and when returnable.]** An order to show cause, prescribing a shorter notice than eight days, or dispensing with it altogether, should only be made in exceptional cases. (Androvette v. Bowne, 4 Abb. 440 [Sp. T. 1857]; S. C., 15 How. Prac. 75.) It must be returnable the first day of the term. (Power v. Village of Athens, 19 Hun, 165 [1879].)

—— The length of time is discretionary. (*Ib.*)

—— **Order returnable after eight days.]** An order to show cause may be returnable after more than eight days. (Gross v. Clarke, 1 Code Proc. R. 17 [Gen. T. 1881].)

—— **The Rule (37) and Code (§ 780) not applicable to it.]** Where an order to show cause is returnable after the expiration of eight days, neither section 780 of the Code nor Rule 37 is applicable to it. (*Ib.*)

—— **Order discretionary.]** The order to show cause is discretionary with the Special Term, and may be set aside in the discretion of the General Term. (Sixth Ave. R. R. Co. v. Gilbert E. R. R. Co., 71 N. Y. 430 [1877].)

—— **Order returnable on Sunday — void.]** An order returnable on a Sunday is void (Arctic Fire Ins Co. v. Hicks, 7 Abb. 204 [Gen. T. 1858.]

—— **Amended nunc pro tunc.]** Order to show cause, when it may be amended *nunc pro tunc.* (Suydam v. Belknap, 1 Law Bull. 41 [Sp. T. 1879].)

—— **What a sufficient reason for short notice of motion to vacate an order of arrest.]** An order to show cause why an order of arrest should not be vacated, which specifies as a ground for short notice that during the period the arrest continued in force, defendant's personal character would suffer, and his business interests would be irreparably impaired, is sufficient. (Shaughnessy v. Chase. 23 Wkly. Dig. [Sup. Ct. 1885].)

—— **Not proper when defendant is not under arrest.]** Where the defendant is not in custody, a motion to vacate an order of arrest should not be made on an order to show cause. (Garrett v. Humier, 1 Law Bull. 42 [Sp. T. 1879].)

—— **Not proper to bring on a motion already noticed for a different place.]** After a motion has been noticed, it is irregular for the adverse party to attempt, by an order to show cause, to require the moving party to bring on his motion at a different place from that fixed by the notice. Any reason why the motion should not be heard at the place fixed in the notice, is a matter to be presented to the court at such place. (Thompson v. Erie Ry. Co., 9 Abb. [N. S.] 233 [Sp. T. 1870].)

—— **Defective order to show cause — not set aside after an admission of service given.]** An order to show cause which does not expressly direct that less than eight days' service shall be sufficient, will not be set aside after the party has given an admission of due service of the order. (Anonymous, 3 Abb. N. C. 51, note [Sp. T. 1877].)

—— **Rehearing on order to show cause before same judge.]** A motion for the rehearing of an order directing a judgment-debtor in supplementary proceedings to deliver assets to the receiver of his property theretofore appointed by a county judge is properly granted at a Special Term of the Supreme Court held by the same judge who granted the original order, when the judge perceives that his former ruling was erroneous because of oversight, misapprehension or mistake. (Matter of Crane, 81 Hun, 96 [1894].)

—— **Necessity of resigning order.]** The failure of a judge who granted a stay to resign his order after a modification by another judge so as to permit a motion to be made, even if such resigning be necessary, is cured by a subsequent consent that the motion be heard by the judge who granted the modi-

fication. (Whitman v. Johnson, 10 Misc. Rep. 730 [N. Y. Com. Pl. Gen. T. 1895].)

—— **Resettlement of order.**] Where an order setting aside a verdict and granting a new trial expresses the decision as rendered a refusal of a motion for resettlement is proper. If there was an error in granting the order or in failing to impose proper terms it can be reviewed on appeal from the original order. (Bloomingdale v. Steubig, 10 Misc. Rep. 229 [N. Y. City Ct. Gen. T. 1894].)

—— **Granted after expiration of time to appeal.**] A motion to resettle an order denying a motion to set aside a verdict cannot be granted after the time to appeal from such order has expired, as the sole effect of so doing would be to extend the time to appeal. (Stierle v. The Union Railway Co., 11 Misc. Rep. 124 [N. Y. Com. Pl. Tr. T. 1895].)

—— **Inherent power of the court.**] The court has inherent power to resettle its own order so as to conform it to the actual adjudication. (Robertson v. Hay, 12 Misc. Rep. 7 [N. Y. Com. Pl. Gen. T. 1895].)

—— **Order to show cause, an order and not an alternative writ of mandamus.**] An order granted at a Special Term of the Supreme Court or by a judge at chambers, upon a petition or affidavit presented by a relator, requiring the person, officer or board to whom the order is directed, to do the thing asked for by the relator, or to show cause at a Special Term why such order or mandamus should not be made peremptory, takes the place of a notice and is to be deemed merely an application for a mandamus and not in itself an alternative mandamus, and is not subject to the provision of section 2072 of the Code of Civil Procedure, which requires an alternative mandamus to be made returnable twenty days after service thereof. (People ex rel. Crouse v. Supervisors, 70 Hun, 560 [1893].)

STAY OF PROCEEDINGS — Successive orders staying more than twenty days — improper.] Successive orders staying proceedings for more than twenty days each are irregular. (Mills v. Thursby, 11 How. Prac. 114 [Sp. T. 1852]; Marvin v. Lewis, 12 Abb. 482 [Sp. T. 1861]. See, also, Condon v. Church of St. Augustine, 14 Misc. Rep. 181 [N. Y. Com. Pl. 1895].)

—— **What is not a stay of proceedings.**] An order extending the time to answer is not a stay of proceedings. (Sisson v. Lawrence, 25 How. Prac. 435 [Sp. T. 1862]; Washbourne v. Langley, 16 Abb. Prac. 259 [Gen. T. 1863].)

—— Nor is an extension of time to make a case and exceptions. (Thompson v. Blanchard, 1 Code Rep. 105 [Sp. T. 1849]; Hoff v. Bennett, 2 id. 139 [Chamb. 1850]; Salls v. Butler, 27 How. Prac. 133 [Gen. T. 1863].)

—— Nor is a motion for a new trial. (Bennett v. Austin, 10 Hun, 451 [1877].)

—— The execution of an undertaking on appeal from an order denying a motion for a new trial upon the minutes, will not stay proceedings under the judgment, without an order of the court. (Carter v. Hodge, 150 N. Y. 532 [1896].)

—— Section 775 is not applicable to stay for purposes of motion for reargument. (F. B. N. Co. v. Mackey, 158 N. Y. 683.) Not applicable to order

extending time to amend answer. (Condon v. Church of St. Augustine, 14 Misc. Rep. 181.) What is a renewal under section 776. (Harris v. Brown, 93 N. Y. 390.) Application to correct order should be made before justice who heard motion. (Dinkelspeil v. Levy, 12 Hun, 130.)

—— **Stay in partition or foreclosure.]** An order to show cause made out of court and returnable in less than two days, if it contains a stay of proceedings of sale under a judgment in partition or foreclosure, is irregular. (Asinari v. Volkening, 2 Abb. N. C. 454 [Chamb. 1877].)

—— **Order granting stay in foreclosure, without requiring security, reversed.]** An order for a stay of a foreclosure suit, granted at the instance of a subsequent mortgagee, pending condemnation proceedings against the property, without requiring adequate security to protect the plaintiff, reversed. (Weekes v. McCormick, 16 App. Div. 432 [1897].)

—— **When granted, in order to allow a party to move for a special jury.]** A stay of proceedings to enable a party to move for a special jury should not be granted, except at the Trial Term, or by the justice assigned to hold that part of the Trial Term upon whose calendar the cause is placed. (Walsh v. Sun Mut. Ins. Co., 2 Rob. 646 [Sp. T. 1864]; S. C., 17 Abb. 356.)

—— **Nonpayment of costs of a motion, an absolute stay.]** Where the costs of a motion are not paid, the party in default is absolutely stayed from the time of the service of the order. (Seward v. Wilson, 3 Abb. N. C. 50 [Sp. T. 1877]; Lyons v. Murat, 54 How. Prac. 23 [Sp. T. 1877].)

—— **No presumption that the costs of a motion are paid.]** No presumption exists in favor of the party against whom the costs of a motion are awarded that such costs have been paid. (Ager v. Ager, 1 Law Bul. 2 [Sp. T. 1878].)

—— **Stay for nonpayment of costs waived by notice of trial.]** The stay for nonpayment of costs is waived by giving notice of trial. (Woodbridge v. Nelson, 1 Law Bull. 27 [Brooklyn Cir. 1879].)

—— **Effect of a stay of proceedings until payment of costs.]** Upon a stay of proceedings until payment of costs, the party enjoined has no right to appeal from an order subsequently made in an action, although the time to appeal therefrom runs from the date of the order. (Newkirk v. Hooker, 11 Misc. 719 [N. Y. City Ct. 1895].)

—— **Relief for refusal by Trial Term to strike case from calendar is not by appeal.]** Where, on an appeal from an order denying a motion of the defendant to vacate an order placing an action on the special calendar of the Supreme Court for the trial of short causes and to strike said action from the special calendar of a Trial Term held by another justice, it appears that judgment has already been taken by default, the defendant will not be given relief on the direct appeal, but will be left to his remedy of making a motion in the court below.

Such a refusal to strike the cause from the calendar was correct within Rule 37. (Knowles v. Lichtenstein, 31 App. Div. 496 [1898].)

—— **Stay of trial at Special Term within the rule.]** Where, when a cause on the Special Term calendar in Westchester county is called for trial, and the defendant's attorney calls to the attention of the court an order to show

cause providing that all proceedings in the action should be stayed until the motion arising upon it should be heard and determined, which stay was granted by a judge other than the judge who held the Special Term at which the action should be tried and was granted within ten days of that Special Term, and the court at Special Term directs that the order be vacated, so far as the stay is concerned, and signs an order to that effect, and the attorney then moves the cause for trial and procures a dismissal of the complaint, he should not be adjudged guilty of a contempt of court.

The action of the Special Term, when the cause was called for trial, was, in fact, a decision that the stay of proceedings granted by the justice at Chambers was rendered wholly ineffective by the operation of Rule 37.

The rule, in its present form, is broad enough literally to include a Special Term for trials. (Oakley v. Cokaletee, 16 App. Div. 65 [1897].)

—— **Terms upon granting a stay.]** The court has a wide discretion in imposing the terms upon granting a stay. (Waring v. Somborn, 12 Hun, 81 [1877].)

—— **Pending an appeal.]** A stay granted pending an appeal from a judgment does not give the defendant leave to disregard the judgment. (Sixth Ave R. R. Co. v. Gilbert Elevated R. R. Co., 71 N. Y. 430 [1877]; Genet v. D. & H. C. Co., 113 id. 472 [1889].)

—— **When it ceases to operate.]** A stay of proceedings "until the further order of the court," does not cease to operate until a further order is actually entered. (Ackroyd v. Ackroyd, 3 Daly, 38 [Com. Pl. 1869].)

—— **When a stay is not terminated by the decision.]** Where a plaintiff's proceedings had been stayed until a motion was decided and the decision of that motion contained a continuance of the stay, and the plaintiff entered judgment before the service of a copy of the order made upon such decision, held, that the judgment was irregularly entered and should be vacated. (Warren v. Wendell, 13 Abb. Prac. 187 [Sp. T. 1861].)

—— **When a decision terminates the stay, before service of the order.]** Under an order to show cause with a stay of proceedings until the decision of the motion, a decision terminates the stay before the service of the order made thereon. (Parmenter v. Rotb, 9 Abb. [N. S.] 385 [Ct. App. 1870]. See, also, Cullen v. Uptegrove & Bro., 101 App. Div. 147.)

IRREGULARITY — What is not a motion to set aside for irregularity.] Where the notice of motion was "to set aside the judgment for irregularity in this, to wit, in entering up judgment and filing a record thereof, subsequent to a full and complete settlement, and for such further relief," etc., held, not to he a motion to set aside the judgment for irregularity merely, and, therefore, that the order made upon such motion was appealable. (Marquat v. Mulvy, 9 How. Prac. 460 [Gen. T. 1854].)

—— **Failure to file papers not a mere irregularity.]** It would seem that failure to file papers before publication, where service of the summons is made by publication, is not a mere regularity within the meaning of Rule 37. (Whiton v. The Morning Journal Assn., 23 Misc. Rep. 299 [1898].)

—— **When rule as to specifying irregularities is inapplicable.]** Where a motion to vacate an attachment is based upon the ground that the facts stated

afford no basis for an attachment, Rule 37, requiring a notice of motion to specify the irregularity attacked, has no application. (Andrews v. Schofield, 27 App. Div. 90 [1898].)

—— **To what case the rule is not applicable.]** Where a party by motion seeks relief from a sole of mortgaged premises made by a referee upon the assumption that a regular judgment existed under which the referee was duly appointed, and that he had given the requisite and usual notice of sale and proceeded to offer the premises thereunder, and executed his deed in pursuance of the sale so made by him, no question as to technical or formal irregularities required by Rule 46 to be specified in a notice of motion arises, and the rule does not apply. (Kellogg v. Howell, 62 Barb. 280 [Sp. T. 1872].)

The following irregularities need not be specified:

—— **Issuing an execution in violation of a stay of proceedings.]** (Jackson v. Smith, 16 Abb. 201 [Gen. T. 1863]; S. C., 525 How. Prac. 476.)

—— **Entering judgment on an answer regarded as frivolous, as if upon a default.]** (Decker v. Kitchen, 21 Hun, 332 [1880].)

—— **A motion to open a sale on the ground of surprise or mistake.]** (Kellogg v. Howell, 62 Barb. 280 [Sp. T. 1872].)

—— **A jurisdictional defect.]** (Blake v. Lucy, 6 How. Prac. 108 [Sp. T. 1850].)

—— **Judgment entered on an irregular confession — a motion to vacate is not a motion for irregularity within the rule.]** A motion by a creditor to vacate a judgment by confession entered against his debtor founded on the ground that the statement is insufficient to authorize a judgment to be entered, is not a motion for irregularity within the rule requiring the notice or order to show cause to specify the irregularity complained of. (Winnebrenner v. Edgerton, 8 Abb. Prac. 419 [Gen. T. 1859].)

—— **Rule when applicable.]** An order requiring the plaintiff to show cause why an attachment which it has obtained should not be vacated must specify the irregularities of which the defendant complains. (Weehawken Wharf Co. v. Knickerbocker Coal Co., 22 Misc. Rep. 559 [City Ct. of N. Y. 1898]; reversed in 24 id. 683 [Sup. Ct. App. T. 1898], but affirmed on this point.)

—— **What are irregularities — what laches fatal.]** On a motion to set aside a judgment taken by default for irregularity, because the complaint was not sworn to, and because there was no legal evidence of the service of the summons, which was made upon the managing agent of the defendants, there being no affidavit annexed verifying the signature of the agent who gave an admission of service, held, that these were irregularities which should have been taken advantage of promptly and at first opportunity, and that the delay in moving was fatal to the motion in this respect. Under the facts and circumstances presented, the plaintiff was allowed to amend *nunc pro tunc* by filing his affidavit of verification of the complaint, and was also allowed to annex an affidavit verifying the signature of the agent of the defendants. (Jones v. U. S. Slate Co., 16 How. Prac. 129 [Sp. T. 1857].)

—— **Entry of several judgment on joint indebtedness — amended after one year.]** The entry of a several judgment on a joint indebtedness is a mere irregularity, and may be amended after the expiration of a year. (Judd Linseed & Sperm Oil Co. v. Hubbell, 19 Alb. Law J. 337 [Ct. Appeals, 1879].)

—— **Defects in the summons and copy paper served are irregularities and must be specified.**] Defects in a summons and a copy of papers served are mere irregularities, and if not relied on in the notice of motion cannot be regarded. The same rule applies in case of an order to show cause, as well as of a notice of motion. (Skinner v. Noyes, 7 Rob. 228 [Sp. T. 1867].)

—— **Objection that the return day in an order of arrest has been changed — must be specified.**] Where orders of arrest are sought to be vacated on the ground that the return day has been changed, the irregularity should be pointed out in the moving papers. A statement in the defendant's affidavit that at the time of his arrest the orders had no legal effect, for the reason that the return day had expired, is not a sufficient notice of the particular ground relied upon. (Lalor v. Fisher, 2 Rob. 669 [Supr. Ct. Gen. T. 1864].)

—— **Objection that an execution was issued after five years without leave.**] On a motion to set aside an execution on the ground that it was issued more than five years from the entry of judgment without leave of the court, the ground of the irregularity must be stated in the notice of motion or order to show cause. It is not sufficient if stated in the moving affidavits only. (Montrait v. Hutchins, 49 How. Prac. 105 [Sp. T. 1875].)

—— **Attachment — irregularities in order to show cause.**] It would seem that an order requiring the plaintiff to show cause why an attachment should not be vacated must specify the irregularities of which the defendant complains. (Weehawken Wharf Co. v. Knickerbocker Coal Co., 22 Misc. Rep. 559 [1898].)

—— **Not sufficient to state it in the moving affidavits only.**] On a motion to set aside an execution on the ground that it was issued more than five years from the entry of judgment, without leave of the court, the irregularity must be stated in the notice of motion or order to show cause. It is not sufficient if stated in the moving affidavits only. (Montrait v. Hutchins, 49 How. Prac. 105 [Sp. T. 1875]; German-American Bank v. Dorthy, 39 App. Div. 166 [1899].)

—— **Irregularities must be stated in notice of motion.**] When a motion is made upon the ground of irregularity, it is not sufficient to state the alleged irregularity in the moving affidavits alone; it must be stated as well in the notice of motion. (German-American Bank v. Dorthy, 39 App. Div. 166 [1899].)

—— **The irregularity must be specified in the notice of motion or order to show cause.**] Where the motion is based upon an irregularity, it must be specified in the notice or order. (People v. Kenney, 2 Hun, 346 [1874]; Graham v. Pinckney, 7 Rob. 147 [Sp. T. 1867]; Lewis v. Graham, 16 Abb. 126 [Gen. T. 1863]; Barker v. Cook, 40 Barb. 254 [Gen. T. 1863]; S. C., 25 How. Prac. 190; 16 Abb. 83; Selover v. Forbes, 22 id. 477 [Sp. T. 1859]; Harder v. Harder, 26 Barb. 409 [Sp. T. 1858]; Perkins v. Mead, 22 How. Prac. 476 [Sp. T. 1857]; Roche v. Ward, 7 id. 416 [Sp. T. 1853]; Coit v. Lambeer, 2 Code R. 79 [Sp. T. 1849]; Kloh v. New York Fertilizer Co., 86 Hun, 266 [1895].)

—— A failure to serve a certified copy of an attachment is a jurisdictional defect, and not an irregularity which must be specified in the notice of motion. (Weil v. Gallum, 75 App. Div. 439.)

—— **Order not reversed on appeal, because the ground of the motion was not specified in the notice.]** An order will not be reversed on appeal because the ground was not sufficiently pointed out in the notice of motion, if it was fully stated in the moving affidavits and distinctly sought to be met by the opposing affidavits, and was actually discussed in the court below. (Livermore v. Bainbridge, 14 Abb. [N. S.] 227 [Gen. T. 1873].) Objections cannot be first raised on appeal. (Miller v. Kent, 10 Wkly. Dig. 361 [Gen. T. 1880].)

—— **Appeal — presumption when irregularity is not mentioned.]** Where the irregularity is not specified in the notice, and the motion is denied, the court, on appeal, may presume that the motion was denied on the ground of the defect in the notice. (Lewis v. Graham, 16 Abb. 126 [Gen. T. 1863].)

—— **Action of court below, not reviewable in Court of Appeals.]** The determination of the Supreme Court vacating a judgment upon a mere irregularity based upon a rule of practice and not upon a positive statute, is not reviewable in the Court of Appeals where the party complaining has not been in any way prejudiced. (Moore v. Shaw, 77 N. Y. 512 [1879].)

—— **All objections — to be presented in one motion.]** A party complaining of any proceeding in a cause must embody all his objections in one motion; the court will not permit him to make separate motions for each objection he may have to make. (Desmond v. Wolf, 1 Code R. 49 [Sp. T. 1848].)

—— **Motion not extended beyond the object specified.]** A motion cannot be extended to objects not specified in the notice, *i. e.*, a motion to set aside an execution will not be extended to the judgment. (Alexander v. Esten, 1 Cai. 152 [1803].)

LACHES — In moving, fatal — motion to set aside for irregularity must be made promptly.] To take advantage of a mere irregularity it is necessary to move at the earliest opportunity, or to show an excuse for not doing so. (Lawrence v. Jones, 15 Abb. Prac. 110 [Gen. T. 1862]; Persse v. Willett, 14 Abb. 119 [Sp. T. 1862]; Jones v. U. S. Slate Co., 16 How. Prac. 129 [Sp. T. 1857].)

—— **What laches in moving to set aside a referee's report is fatal.]** A delay of about seven months in making a motion to set aside a report of a referee for irregularity, although it was claimed that a substantial right was involved, held, fatal to the motion. (Patterson v. Graves, 11 How. Prac. 91 [Gen. T. 1854.])

—— **Laches of the clerk in entering orders — not to prejudice parties.]** It is the clerk's duty to enter orders of the court without any special direction to that effect, and his delay or omission to make actual and speedy entry of orders in the minutes will not be allowed to prejudice the substantial rights of parties. (People v. The Central City Bank, 53 Barb. 412 [Gen. T. 1867].)

—— **Objection to irregularity must be made at Special Term.]** Objections to the irregularity of papers upon which an order to show cause why a bill of particulars should not be directed, should be addressed to the Special Term; if not, on appeal from the order directing the service of the bill of particulars, it must be held that there has been a waiver. (Wooster v. Bateman, 4 Misc. Rep. 431 [N. Y. Supr. Ct. 1893].)

—— **Formal objections waived, if not taken at once.]** All objections to the bringing on of a motion must be made before the grounds of it are entered into; if not, they will be considered as waived. (Roosevelt v. Dean, 3 Caines, 105 [1805]; Low v. Graydon, 14 Abb. Prac. 444 [Chamb. 1862].)

PLACE OF MAKING MOTION — Stipulation to allow a motion to be made in any county.] Counsel may agree to have a motion in the Supreme Court heard and decided at a Special Term in any county. (Rice v. Ehle, 65 Barb. 185 [Gen. T. 1873]; S. C., 46 How. Prac. 153].)

—— **At chambers — when heard only by consent.]** A contested motion cannot be heard at a Special Term adjourned to the justice's chambers, except by consent. (Matter of Waldley, 29 Hun, 12 [1883].)

—— **Motion to set aside a substituted service — where to be made.]** A motion to set aside a substituted service of a summons should only be made in the district in which the action is triable, or a county adjoining that. (McCarthy v. McCarthy, 54 How. Prac. 97 [Sp. T. 1877].)

—— **Motion to consolidate actions in different districts, where made.]** A motion to consolidate several actions may be made anywhere in the district containing the county in which any one of the actions is triable. (Percy v. Seward, 6 Abb. 326 [Sp. T. 1858]; Phillips v. Wheeler, 16 Abb. [N. S.] 242 [Gen. T. 1874].)

—— **Motions in first judicial district in actions triable therein.]** All motions affecting the rights of parties in actions triable in the first judicial district must be made therein. (Dupignac v. Van Buskirk, 44 Hun, 45 [1887].)

—— **In the first district — application to vacate an attachment.]** An application to vacate an attachment or order on notice, if made on the original papers, may be heard in the first district at the term for *ex parte* business, where it was granted. (Sturz v. Fisher, 15 Misc. Rep. 410 [Sup. Ct. Sp. T. 1896]; Byrnes v. Ladew, Id. 413 [Sup. Ct. Sp. T. 1896].)

—— **In the first district, a motion in an action triable in another district is improper.]** In the first district the Special or General Term of the Supreme Court cannot hear a motion upon notice in an action triable in another district. (Harris v. Clark, 10 How. Prac. 415 [Sp. T. 1864]; Canal Bank v. Harris, 19 Barb. 587 [Gen. T. 1855].)

—— **Moving papers need not show that motion is made in the proper county.]** It is not necessary that the moving papers should show that the motion is made in the proper county. (Newcombe v. Reed, 14 How. Prac. 100 [Sp. T. 1856].)

—— **Motion to vacate an order of arrest.]** Section 568 of the Code of Civil Procedure does not abrogate the provisions of section 769 of the Code, requiring motions to be made in the judicial district or an adjoining county. (Sutton v. Sabey, 22 Hun, 557 [1880].)

—— **Motion to dismiss an appeal, to be made at General Term.]** A motion to dismiss an appeal for irregularity should be made at the General Term. (Barnum v. Seneca Co. Bank, 6 How. Prac. 82 [Sp. T. 1851]. See as to costs of such motion, Williams v. Fitch, 15 Barb. 654 [Gen. T. 1853].)

TIME OF ARGUING MOTION — Rights of parties in regard thereto.] There is no analogy between the rules with regard to the trial calendars and

the regulations as to hearing and decision of motions. Parties have a right to bring on a motion when they please, and neither side should be forced on, in violation of a written consent to adjourn. (Lilianthal v. Levy, 4 App. Div. 90 [1896].)

RENEWAL OF MOTION — Leave necessary.] A motion denied upon the merits cannot be renewed without leave. (Mayor of New York v. Conover, 25 Barb. 514 [Sp. T. 1857]; S. C., 5 Abb. 252; Cazneau v. Bryant, 6 Duer, 668 [Sp. T. 1857]; S. C., 4 Abb. 402; Mills v. Thursby, 11 How. Prac. 114 [Sp. T. 1852]; Bellinger v. Martindale, 8 id. 113 [Sp. T. 1853]; Snyder v. White, 6 id. 321 [Sp. T. 1851]; Bowman v. Sheldon, 5 Sandf. 657 [Sp. T. 1852]; Willet v. Fayerweather, 1 Barb. 73 [Sp. T. 1847]; Dodd v. Astor, 2 Barb. Ch. 365 [1847]; Pike v. Power, 1 How. Prac. 164 [Sp. T. 1864]; Harker v. McBride, Id. 108 [Sp. T. 1845]; Dollfus v. Frosch, 5 Hill, 493 [Sp. T. 1843]; Mitchell v. Allen, 12 Wend. 290 [1835]; Allen v. Gibbs, Id. 202 [1834]; Hoffman v. Livingston, 1 Johns. Ch. 211 [1814]; Dunn v. Meserole, 5 Daly, 434 [Com. Pl. Gen. T. 1874]; Seaman v. McReynolds, 52 Supr. Ct. [J. & S.] 543 [1885]; Floersheim v. Musical Courier Co., 103 App. Div. 388.)

—— When a motion cannot be renewed without leave of the court.] A motion made by the defendant in an action to have the complaint made more definite and certain, and in default of that relief being granted, for a bill of particulars, having been denied without any leave being given to renew it, a second motion was made by him for a bill of particulars in reference to the second cause of action mentioned in the complaint. Held, that the adjudication upon the prior motion was a bar to the making of the second one. (Klump v. Garner, 44 Hun, 515 [1887].)

—— Second motion without leave.] Leave is not necessary for a second motion, when it is not a renewal, but is founded on new and subsequent facts. (Goddard v. Stiles, 1 N. E. 402 [Court of Appeals, 1885].)

—— When leave to renew, unnecessary.] Leave to renew *ex parte* applications, made out of court to a "judge or justice" upon affidavits, is not necessary. (Belmont v. Erie R. R. Co., 52 Barb. 637, 643 [Sp. T. 1869]. See, however, Rule 25, *ante*.)

—— Leave to renew — discretionary.] Leave to renew a motion is discretionary. When granted. (Hall v. Emmons, 9 Abb. [N. S.] 370 [Ct. of App. 1870]; Livingston's Petition, 2 id. 2 [Ct. of App. 1866]; S. C., 34 N. Y. 555.)

—— As to when leave to reargue will be granted.] (See Boles v. Duff, 56 Barb. 567 [Gen. T. 1870]; Webb v. Groom, 6 Rob. 532 [Sp. T. 1866]; Merrill v. Merrill, 11 Abb. [N. S.] 74 [Sp. T. 1871].)

—— Defective papers — the ground of denial of original motion.] Leave to renew a motion granted, when the motion was denied because of defective papers. (Wood v. Kimball, 9 Abb. 419 [Sp. T. 1859]; Bellinger v. Martindale, 8 How. Prac. 113 [Sp. T. 1853]; Dollfus v. Frosch, 5 Hill, 493 [Sp. T. 1843]; Mitchell v. Allen, 12 Wend. 290 [Sp. T. 1835].)

—— Renewal of denied motion — exception to rule.] The general rule is that a motion once denied at a Special Term cannot be renewed or heard by another Special Term, unless by the terms of the order it appears that the motion was denied for some technical reason not affecting the merits, or leave

is granted to renew the motion, but this rule has exceptions, and where new and different facts have arisen a motion may be renewed without consent. (Noonan v. New York, L. E. & W. R. Co., 68 Hun, 387 [1893]; Shultze v. Rodewald, 1 Abb. N. C. 365 [Sp. T. 1876].)

—— **Where leave to renew is granted it should be so stated in the order.]** Dollfus v. Frosch, 5 Hill, 493 [1843].)

—— **When leave to renew is granted at time of application — when renewal need not be made within a year.]** Where a motion to correct a judgment is made within a year after entry of the judgment, and is denied with leave to renew, a renewal of the motion pursuant to such leave cannot be objected to because not made within one year. (Oliver v. French, 41 N. Y. Supp. 106 [Sup. Ct. App. Div. 1896].)

—— **On new facts.]** A motion should not be denied merely on the ground that a motion of the same nature has already been made and denied, if new facts are presented at the second hearing, such as would be ground for giving leave to renew. (People ex rel. Wilbur v. Eddy, 3 Lans. 80 [Gen. T. 1870]; Butts v. Burnett, 6 Abb. [N. S.] 302 [Sp. T. 1869]; Bank v. Moore, 5 Hun, 624; Mills v. Thurshy, 11 How. Prac. 114.)

—— **On different facts.]** Where a different state of facts has arisen since the first motion, a new motion, based upon these facts, may be made as a matter of right. (People ex rel. Wilbur v. Eddy, 3 Lans. 80 [Gen. T. 1870]; Butts v. Burnett, 6 Abb. [N. S.] 302 [Sp. T. 1869]; Bank v. Moore, 5 Hun, 624; Erie R. R. Co. v. Ramsey, 57 Barb. 449 [Gen. T. 1870].)

—— **On newly-discovered facts.]** A motion may be made to vacate or modify, founded on matters arising or discovered since the first motion, when no laches is imputable to the moving party. (Cazneau v. Bryant, 6 Duer, 688 [Sp. T. 1857]; S. C., 4 Abb. 402.)

—— **Renewal not granted on grounds known when the original motion was made.]** A renewal of a motion to open a judgment taken by default cannot be entertained on the ground of a defense which was known to the defendant when the original motion was made. He should have stated at that time all that was necessary to secure his success. [Pattison v. Bacon, 12 Abb. Prac. 142 [Sp. T. 1861]; Lovell v. Martin, Id. 178 [Sp. T. 1861]; Schlemmer v. Myerstein, 19 How. Prac. 412 [Sp. T. 1860]; Pattison v. Bacon, 12 Abb. 142 [Sp. T. 1861]; S. C., 21 How. Prac. 478.)

—— **Second motion improperly granted, pending a decision of first motion.]** Pending the decision of a motion to correct answer, opposed because the grounds thereof were not stated in the notice of motion, a new motion for the same relief was made, the notice withdrawing the former motion. Held, that the order granting the second motion could be reversed, since the party had neither paid costs nor obtained leave of the courts to withdraw. (Hoover v. Rochester Printing Co., 2 App. Div. 11 [1896].)

—— **Not upon cumulative papers.]** A motion can only be renewed upon new grounds, and not upon mere additional or cumulative papers. (Bascom v. Feazler, 2 How. Prac. 16 [Sp. T. 1845]; Ray v. Connor, 3 Edw. Ch. 479 [1841].)

—— **When leave granted, will not be reviewed on appeal.]** It is discretionary with the court to allow a renewal of a motion on the same or additional

papers, and its decision will not be reviewed on appeal. (Smith v. Spalding, 3 Rob. 615 [Gen. T. 1864]; S. C., 30 How. Prac. 339; White v. Monroe, 33 Barb. 650 [Gen. T. 1861]; S. C., 12 Abb. 357; Marvin v. Lewis, Id. 482 [Sp. T. 1861.])

——**Attachment vacated on the merits — when another application improper.]** Where an attachment has been vacated by the court, after opposition and argument on the merits of the application, another application for the attachment on substantially the same facts, whether before the same or another court, will not be entertained. (Schlemmer v. Myerstein, 19 How. Prac. 412 [Sp. T. 1860].)

——**Attachment against national bank — when motion to vacate may be made.]** Matter of Keller, 116 App. Div. 58; McBride v. Illinois National Bank, 128 App. Div. 503.)

——**Defendant not to be continually vexed with the same application.]** The defendant is not to be continually vexed by the same application, nor are the same or different tribunals to hear and decide upon the same matters more than once. (Schlemmer v. Myerstein, 19 How. Prac. 412 [Sp. T. 1860].)

——**Motion denied on preliminary objection — may be renewed on the merits.]** A motion denied on a preliminary objection may be renewed on the merits. (Marvin v. Lewis, 12 Abb. 482 [Sp. T. 1861]; Adams v. Bush, 2 id. [N. S.] 112 [Sp. T. 1863].)

——**A motion to open an order and for the relief sought may be made at the same time.]** A motion may be properly made to reopen an order and for the relief to which the moving party claims to be entitled, and it rests in the discretion of the Special Term whether or not both branches of the motion shall be heard together. (Andrews v. Cross, 17 Abb. N. C. 92 [Sup. Ct. Sp. T. 1885]; Fowler v. Huber, 7 Rob. 52 [1868]; Bellinger v. Martindale, 8 How. Prac. 113, 115 [Sp. T. 1853].)

——**Motion to strike out an answer a sham, after the denial of a motion for judgment thereon as frivolous.]** (Kreitz v. Frost, 5 Abb. [N. S.] 277 [Sp. T. 1868]. See Fox v. Fox, 24 How. Prac. 385 [Sp. T. 1862]; Frost v. Flint, 2 id. 125 [Sp. T. 1846].)

——**Bail — application to allow surrender as a favor, after denial of, as matter of right.]** An application may be made to the court to allow bail to surrender, as matter of favor, upon excuse for delay, after an application for exoneration as matter of right has been denied on the ground that the strict time has passed. (Hall v. Emmons, 9 Abb. [N. S.] 370 [1870], reversing 8 id. 451, 39 How. Prac. 187, 2 Sweeny, 396.)

——**Appeal from original motion — motion to renew not precluded by.]** A motion to renew may be granted, although an appeal taken from the original order is still pending. (Belmont v. Erie R. R. Co., 52 Barb. 637 [Sp. T. 1869].)

——**The motion will, however, prevent the hearing of the appeal.]** (Peel v. Elliott, 16 How. Prac. 483 [Gen. T. 1858].)

——**First order a bar.]** An order unappealed from and unreversed, is conclusive against the right of the moving party to the same relief on a second motion. (Oppenheim v. Lewis, 20 App. Div. 332 [1897].)

—— **Application to another judge.]** When an order has been denied at Special Term without leave to renew motion it cannot be granted by another judge at circuit. (Chamberlain v. Dumville, 50 St. Rep. 356 [Sup. Ct. 1893].)

—— **Motion need not be made before the judge who decided the former motion.]** (Belmont v. Erie R. R. Co., 52 Barb. 637 [Sp. T. 1869].)

—— **New facts justify — without leave.]** New facts justify a renewal, though leave to renew has not been given. (Butts v. Burnett, 6 Abb. [N. S.] 302 [N. Y. Supr. Ct. Sp. T. 1869]; Bank v. Moore, 5 Hun, 642.)

—— **Without payment of the costs of a prior motion.]** Where a renewal of a motion is made without the payment of costs, if it is not shown that costs were ever demanded, an objection to the motion should not be considered by the appellate court unless it appears that such objection was made on the hearing below. (Matter of Loftus, 41 St. Rep. 357 [Sup. Ct. 1891].)

—— **Papers once served may be referred to on a subsequent motion.]** A moving party, who desires to use papers which, on a previous motion, have been recently served on the adverse party, and are still in the latter's possession, is not bound to serve such papers again, but notice of intention to use them is sufficient. (Deutermann v. Pollock, 36 App. Div. 522 [1899].)

TO OBTAIN LEAVE.] Practice as to obtaining leave to renew a motion. (Wentworth v. Wentworth, 51 How. Prac. 289 [Sp. T. 1876]; Fowler v. Huber, 7 Rob. 52 [Gen. T. 1868].)

—— **Motion for leave and of renewal at same time.]** Motion for leave to renew and such renewal may be made at the same time. (Fowler v. Huber, 7 Rob. 52 [Gen. T. 1868]; Bolles v. Duff, 56 Barb. 567 [Gen. T. 1870].)

—— **An appeal pending — not a bar.]** The fact that an appeal is pending is not a bar to an application to renew a motion. (Belmont v. Erie R. R. Co., 52 Barb. 637 [Sp. T. 1869]. See Clumpha v. Whiting, 10 Abb. 448 [Sp. T. 1860].)

—— **Motion to renew prevents hearing of appeal.]** A motion for leave to renew will prevent the hearing of an appeal from the order denying the original motion. (Peel v. Elliott, 16 How. Prac. 483 [Gen. T. 1858]; Harrison v. Neher, 9 Hun, 127 [1876].)

ENTITLING MOTION PAPERS — Where objection is to be taken.] Objection to the entitling of motion papers cannot for the first time be taken on appeal from the order. (Watts v. Nichols, 19 Wkly. Dig. 165 [Sup. Ct. 1884].)

—— **Failure to entitle a motion for the appointment of a trustee in a separate proceeding.]** Entitling a motion for the appointment of a trustee in place of a deceased trustee, in an action relating to the disposition of the trust fund instead of in a separate proceeding, does not deprive the court of jurisdiction. (Wetmore v. Wetmore, 44 App. Div. 221.)

—— **Entitling one order in several actions.]** Drawing orders entitled in several actions is exceedingly objectionable where it appears that an order for the examination of witnesses *de bene esse* was entitled in six actions and directed the examination of a witness simultaneously in all six suits, which order, if it had been construed so as to direct a consolidated examination, would have been reversed, but as it appeared that six separate orders had

been made, and an order denying a motion to vacate had directed that the depositions be taken separately upon appeal, such order should be affirmed. (August v. Fourth Nat. Bk., 31 St. Rep. 85 [Sup. Ct. 1890].)

COSTS.] All proceedings on the part of a party required to pay costs by an order, except to review or vacate the order, are stayed without further direction of the court, until the payment thereof. (Code Civil Procedure, § 779.)

—— Withdrawal of motion — costs — when payable.] Although it is settled that a notice of motion cannot be withdrawn or countermanded without payment of costs, yet where a motion embraces two distinct matters, as for leave to add parties defendant, and for an injunction and receiver, the first part may be withdrawn, leaving the motion as to the second part still pending, without payment of costs of the motion. (Walkinshaw v. Perzel, 7 Rob. 606 [Chamb. 1867].)

—— Motion costs not allowed where, before the hearing, the ground of the motion is obviated.] A motion was made to set aside an order for the examination of a party before trial on the ground that a copy of the order and moving papers had not been served on the attorney for the party, and before the hearing of a motion such papers were served and no further ground was left for the motion. Held, that the motion costs were improperly imposed on the moving party. (New York, Lake Erie, etc., Railroad Co. v. Carhart, 36 Hun, 288 [1885].)

—— Where costs are inserted in an order entered under a decision not giving them — judge cannot then give costs.] An order entered upon a filed decision without settlement or allowance by the judge, contained an award of costs which was not authorized by the decision. Held, that such allowance of costs was unauthorized and that upon a motion to correct the order in this respect, the judge had no jurisdiction to exercise his original discretion and award costs, but should have corrected the order to conform to the decision. (Siegrist v. Holloway, 7 Civ. Proc. R. 58 [Sup. Ct. 1885].)

—— The party who is to pay costs must seek and tender them to the other.] (Hoffman v. Treadwell, 5 Paige, 82 [1834]; Pugsley v. Van Allen, 8 Johns. 352 [1811]; Hoadley v. Cuyler, 10 Wend. 593 [1833]; Delehanty v. Hoffman, 1 How. Prac. 7 [Sp. T. 1844].)

—— Nonpayment of, a stay.] Under the Code all proceedings on the part of the party required to pay are stayed till payment. (Code of Civil Procedure, § 779.)

—— On failure to pay costs.] The proceedings are absolutely stayed by a failure to pay costs. (Thaull v. Frost, 1 Abb. N. C. 298 [Chamb. 1876]; Hazard v. Wilson, 3 id. 50 [Sp. T. 1877]; Lyons v. Murat, 54 How. Pr. 23 [Sp. T. 1877]. See Code of Civil Procedure, § 3247.)

—— A receiver may enforce by execution a judgment between other parties which requires money to be paid to him.] (Geery v. Geery, 63 N. Y. 252 [1875].)

—— When stay does not deprive court of jurisdiction. (Wessels v. Boettcher, 142 N. Y. 212.)

—— Plaintiff must exhaust other remedies first. (Halsted v. Halsted, 21 App. Div. 466.)

—— When execution for costs may be issued. (Bernheimer v. Hartmayer, 34 Misc. Rep. 346.)

—— After dismissal, costs must be paid before new action can be commenced. (Ingrosso v. B. & O. R. Co., 105 App. Div. 404.)

—— Failure to pay costs of previous motion, not a bar to motion to compel plaintiff to accept service of delayed amended answer. (Tracy v. Lichtenstadter, 113 App. Div. 754.)

—— As to payment of costs of subsequent action when costs of first action remain unpaid, see Wilner v. Ind. Order Abawos Israel, 122 App. Div. 615; Obermeyer & Liebman v. Adisky, 123 id. 272; Hirschfeld v. Hassett, 59 Misc. Rep. 154; Roth v. Wallach, Id. 515.

CONDITION — When and how complied with.] Where an order is granted on condition, and no particular time is mentioned in the order, it must be performed within twenty-four hours. (Kellogg v. Johnson, 7 Cow. 420 [1827].)

—— **Party must take notice of, and comply with order.]** Where a favor is granted to a party, on condition, he must, at his peril, take notice of the order, and comply with its terms. (Willink v. Renwick, 22 Wend. 608 [1840.])

—— **Motion granted conditionally — failure to perform condition, proper practice on.]** Where a motion is granted conditionally upon the failure of the opposing party to do a certain act, if the act is not performed, the proper practice is for the moving party to show, by affidavit, such failure to perform, and thereupon to apply for an *ex parte* order granting the motion absolutely. (Stewart v. Berge, 4 Daly, 477 [Gen. T. 1873].)

—— **What condition may be imposed.]** Upon vacating an execution against the person for irregularities therein, the court may compel the defendant to stipulate that he will not sue for the arrest or for false imprisonment under the execution. (Walker v. Isaacs, 36 Hun, 233 [1885].)

NOTICE OF ARGUMENT — Proper after settlement of a case.] Immediately after the case or exceptions are settled the respondent may give notice of argument. (Anderson v. Dickie, 26 How. Prac. 199 [N. Y. Supr. Ct. Gen. T. 1863]; Donahue v Hicks, 21 id 438 [Gen T. 1861].)

REARGUMENT — Application for reargument must be made before the same justice.] When, upon a motion to reargue a motion, if the judge who originally heard and denied the same does not preside at the Special Term for the hearing of nonenumerated motions, that being the proper place to make such motion, it should be referred to him or postponed until a Special Term is held by him; it should not be denied or dismissed. (Averell v. Barber, 44 St. Rep. 542 [Sup. Ct. 1892].)

—— **Motion for rehearing on the ground of misapprehension or inadvertence before original judge.]** Where a right has been denied to a party under a misapprehension or from inadvertence, a motion for a rehearing before the same judge may be made, and may be granted upon the same papers on which the first motion was made. (Matter of Crane, 81 Hun, 96 [1894].)

—— **Ordered when the highest court has decided otherwise.]** A reargument may be ordered where some obvious mistake has been committed by the court, or where, pending the appeal, the highest appellate court has decided the question otherwise. (See Taylor v. Grant, 36 N. Y. Supr. Ct. Rep. 259 [Gen. T.

1873]; Coleman v. Livingston, Id. 231 [Gen. T. 1873]; Butterfield v. Radde, 40 id. 169 [Gen. T. 1874]; Produce Bank v. Morton, 42 id. 124 [Gen. T. 1877].)

—— **If important point overlooked by the court.]** A reargument may be granted if an important point was not considered by the court. (Guidet v. Mayor, 37 N. Y. Supr. Ct. Rep. 124 [Gen. T. 1874]; Weston v. Ketchum, 39 id. 552 [Gen. T. 1875].)

—— Overlooked by counsel. (Krom v. Levy, 6 T. & C. [Sup. Ct.] 253 [1875]; Guidet v. Mayor, 37 N. Y. Supr. Ct. Rep. 124 [Gen. T. 1874].)

—— **Motion for, not stating the facts overlooked.]** When the motion papers for a reargument do not specifically state what facts have been overlooked upon the former hearing, the motion should not be granted. (Van Wagener v. Royce, 21 N. Y. Supp. 191 [Sup. Ct. 1892].)

—— **Reargument denied, where the question can be settled on a new trial.]** When a new trial has been ordered by a judgment of the Second Division of the Court of Appeals, a motion for a reargument should not be granted by the Court of Appeals on the ground that a question has been overlooked if, upon the new trial, that question might be settled. (People v. Ballard, 136 N. Y. 639 [1892].)

—— **Reargument, heard upon the same case.]** Reargument at General Term cannot be heard upon a new and amended case. (Wright v. Terry, 24 Hun, 228 [1881].)

—— **Reargument denied, in case of leave to go to Court of Appeals.]** A reargument will not be granted at the General Term of the Court of Common Pleas after leave has been granted to go to the Court of Appeals and the judgment has been affirmed by that court. (Jung v. Keuffel, 12 Misc. Rep. 89 [1895].)

—— **Reargument, effect of a decision of the Court of Appeals.]** It is not only the duty of the court to do justice but, also, to satisfy the parties that justice has been done. Where the evidence as to the point in issue is identical on both trials the decision of the Court of Appeals on a former appeal upon that point is obligatory upon the court below. (Myers v. Dean, 10 Misc. Rep. 402 [1894].)

—— **Reargument when application is too late.]** After remittitur filed in the court below and judgment entered thereon and paid, the General Term of the Court of Common Pleas has no jurisdiction to entertain a motion for reargument of an appeal from the City Court of New York. (Bradley v. Laly, 10 Misc. Rep. 366 [1894].)

—— **Order denying reargument at General Term — not reviewable in Court of Appeals.]** An order made at General Term denying an application for a reargument in that court is not reviewable in the Court of Appeals. (Fleischmann v. Stern, 90 N. Y. 110 [1882].)

——When a reargument granted. (Banks v. Carter, 7 Daly, 417 [Gen. T. 1878].)

—— **That remedy exists by appeal — is ground for refusing a reargument.]** The fact that a remedy exists by appeal is a good reason for refusing a reargument. (Giles v. Austin, 34 N. Y. Supr. Ct. Rep. 540 [Gen. T. 1872].)

—— **Motion, not appeal, the proper mode to enforce stipulations.]** A motion, and not an appeal, is the proper mode of obtaining a rehearing in regard to matters of agreement between the court and counsel. (Herbert v. Smith, 6 Lans. 495 [Gen. T. 1872].)

MOTIONS AND ORDERS — What action will not preclude a motion to reopen a default.] The right to reargue a motion to open a default should be determined by the court, and the plaintiff may still be entitled to the right, although he has consented to resettle the original order, received costs therein allowed, and excepted to the sufficiency of the sureties on an undertaking. (Lanahan v. Drew, 44 St. Rep. 769 [N. Y. City Ct. 1892].)

—— **Order denying reargument, not appealable.]** The General Term of the Supreme Court cannot entertain an appeal from an order denying a motion for the reargument of a motion. The court which hears the original motion can alone judge whether it has failed to consider any of the points raised upon a motion and its determination upon this point is final. (Matter of Grout, 83 Hun, 25 [1894].)

—— Jurisdiction of judge out of court to make order, not restricted to cases where matter may be heard out of court. (Matter of Petition of Argus Co., 138 N. Y. 535.)

—— Granting application for order to show cause is discretionary. (Androveth v. Bowne, 151 How. Prac. 75.)

RES ADJUDICATA — Not applicable to special motions.] The principle of *res adjudicata* does not apply to orders made on special motions. (Easton v. Pickersgill, 8 Wkly. Dig. 37 [Ct. of Appeals, 1878]; S. C., 75 N. Y. 599. See Matter of Livingston, 34 id. 555 [1866].)

—— **A person allowed a hearing on a motion is concluded by the decision.]** Where the court allows any person to appear and be heard upon the argument of a motion, in the decision of which he is interested, such hearing is as effectual as though such person had received notice of the motion, and had been named as a formal party to it; and he is fully concluded by the disposition which the court may make of such motion. (Jay v. De Groot, 2 Hun, 205 [1874].)

JURISDICTION — Question of jurisdiction, not to be decided on a motion to dismiss the complaint.] The question of jurisdiction should not be tested on a motion to dismiss the summons and complaint; it should be presented by answer or demurrer. (Johnson v. Adams Tobacco Co., 14 Hun, 89 [1878].)

SERVICE BY MAIL — On what hour of the last day to be made.] A service by mail of notice of appearance and demurrer must be made by a deposit in the mail at such hour on the last day that it will go on that day, or by the first mail on the next day. (Green v. Warren, 14 Hun, 434 [1878].)

MOTION TO VACATE — A judge granting an order for substituted service may entertain a motion to vacate it.] A judge who grants an order for substituted service may entertain a motion to vacate or modify it. (McCarthy v. McCarthy, 13 Hun, 579 [1878].)

—— **Ex parte order vacated on motion at Special Term.]** The court at Special Term on notice, has authority to vacate an *ex parte* order of a judge. (McMahon v. Brooklyn City Railroad Co., 20 Wkly. Dig. 404 [Sup. Ct. 1884].)

—— **Affidavit must show present condition of action.]** Unless the affidavit on a motion to vacate an attachment states the present condition of the case, whether at issue, etc., the motion to vacate should be denied. (Cole v. Smith, 84 App. Div. 500 [1903].)

—— **Denied when affidavit insufficient.]** Affidavit must show present condition of action. (Cole v. Smith, 84 App. Div. 500 [1903].)

MODIFICATION — An order can be modified only on motion.] The court cannot modify an order of its own motion without notice to the parties interested. (Simmons v. Simmons, 32 Hun, 551 [1884].)

—— **After modification.]** The failure of a judge who granted a stay to resign his order after a modification by another judge so as to permit a motion to be made, even if such resigning be necessary, is cured by a subsequent consent that the motion be heard by the judge who granted the modification. (Whitman v. Johnson, 10 Misc. Rep. 730 [1894].)

ENTRY OF ORDER, BY WHOM — Right of unsuccessful party to enter order.] If a party who is entitled to enter an order fails to do so within twenty-four hours after the decision has been made, any party interested may have it drawn up and entered. (Matter of Rhinebeck & Conn. R. R. Co., 8 Hun, 34 [1876].)

—— **Omission to enter order — effect of — who may enter it.]** An omission to enter an order does not give the right to agitate the same question by a fresh motion. The unsuccessful party can enter the order when he desires to appeal, if the prevailing party omits to do so. (Peet v. Cowenhoven, 14 Abb. Pr. 56 [Chamb. 1861]; Hall v. Emmons, 2 Sweeny, 396 [Gen. T. 1870].)

See notes under Rule 3.

REVIEW — Review of decision of one Special Term by another — improper.] A decision of one justice cannot be reviewed at a Special Term, held by another. (Trunstall v. Winton, 31 Hun, 222 [1883].)

—— **Relief from terms imposed must be sought from the justice imposing them.]** An appeal cannot be taken from one Special Term to another; a party must apply to the judge who made the order, or to the General Term when he wishes relief from terms imposed as a condition of a favor granted by a Special Term. (Finelite v. Finelite, 41 St. Rep. 158 [Sup. Ct. 1891].)

APPEAL — When it does not prejudice a motion.] The fact that a party appeals from a judgment does not prejudice a pending motion to set it aside. (Clumpha v. Whiting, 10 Abb. 418 [Sp. T. 1860]; Belmont v. Erie R. R. Co., 52 Barb. 637 [Sp. T. 1869]. See Peel v. Elliott, 16 How. Prac. 483 [Gen. T. 1858]; Harrison v. Neher, 9 Hun, 127 [1876].)

DEFAULT ON MOTION — Laches in opening.] Laches in delaying for nine months to move to open default on a motion to dismiss, held, a sufficient ground for denying it, though during the intervening time other proceedings towards a similar end were prosecuted. (Matter of Peekamose Fishing Club, 8 App. Div. 617 [1896].)

—— **Costs not granted when not demanded in notice.]** If the notice of motion, which is granted on the default of the parties served, does not state that costs will be asked for, none can be granted. (Smith v. Fleischman, 17 App. Div. 532 [1897].)

DIVORCE.] See notes under Rule 72.

RULE 38.

Enumerated Motions — Non-enumerated Motions, What Are — Contested Motions, When Not Heard at Trial Term.

Enumerated motions are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgments sustaining or overruling demurrers, appeals from judgment or order granting or refusing a new trial in an inferior court, appeals by virtue of sections 1346 and 1349 of the Code, agreed cases submitted under section 1279 of the Code, and appeals from final orders and decrees of Surrogates' Courts, and matters provided for by sections 2085–2099 and 2138 of the Code.

Non-enumerated motions include all other questions submitted to the court, and shall be heard at Special Term except when otherwise directed by law.

Contested motions shall not be noticed or brought to a hearing at any Special Term held at the same time and place with a Trial Term, except in actions upon the calendar for trial at such term, and in which the hearing of the motion is necessary to the disposal of the cause, unless otherwise ordered by the justice holding the court; and except, also, that in counties in which no Special Term distinct from a Trial Term is appointed to be held, motions in actions triable in any such county may be noticed and brought on at the time of holding the Trial and Special Term in the county in which such actions are triable.

Rule 40 of 1858, amended. Rule 47 of 1871, amended. Rule 47 of 1874, amended. Rule 38 of 1877, amended. Rule 38 of 1880. Rule 38 of 1884. Rule 38 of 1888, amended. Rule 38 of 1896.

See notes to Rule 37.

CODE OF CIVIL PROCEDURE

§ 768. Definition of a motion.
§ 769. Where motions in the Supreme Court are to be heard.
§ 770. Motions in New York city.
§ 771. Transfer of a motion from one judge to another.
§§ 772, 773. What judges may make orders out of court.
§ 776. Second application for an order.
§ 778. Penalty for a violation of the last section.

§ 779. Costs of motion — how collected.
See sections of the Code under Rule 37.

ENUMERATED MOTIONS.] The following have been held to be enumerated motions:

An appeal from an order appointing an administrator. (Brockway v. Jewett, 16 Barb. 590–593 [Gen. T. 1853].)

An appeal from an order sustaining or overruling a demurrer. (Reynolds v. Freeman, 4 Sandf. 702 [Sp. T. 1852].)

A motion for a new trial on a case or bill of exceptions. (Ellsworth v. Gooding, 8 How. Prac. 1 [Sp. T. 1852]; Van Schaick v. Winne, Id. 5–8 [Sp. T. 1853].)

A motion for a new trial on newly-discovered testimony. (Chandler v. Trayard, 2 Cai. 94 [1804]; S. C., Col. & C. Cases, 358.)

A motion to set aside the report of a referee on the merits. (Remsen v. Isaacs, 1 Cai. 22 [1803]; S. C., Col. & C. Cases, 158.)

A motion to confirm referee's report on reference, under interlocutory decree. (Empire B. & M. L. Asso. v. Stevens, 8 Hun, 515 [1876].)

An appeal from an order of the County Court granting a new trial on the judge's minutes. (Harper v. Allyn 3 Abb. N. C. 186 [Gen. T. 1867].)

Appeal from an order of the New York Court of Common Pleas, denying motion for new trial, taken independently from the judgment. (Kenney v. Sumner, 12 Misc. Rep. 86 [1895].)

—— After an interlocutory judgment, adjudicating certain rights and referring the cause to the referee to state accounts, he made a report, and before the filing of exceptions plaintiff gave notice of motion on the reports, accounts filed, evidence, interlocutory judgment, pleadings, etc., for confirmation of the report and for final judgment. Held, that it was an enumerated motion, under General Rules of Practice 38, and the papers on which it was made should have been served with the notice under Rule 40, and the motion noticed for the first day of the term. (Rogers v. Pearsall, 21 App. Div. 389 [1897]. See, also, Rogers v. Pearsall, 47 N. Y. Supp. 551 [1897].)

NON-ENUMERATED MOTIONS.] The following have been held to be non-enumerated motions:

A motion for a reference in an action. (Conway v. Hitchins, 9 Barb. 378–386 [Gen. T. 1850].)

A motion to set aside a report of referees on the ground of irregularity, but if grounded on merits also, it is an enumerated motion. (Remsen v. Isaacs, 1 Cai. 22 [1803]; S. C., Col. & C. Cases, 158.)

A motion to set aside a verdict for irregular conduct of jury. (Smith v. Cheetham, 2 Cai. 381 [1805]; S. C., Col. & C. Cases, 425.)

A motion to bring on trial by record. (M'Kenzie v. Wilson, 2 Cai. 385 [1805]; S. C., Col. & C. Cases, 428.)

A motion for judgment on the pleadings on the ground that an answer raises no issue. (People v. Northern R. R. Co., 42 N. Y. 217 [1870].)

Distinction between final order and order with leave to plead over. (Hoffman v. Barry, 2 Hun, 52 [1874].)

—— **Motion for judgment for frivolousness is the trial of an action.]** A motion for judgment on account of the frivolousness of the demurrer [§ 247, Code of Civil Procedure], is the trial of an issue of law; and a determination upon it is a judgment. (Roberts v. Morrison, 7 How. Prac. 396 [Sp. T. 1853].)

CONTESTED MOTIONS — Heard only at regular Special Terms, unless otherwise ordered.] Contested motions will be entertained and heard only at the regular Special Term of the court, unless differently ordered by the judge holding such term. (Mayer v. Apfel, 2 Sweeny, 729 [Gen. T. 1870].)

A contested motion cannot be heard at a Special Term adjourned by the justice holding it to his chambers, except by consent. (Matter of Wadley, 29 Hun, 12 [1883].)

—— **When a hearing is in the discretion of the court.]** Entertaining a motion for restitution and granting an order therefor at a Special Term, held in connection with the Circuit, held, to be in the discretion of the court. (Skinner v. Hannan, 81 Hun, 376 [1894].)

—— **When properly noticed for a Trial Term.]** Where, in a proceeding for the substitution of an attorney in two pending actions, the judge at Special Term refers the matter to a referee to take proof and report what sum is due the attorney sought to be removed and directs the application to stand over until the referee makes his report, it is not improper to notice the motion for the confirmation of the report for a Trial Term at which the same judge who held the Special Term is then sitting. (Hinman v. Devlin, 40 App. Div. 234 [1899].)

RULE 39.

Appellate Division Calendar — Notes of Issue, When to be filed — Issue, Date of — Separate Calendar for Non-enumerated Motions — Preferred Cases — Rules in Each Department — Judgment by Default — Twice Passed, Appeal Dismissed.

At the first term of the Appellate Division of the Supreme Court in each department, and at such other times as the court shall from time to time direct, the clerk shall make up a calendar which shall consist of cases pending and undisposed of, as follows:

Notes of issue for the Appellate Division shall be filed eight days before the commencement of the court at which the cause may be noticed. The clerk shall prepare a calendar for the Appellate Division, and, except in the first department, cause the same to be printed for each of the justices holding the court. Appeals shall be placed on the calendar, according to the date of the service of the notice of appeal; and all subsequent enumerated appeals in the same cause shall be put on the calendar as of the date of the first appeal; and other cases as of the time when the question to be reviewed arose. Appeals in non-enumerated mo-

tions shall also be placed upon a separate calendar. Cases entitled to preference shall be placed separately on the calendar.

The Appellate Division of each department shall adopt rules regulating the hearing of causes and of calendar practice in such department not inconsistent with the Code of Civil Procedure.

Judgment of reversal by default will not be allowed. Where the cause is called in its order on the calendar, if the appellant fails to appear and furnish the courts with the papers required, and argue or submit his cause, judgment of affirmance by default will be ordered on motion of the respondent. If the appellant only appears he may either argue or submit the case. If neither party appears, the case will be passed and placed at the foot of the calendar. When any cause shall be twice passed, the clerk shall enter an order of course dismissing the appeal or the proceedings, or denying the motion for a new trial — but the court may, upon motion, vacate the order and restore the cause.

Rule 41 of 1858, amended. Rule 48 of 1871, amended. Rule 48 of 1874. Rule 39 of 1877, amended. Rule 39 of 1880. Rule 39 of 1884. Rule 39 of 1888, amended. Rule 39 of 1896.

CODE OF CIVIL PROCEDURE.

§§ 789–793. Causes entitled to preference — when an order is necessary.
§ 977. Note of issue, contents and filing of.

LACHES — Of attorney — delay in sending note of issue to clerk.] If an attorney, without sufficient excuse, waits until the last day but one for filing notices of argument or issue before sending them to the clerk to file for the calendar, and circumstances then transpire which prevent his sending notice in season for the calendar, he will not be allowed to put it on, whatever his excuse may be, after that time. (Wilkin v. Pearse, 4 How. Prac. 26 [Ct. of Appeals, 1849].)

—— Neglect to file note of issue — application to supply must be on first day of term.] The omission to file a note of issue may be supplied by permission of the court, under section 174 of the Code of Procedure, but the application must be made on the first day of the term. (Clinton v. Myers, 43 How. Prac. 95 [Sp. T. 1872].)

DEFAULT — Case reinstated — second default — practice on.] After a default has been taken by respondent, and it is opened on condition that the case be restored to the calendar and argued that term, if the appellant neglects to comply with the condition, it is proper for the respondent to have the cause restored to the calendar; and a second default taken by him when

the cause is regularly called is not irregular. (Luft v. Graham, 13 Abb. Prac. [N. S.] 175 [N. Y. Com. Pl. Sp. T. 1871].)

CALENDAR — Control of the court over its calendar.] Subject to the statutory provisions as to preferences, the court has entire control of its calendar. (Maretzek v. Cauldwell, 4 Rob. 666 [Sp. T. 1865]; Martin v. Hicks, 6 Hun, 74 [1875].)

—— Motion to strike from — contents of papers on motion.] The affidavit, on which the motion is made must show that the party moving has served a notice of argument unless such notice has been served by the adverse party. (Herkimer Co. Bank v. Devereux, 5 Hill, 9 [1843].)

—— Appeal from an order putting a cause on the calendar.] An order placing a cause on the calendar for a certain day is not appealable to the General Term. (Schermerhorn v. Carter, 8 N. Y. Wkly. Dig. 383 [1879].)

—— Case in first department — reversed on appeal — its place on the day calendar.] A case upon the general calendar in the first department, which has been reversed at General Term, may be placed on the day calendar at the circuit on two days' notice, and no new notice of trial is necessary when a new calendar is made up. (Watson v. Phyfe, 44 Hun, 562 [1887].)

—— An amendment of a pleading necessitates a new notice of trial.] In the first department an amendment of the pleadings necessitates the giving and filing of a new notice of trial and new note of issue, and such requirement cannot be avoided by a stipulation that the amendment shall not prejudice the position of the case on the calendar, although it is assented to by the trial justice. (Keilty v. Traynor, 25 Misc. Rep. 351 [1898]; Zeigler v. Trenkman, 31 App. Div. 305; Leonard v. Faber, Id. 137; Roberts v. Schaf, 76 id. 433.)

—— Note of issue filed before an answer, returned, has been reserved.] A note of issue filed before an unverified answer which has been returned is reserved in a verified form, is not effective to place the case on the calendar. (Pritchard v. Nederland Life Ins. Co., 38 App. Div. 109 [1899].)

—— Service of an amended complaint.] The service of an amended complaint takes the case from the general and day calendars as the original issues are destroyed; and the case should be stricken therefrom on motion. (Neville v. Butler, 26 Misc. Rep. 203 [1899].)

—— Expense of printing calendars. (See Code of Civil Procedure, § 20.)

PREFERRED CAUSES — Action by an administratrix for negligent killing.] An action to recover damages for negligence which resulted in the death of plaintiff's intestate, brought by an administratrix, may be put on the trial calendar as a preferred case under section 791 of the Code of Civil Procedure. (Hayes v. Consolidated Gas Co., 60 St. Rep. 480 [Ct. of App. 1894].)

—— When party entitled to a preference under Code of Civil Procedure, section 791, subd. 5.] A party is only entitled to a preference under Code of Civil Procedure (§ 791, subd. 5) where in one of the capacities mentioned he is the sole plaintiff or the sole defendant. The right to a preference does not exist where another person is joined with the plaintiff as executor, although that person may be the executor suing in his individual capacity.

(Haux v. Dry Dock Savings Institution, 150 N. Y. 581 [1896]. See, also, Ritchie v. Seaboard National Bank, 12 Misc. Rep. 146 [N. Y. Com. Pl. 1895].)

—— **When party not entitled to preference under Code of Civil Procedure, section 791, subd. 4.]** Where one of the several plaintiffs in an action dies during its pendency and a personal representative is substituted, he is not entitled to have the case placed upon the calendar of the Court of Appeals as a preferred cause under the provisions of Code of Civil Procedure (§ 791, subd. 4), as a party is not entitled to a preference under that provision unless he is a sole plaintiff or sole defendant in the action. (Colton v. N. Y. El. R. R. Co., 151 N. Y. 266 [1896].)

—— **Right is mutual.]** Right to preference where order of arrest has been granted inures to both parties. (Knox v. Dubroff, 17 App. Div. 290 [1897].)

—— **A cause cannot be made a preferred one by stipulation.]** Attorneys cannot, by consent, give a cause a preference to which they are not entitled by law, and where the last pleadings have not been served, the cause will not be placed on the trial calendar in the first judicial department. (Leonard v. Faber, 31 App. Div. 137 [1898].)

—— **What is not a strict compliance with Code of Civil Procedure, section 793, to entitle to a preference.]** A motion for a preference on the calendar, made on a statutory ground, that the sole defendant is the committee of a lunatic, where the notice of trial has stated a claim for preference upon that ground, being not addressed to the discretion of the court but made as a matter of right, denied as not being a strict compliance with the requirements of Code of Civil Procedure (§ 793). (Hardy v. Knickerbocker Trust Co., 23 Misc. Rep. 503 [Sup. Ct. Sp. T. 1898].)

—— **The preference is available, though the motion to grant it is opposed.]** The preference accorded by virtue of Code of Civil Procedure (§ 791, subd. 5) to the action in which an administratrix is sole plaintiff or sole defendant is not personal to the administratrix and may be accorded although she oppose the motion therefor. (Schwartz v. Wolfrath, 24 Misc. Rep. 406 [N. Y. City Ct. 1898].)

—— **Orders in preferred cases.]** Where the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court or a judge thereof upon notice to the adverse party, which must be served with or before the notice of trial or argument. (Code of Civil Procedure, § 793.)

—— **Order to put a cause on the calendar for preferred causes — when necessary.]** In those cases in which the pleadings do not show the right to a preference, an order giving the preference should be obtained and served before or with the notice of trial. (Robertson v. Schellhaas, 62 How. Prac. 489 [Sup. Ct. Sp. T. 1881]; City National Bank of Dallas v. National Park Bank, Id. 495 [Sup. Ct. Sp. T. 1882].)

—— **Special order to put cause on preferred calendar.]** The court may, by special order, advance a cause as preferred and place it upon the calendar for a particular day. (The City of New York v. Shack, 81 App. Div. 575 [1903].)

—— **Issues in a special proceeding, how preferred.]** To entitle issues in a special proceeding, which are to be tried by a jury, to be placed upon the special calendar in Part 2 of the New York Trial Term, under Rule 3, it is not necessary to claim a preference in the notice of trial or to serve with such notice a notice of motion for a preference. (People ex rel. Tyng v. Feitner, 39 App. Div. 532 [1899].)

—— A cause need not be placed upon the calendar by the filing of a note of issue before a notice of trial and a notice of motion for a preference can be served, although the motion cannot be granted until the cause is on the calendar. (Warden v. Post Steamboat Co., 39 App. Div. 543 [1899].)

—— **Privilege not regained by amending the complaint.]** A plaintiff who has lost his right to a preference by failing to demand it when he first noticed the case for trial cannot, by amending his complaint, regain the lost privilege. (Ziegler v. Trenkman, 26 Misc. Rep. 432 [1899].)

—— Order in which civil actions are entitled to preference among themselves in the trial or hearing thereof. (See section 791, Code of Civil Procedure.)

—— **Short causes — court not prohibited from establishing a calendar for.]** The provisions of the Code as to preferences are not exclusive and do not prohibit courts from establishing a calendar for short causes. (Weiss v. Morrell, 7 Misc. Rep. 539 [N. Y. Com. Pl. 1894].)

—— **Short causes — court to determine the time a trial will occupy.]** It is within the discretionary power of the court at Special Term, on a motion to put a cause on the special calendar for short causes, to determine whether there is reason to believe that the trial will not occupy more than one hour. (Guerineau v. Weil, 8 Misc. Rep. 94 [N. Y. Supr. Ct. 1894].)

—— **Equity case — not triable at Circuit.]** The issues in an equity case were not triable at Circuit in 1893, unless so directed, in the absence of consent. (Frothingham v. Stillwell, 35 App. Div. 536 [1898].)

—— **Consent to a trial at Circuit — from what not implied.]** Consent to the trial of issues in an equity case at Circuit cannot be implied from the fact that the party noticed it for trial at such court and consented to its being placed on the calendar, where he moved before trial to strike it from the calendar on the ground that the court had no jurisdiction to try the issues. (Frothingham v. Stillwell, 35 App. Div. 536 [1898].)

—— **Police commissioner of New York entitled to preference.]** The police commissioner of the city of New York, sued as such, held entitled to preference on calendar. (National Athletic Club v. Bingham, 63 Misc. Rep. 62.)

—— **Notice of application to be served with notice of trial.]** Notice of application for preference under the Code must be served with the notice of trial. (Cohen v. Thomas, 63 Misc. Rep. 62.)

—— **Facts justifying preference to be set forth in moving papers.]** Application for preference under the provisions of section 791, Code Civil Procedure, is in discretion of court, hence the facts justifying preference are to be set forth in the moving papers. (Peck v. Maher, 116 N. Y. Supp. 574. See, also, Wilner v. Mink Restaurant Co., 61 Misc. Rep. 73.)

—— **What determines date of issue.]** Time when last pleading is served determines date of issue. (Van Norden Trust Co. v. Murphy, 125 App. Div.

—— **When notice may be served.]** Notice of application for preference may be served at any time within which cause could be noticed for trial. (Thompson v. Post & McCord, 125 App. Div. 397.)

—— **Action for causing death of infant not entitled to preference.]** In an action for damages by causing the death of an infant, held, not to entitle party to preference under section 791, Code of Civil Procedure. (Gehrt v. Deane, 109 N. Y. Supp. 679. See, also, Ortner v. N. Y. City Ry. Co., 54 Misc. Rep. 83.)

—— **Extreme age of plaintiff.]** Extreme age of plaintiff and the likelihood that he might not live until cause reached, held sufficient to entitle to preference. (Hickman v. Schimper & Co., 121 App. Div. 257.)

—— **Failure to make motion operates as a waiver.]** Failure to make motion for preference at the commencement of term for which notice of trial served held to operate as a waiver of the right. (Myerson v. Levy, 117 App. Div. 475; Gegan v. Union Trust Co., 120 id. 382.)

—— Action for a separation held not entitled to preference. (Seligman v. Seligman, 52 Misc. Rep. 9.)

THIRD DEPARTMENT RULES — Rule 15 will be strictly enforced.] The court has full power to protect every party against a wilful disobedience of this rule; and upon a failure to serve a brief by appellant within the time specified, respondent's motion to put the case over the term was granted. (Matter of Haase, 101 App. Div. 336.)

RULE 40.

Enumerated Motions — Papers to be Furnished On — Neglect to Furnish Papers — Cause May be Struck from Calendar — Papers, by Whom Furnished — Points to Contain a Statement of Facts.

The papers to be furnished on enumerated motions at Special Term shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, a copy of the special verdict, return or other papers on which the question arises. The party whose duty it is to furnish the papers shall serve a copy on the opposite party, except upon the trial of issues of law, at least five days before the time for which the matter may be noticed for argument. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party shall be entitled to move, on affidavit and on four days' notice of motion, that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.

The papers shall be furnished by the plaintiff when the question arises on special verdict, and by the party demurring on the trial of issues of law, and in all other cases by the party making the

motion. Each party shall prefix to his points a concise statement of the facts of the case, with reference to the folios; and if such statement is not furnished, no discussion of the facts by the party omitting such statement will be permitted.

Rule 42 of 1858, amended. Rule 49 of 1871, amended. Rule 49 of 1874. Rule 40 of 1877, amended. Rule 40 of 1880. Rule 40 of 1884. Rule 40 of 1888, amended. Rule 40 of 1896, amended.

CODE OF CIVIL PROCEDURE.

§ 1353. Upon what papers an appeal should be heard.

SERVICE OF PAPERS — Neglect — notice must be given of a motion to strike from the calendar.] Where a party intends to object to the argument of a case, demurrer or special verdict because papers have not been served, he must give notice of an application to strike the cause from the calendar, as the objection will not be heard when the cause is called for argument. (Delamater v. Smith, 16 Johns. 2 [1819]; Townsend v. Wheeler, 4 Wend. 196 [1830]; 10 id. 537, note.)

—— Failure to serve papers.] Plaintiff noticed an enumerated motion for the second day of the term, and also failed to serve a copy of the papers on which the motion was founded. Defendant, however, obtained the stenographer's minutes at his own expense. Held, that the motion was fatally irregular and should have been stricken from the calendar under General Rule 40. (Rogers v. Pearsall, 47 N. Y. Supp. 551 [1897].)

—— On motion to confirm referee's report, the supporting papers should be served with the notice. (Rogers v. Pearsall, 21 App. Div. 389 [1897].)

DEMURRER — Papers to be furnished by a party demurring, to the court only.] The party demurring is not required to serve on the opposite party any copy of the pleadings or other papers when the question to be decided arises on demurrer. He is only required to furnish them to the court. (Galt v. Finch, 24 How. Prac. 193–196 [Gen. T. 1862].)

RULE 41.

Papers to be Furnished, on Appeal, by Appellant — Printed Copies of Case and Points — Appeals from Non-enumerated Motions — Delegation of Powers.

In all cases to be heard in the Appellate Division, except appeals from non-enumerated motions, the papers shall be furnished by the appellant or the moving party, and in cases agreed upon, under section 1279 of the Code, by the plaintiff. The party whose duty it is to furnish the papers shall cause a printed copy of the requisite papers to be filed in the office of the clerk of the Appellate Division within twenty days after an appeal has been taken, or the order made for the hearing of a cause therein, or

the agreed case filed in the clerk's office pursuant to section 1279 of the Code of Civil Procedure; but if it shall be necessary to make a case or case and exceptions after the appeal has been taken or the order made for the hearing in the Appellate Division, the printed papers, including the case as settled and signed by the judge before whom the case was tried, shall be filed within twenty days after the settlement of the case; and the party whose duty it is to furnish the papers shall serve within said twenty days upon his adversary three printed copies of such papers.

Such papers shall consist of a notice of appeal, if an appeal has been taken; a copy of the judgment-roll, or the decree in the court below, and the papers upon which it was entered; if no judgment was entered, the pleadings, minutes of trial, and the order sending the case to the Appellate Division or the order appealed from, or the papers required by section 1280 of the Code of Civil Procedure. To these papers shall be attached the case or case and exceptions if it is to be used in the Appellate Division. All the foregoing papers shall be certified by the proper clerk, or be stipulated by the parties to be true copies of the original. There shall be prefixed to these papers a statement showing the time of the beginning of the action or special proceeding, and of the service of the respective pleadings; the names of the original parties in full; and any change in the parties, if such has taken place. There shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured. The foregoing papers shall constitute the record in the Appellate Division. If the papers shall not be filed and served as herein provided by the party whose duty it is to do so, his opponent may move the court on three days' notice, on any motion day, for an order dismissing the appeal, or for a judgment in his favor, as the case may be.

The papers in all appeals from non-enumerated motions shall consist of printed copies of the papers which were used in the court below, and are specified in the order, certified by the proper clerk, or stipulated by the parties to be true copies of the original, and of the whole thereof. There shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured.

They shall be filed with the clerk within fifteen days after the appeal is taken and at the same time the appellant shall serve upon his adversary three printed copies thereof.

If the appellant fails to file and serve the papers as aforesaid, the respondent may move, on any motion day, upon three days' notice, to dismiss the appeal.

If the judge from whose order the appeal is taken orders that it shall not be necessary to insert in the printed papers upon which the appeal is to be taken such exhibits or other voluminous documents as are not necessary for a consideration of the questions raised by appeal, the clerk shall then certify that the printed papers are true copies of the originals and of the whole thereof specified in the order except those omittted by order of the court.

Rule 43 of 1858, amended. Rule 50 of 1871, amended. Rule 50 of 1874, amended. Rule 41 of 1877, amended. Rule 41 of 1880, amended. Rule 41 of 1884. Rule 41 of 1883, amended. Rule 41 of 1896, amended. Rule 41 as amended, 1910.

CODE OF CIVIL PROCEDURE.

§ 1353. Upon what papers an appeal will be heard.

§ 1361. Appeal from a determination in a special proceeding — how far regulated by the General Rules of Practice.

PRINTING PAPERS — Dispensed with only on order of the court.] Printing the necessary papers on which the appeal is to be heard is not for the benefit of counsel or parties, but of the court, and is not to be dispensed with, except by its order. (Wheeler v. Falconer, 7 Robt. 45 [Gen. T. 1867].)

—— Right of Special Term to dispense with the printing of papers on an appeal.] There is no provision of the Code or the rules which authorizes the Special Term to direct that papers submitted upon a motion heard at Special Term, and which have been duly filed and are recited in the order entered upon such motion, need not be printed in the papers to be used on the argument of an appeal from such order; the power to make such direction can be exercised only upon the theory that some of the papers which have been so submitted, filed and recited were not actually used, or that they were not considered by the court in deciding the motion. (Manhattan Railway Co. v. Taber, 7 Misc. Rep. 347 [Sup. Ct. 1894].)

—— To be sparingly exercised.] Such power must be sparingly exercised, and only in cases where there can be no reasonable difference of opinion as to the materiality of the papers in question. (*Ib.*)

—— Papers to be printed on an appeal from an order of the County Court granting a new trial.] An appeal from an order of the County Court granting a new trial on the judge's minutes, is an enumerated motion and must be placed on the calendar, and brought on upon printed papers. (Harper v. Allyn, 3 Abb. [N. S.] 186 [Gen. T. 1867].)

—— **What papers are required at General Term.]** The General Term should have before it all the papers upon which the order appealed from is based. (Eldredge v. Strenz, 39 N. Y. Supr. Ct. 295 [Gen. T. 1875]; Smith v. Chapman, 33 How. Prac. 308 [Gen. T. 1867].)

—— **Contents of record on appeals from orders.]** On appeals to the Appellate Division from orders, all the papers used in the court below must be contained in the record, and all such papers must be referred to in the order disposing of the motion; otherwise an appeal from an order will not be entertained (Whipple v. Ripson, 29 App. Div. 70 [1898].)

—— **The opinion below.]** The opinion of the court below cannot be referred to to show the grounds of the decision, as it forms no part of the record. (Randall v. New York El. R. R. Co., 149 N. Y. 211 [1896].)

—— **Two independent cases cannot be incorporated in one appeal book.]** Two independent cases should not be incorporated in one appeal book; the record on each appeal should be printed by itself so that independent judgment-rolls may be made up, each embracing only the papers applicable to one case. (Geneva & Waterloo Ry. Co. v. N. Y. C. & H. R. R. R. Co., 24 App. Div. 335 [1897].)

—— **Appeal book showing no decision of the issues of law.]** Where the appeal book presented by the defendant upon appeal from a judgment obtained by the plaintiff at a trial of the issues of fact does not show that any decision in writing of the issues of law raised by the demurrer has been filed, the judgment is final against the defendant. (McNulty v. Urban, 1 Misc. Rep. 42 [Brooklyn City Ct. 1892].)

—— **Omitting opinion — argument postponed to allow it to be presented.]** Warren v. Warren, 22 How. Prac. 142 [Gen. T. 1861].)

—— **Argument on the stenographer's minutes, denied.]** In an action for divorce the court denied a motion to allow argument on the minutes of the stenographer, and to dispense with the printing of the case on appeal, it appearing that the parties were living together, and that a reconciliation might thus be effected. (Wanzor v. Wanzor, 25 St. Rep. 753 [N. Y. Com. Pl. 1889].)

—— **The expense of printing is a necessary disbursement.]** The rule requiring papers, which are to be used at General Term, to be printed, renders the expense of printing a necessary disbursement; the party is confined to that mode of compensation, and it is error to charge for printed copies of the case and points by the folio. (Brockway v. Jewett, 16 Barb. 590 [Gen. T. 1853].)

—— **Cost of printing what papers, is a taxable disbursement.]** The cost of printing papers not required to be printed by the rules of the court cannot be taxed as a disbursement. (Veeder v. Mudgett, 27 Hun, 519 [1882].)

—— **Expense of preparing the case in a criminal cause.]** When the expense of preparing the case in a criminal cause will be charged upon the county. (People v. Jones, 34 Hun, 620 [1885].)

—— **Error in printed case — when disregarded.]** An error in the printed case will be disregarded unless corrected by proper application to the court at Special Term, before the case is brought on for argument. (Hickey v. Draper, 2 Hun, 523 [1874].)

—— **Papers used on appeal different from those used below — remedy.]** Where the printed papers on the appeal are not the papers on which the order below was granted, the remedy is to correct the printed papers filed and served, not to strike out from the appeal papers an affidavit which varied from that used below. (People ex rel. Mulligan v. Collis, 8 App. Div. 618 [1896].)

—— **Rule — how enforced.]** The rule will be enforced by considering only such papers as are printed as being before the court. (Wheeler v. Falconer, 7 Rob. 45 [Gen. T. 1867].)

—— **Case, when ordered off the files.]** If the case printed and filed does not correspond with the case as settled, it should be ordered off the files. Tyng v. Marsh, 42 N. Y. Supr. Ct. 235 [Gen. T. 1877].)

—— **Irregular case.]** Where a case is improperly prepared, it should be dismissed, or should be sent back for resettlement. (Ryan v. Wavle, 4 Hun, 804 [1875].)

—— **Irregularities must be corrected by motion.]** Irregularities in the case must be corrected by motion before the appeal is reached. (Frost v. Smith, 7 Bosw. 108 [N. Y. Supr. Ct. Gen. T. 1860]; Eters v. Groupe, 15 Abb. 263 [N. Y. Supr. Ct. Gen. T. 1862]. See Warren v. Eddy, 13 Abb. 28 [Gen. T. 1860].)

—— **Amendment of appeal papers not allowed after argument and decision on appeal.]** Leave will not be granted at General Term to amend appeal papers after argument and decision thereat, on the ground that the correction of a mistake therein would show that a point decided against the appellant had been waived, when it appears that the point was argued and the applicant supposed it not well taken. (The People ex rel. Baker v. Board of Apportionment, 1 Hun, 123 [1874].)

—— **Court cannot shorten time for service of printed case.]** The court cannot shorten the time within which an appellant may file and serve copies of the printed appeal papers. (Ford v. Lyons, 40 Hun, 557 [1886].)

—— **Appeal papers — must be certified.]** An appeal will not be considered unless the appeal papers have been certified as required by section 1353 of the Code of Civil Procedure. The observance of the duty imposed by the said section is regarded as exceedingly important. (Lewisohn v. Neiderweissen, 40 Hun, 545 [1886].)

—— **Certificate to an appeal book on appeal from an order.]** An appeal from an order will not be heard where the appeal book does not contain a certificate that the notice of appeal and papers purporting to have been presented to the court contained therein are copies of such papers. (Stanton v. Catholic Mut. Benefit Assn., 8 Misc. Rep. 346 [Supr. Ct. of Buffalo, 1894].)

—— **Uncertified case stricken from calendar.]** An appeal should be stricken from the calendar unless the case has been certified, or it is shown by the papers that a stipulation had been entered into by the parties that the papers were copies of the judgment-roll and case. (Crawford v. Price, 51 St. Rep. 927 [Sup. Ct. 1893].)

—— **Exceptions ordered to be heard at General Term — plaintiff must serve papers.]** It is the duty of the plaintiff to prepare and serve papers when exceptions are ordered to be heard in the first instance at the General Term.

In case of his failure so to do, judgment will be ordered for the defendant. (Staacke v. Preble, 43 Hun, 441 [1887].)

APPEAL DISMISSED — If proper papers are not submitted.] Where the proper papers are not submitted to the court upon appeal the appeal will be dismissed. (Sun Mut. Ins. Co. v. Dwight, 1 Hilt. 50 [N. Y. Com. Pl. 1856].)

—— Dismissal — absence of papers.] The absence of papers from an appeal book is not a ground for dismissal. (Rosskam v. Curtis, 15 App. Div. 190 [1897].)

—— When it does not appear whether the appeal is from a judgment or an order.] The appeal will be dismissed when the papers do not show whether the appeal was taken from a judgment on a demurrer, or from an order striking out a demurrer as frivolous. (Sun Mut. Ins. Co. v. Dwight, 1 Hilt. 50 [N. Y. Com. Pl. 1856].)

—— New York Common Pleas — failure to print papers — remedy.] According to the practice of this court, a dismissal of appeal is not the exclusive remedy for neglect to serve the printed papers, but the General Term has power to affirm by default, and if it does so, the court at Special Term will not interfere with the judgment. (Brown v. Niess, 15 Abb. [N. S.] 345 [Sp. T. 1874]; S. C., 46 How. Pr. 465.)

—— New York Common Pleas — length of notice to dismiss appeal.] A motion to dismiss an appeal from an order denying a motion for a new trial must be made upon eight days' notice; four days' notice is insufficient. (Kenney v. Sumner, 12 Misc. Rep. 86 [1895].)

—— By City Court for failure to prosecute.] Under Rule 41 of the General Rules of Practice the General Term of the City Court of New York may, by order, dismiss an appeal thereto from a judgment of a Trial Term of said court for failure to prosecute the appeal with reasonable diligence. (Sayer v. Kirchhoff, 3 Misc. Rep. 245 [N. Y. Com. Pl. 1893].)

—— Dismissal of appeal, for failure to serve printed appeal papers — a second appeal cannot be taken without leave of the court.] (Sperling v. Boll, 26 App. Div. 64 [1898].)

JUDGMENT ON APPEAL — Form of.] The memorandum of its decision handed down by the General Term is not a judgment, but simply an authority to enter one. (Knapp v. Roche, 82 N. Y. 366 [1880].) An objection does not lie on appeal because a judgment gives the relief more minutely than specified in the decision. (Applegate v. Morse, 7 Lans. 59 [1872].)

—— Must conform to remittitur.] A judgment entered on a remittitur must conform thereto. (Parish v. Parish, 87 App. Div. 430 [1903].)

POINTS — What is covered by.] Only the heads of an argument and the authorities cited, and not the argument at length, are embraced under the term points. (Gray v. Schenck, 3 How. Prac. 231.)

—— Submission of brief after argument.] A judge cannot consider a paper submitted after argument by one party without notice to the other. (Whitney v. The New York & Atlantic R. R. Co., 32 Hun, 164 [1884].)

—— Error considered, though not argued.] When the General Term will consider an error committed on the trial to which an exception was taken,

although the points do not mention it. (Schoonmaker v. Woolford, 20 Hun, 166 [1880].)

—— **On appeal an order is presumed to have been correctly granted.]** An order appealed from is presumed to be correct, and until the papers upon appeal show that it should not have been granted, it necessarily devolves upon an appellate court to affirm the order. (Mellen v. Banning, 76 Hun, 225 [1894].)

—— **Appellant's points should point out defects.]** The appellant's points should direct the attention of the court to the features of the case upon which the reversal of the judgment is asked for, and if this is not done the court will refuse to examine such question. (Landers v. Staten Island R. R. Co., 13 Abb. Pr. [N. S.] 338 [Gen. T. Brooklyn City Ct. 1872].)

—— **Numerous exceptions — on appeal duty of counsel to point out in his points those upon which he relies.]** When numerous exceptions to rulings upon evidence are to be passed upon by the court, it is the duty of counsel to aid the court by selecting exceptions upon which he relies, and stating tersely in his brief the ground upon which they should be sustained. (Nelson v. Village of Canisteo, 100 N. Y. 89 [1885]; Hebbard v. Haughian, 70 id. 61 [1877]; Jewell v. Van Steenburgh, 58 id. 85.)

—— **Opening of default.]** Opening of a default is with the Special Term, but after case is settled and filed, the filing and service of the papers upon which an appeal is heard are part of the appeal, and the opening of any default therein lies with the Appellate Division. (Hansen v. Walsh, 117 App. Div. 39.)

—— **Stipulation not in record.]** Appeal from order of Appellate Division will not consider stipulation not contained in the record. (Wilson v. Harter, 57 App. Div. 484; People v. Stephens, 52 N. Y. 306. See, also, Russell v. Randall, 123 id. 436; People ex rel. Harman v. Culkin, 60 Misc. Rep. 414.)

—— **What is a final order.]** Order settling account of committee of incompetent is a final order is a special proceeding. (Matter of Chapman, 162 N. Y. 456. See, also, 163 id. 345; 164 id. 354; 165 id. 305.)

—— **Matter in brief disapproved of.]** The printing of a private letter of a judge in a brief is disapproved of. (MacIntosh v. Kimhall, 101 App. Div. 500.)

See notes under Rule 32.

RULE 42.

Exchange of Briefs and Delivery of Papers.

The Appellate Division in any department may make such rules in relation to the exchange of briefs and the delivery of papers and briefs to the justices thereof as they may deem expedient in all cases, whether enumerated or non-enumerated.

Rule 42 of 1896.

RULE 43.

Cases and Points, to be Printed and Indexed — Number to be Delivered to the Court.

The cases and points, and all other papers furnished in the Appellate Division in calendar cases, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than one and a half inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide. The folio, numbering from the commencement to the end of the papers, shall be printed on the outer margin of the page.

The cases and points in each case shall be uniform in size and in the type of this rule.

All cases cited on the briefs from the courts of this State shall be cited from the reports of the official reporters, if such cases shall have been reported in full in the official reports.

At the beginning of the argument of any appeal, the party whose duty it is to furnish the papers shall deliver to the clerk thirteen copies thereof, and each party shall deliver to the clerk thirteen copies of his briefs and points. The clerk shall deliver one copy of the papers and briefs to each justice, two to the official reporter, and shall transmit one to the librarian of the State Law Library, one to the clerk of each of the other departments, and shall dispose of the remainder as directed by the court. The Appellate Division in any department may require further copies of the papers and briefs to be delivered in their discretion.

The printed papers on appeal shall contain an index in the front thereof. The index of the exhibits shall concisely indicate the contents or nature of each exhibit and the folio of the case at which it is admitted in evidence and at which it is printed in the record. Said index shall also contain a reference to the folios at which a motion for a dismissal of the complaint or the direction of a verdict is contained; and to the certificate that the case contains all the evidence. At the top of each page of the case or bill of exceptions must be printed the name of the witness then testifying and of the party calling him, and indicating

whether the examination is direct, cross or re-direct. Each affidavit or other paper printed upon an appeal from an order shall be preceded by a description thereof that must specify on whose behalf it was read; and the name of the affiant shall be printed at the top of each page containing an affidavit. On an appeal from an order granting or denying a motion to strike out parts of a pleading as irrelevant, redundant or scandalous, or to make a pleading more definite and certain, the portion of the pleading to which the motion relates must be printed in italics.

Rule 46 of 1858, amended. Rule 52 of 1871, amended. Rule 52 of 1874, amended. Rule 43 of 1877. Rule 42 of 1880. Rule 42 of 1884. Rule 42 of 1888, amended. Rule 41 of 1888, amended. Rul e43 of 1896. Rule 43 as amended, 1910.

OMISSION OF INDEX — Case stricken from calendar.] A case should be stricken from the calendar of the General Term in the absence of the index required by Rule 42, and where the judgment-roll has not been printed. (Reid v. Mayor, etc., of New York, 50 St. Rep. 758 [Sup. Ct. 1893].)

RULE 44.

Non-enumerated Motions, When Heard — Default, How Taken.

Non-enumerated motions in the Appellate Division and appeals from orders will be heard upon such days as are designated by the special rule of the Appellate Division in each department.

If a non-enumerated motion noticed to be heard at the Appellate Division shall not be made upon the day for which it is noticed, the party attending pursuant to notice to oppose the same, may, at the close of that order of business, unless the court shall otherwise order, take an order against the party giving the notice, denying the motion, with costs.

Rule 48 of 1858, amended. Rule 54 of 1871, amended. Rule 54 of 1874, amended. Rule 45 of 1877, amended. Rule 43 of 1880, amended. Rule 43 of 1884. Rule 43 of 1888, amended. Rule 44 of 1896. Rule 44 as amended, 1910.

See notes to Rules 22 and 37.

RULE 45.

Additional Allowance, Where to be Applied For.

Application for an additional allowance can only be made to the court before which the trial is had, or the judgment ren-

dered, and shall in all cases be made before final costs are adjusted.

Rule 52 of 1858. Rule 56 of 1871, amended. Rule 56 of 1874, amended. Rule 47 of 1877. Rule 44 of 1880. Rule 44 of 1884. Rule 44 of 1888. Rule 45 of 1896.

CODE OF CIVIL PROCEDURE.

§ 2562. Additional allowance — when surrogate may grant.
§ 2563. Upon a sale of real estate of decedent.
§ 3252. To plaintiff in foreclosure, partition, etc.
§ 3253. To either party in foreclosure, partition, or in difficult, etc., cases.
§ 3254. Limitation to $2,000.
§ 3262. How computed upon taxation of costs.

ADDITIONAL ALLOWANCE — Motion — to what court made.] The application must be made to the court of original jurisdiction. The appellate court has not power to grant an extra allowance. (Wolfe v. Van Nostrand, 2 N. Y. 570 [1850]; S. C., 4 How. Prac. 208; People v. N. Y. C. R. R. Co., 29 id. 418, 428 [1864].)

—— Submission of controversy.] An extra allowance of costs may not be granted in a controversy submitted upon an agreed case, pursuant to section 1279 of the Code of Civil Procedure. (See People v. F. R. R. Co., 133 N. Y. 239 [1892].)

—— Motion — in what county made.] It should be made in the county where the judgment was rendered unless some special reason exists for applying elsewhere. (Niver v. Rossman, 5 How. Prac. 153 [Sp. T. 1850]; S. C., 3 Code Rep. 192; *contra*, Strong v. Snyder, 6 id. 11 [Sp. T. 1851].)

—— Additional allowance made at Rochester in an action tried in New York — set aside.] An order for an additional allowance was made at a court held in the city of Rochester in an action of which the place of trial was in the city and county of New York. Held, that it should be reversed. (Bear v. The American Rapid Telegraph Co., 36 Hun, 400 [1885].)

—— In the first district.] In a case triable in the first district, a motion for an extra allowance can only be made in that district, although the justice who tried the case resides in another district. (Hun v. Salter, 92 N. Y. 651 [1883].)

—— Application should be to the same court or judge trying the case.] The application should be made at the Circuit at which the case was tried, or to the justice who held the same, and to none other. (Saratoga & Washington R. R. Co. v. McCoy, 9 How. Prac. [Sp. T. 1853]; Osborne v. Betts, 8 id. 31 [Sp. T. 1853]; Dyckman v. McDonald, 5 id. 121 [Sp. T. 1850]; Van Rensselaer v. Kidd, Id. 242 [Sp. T. 1850]; Sackett v. Ball, 4 id. 71 [Sp. T. 1849].)

—— Rule that the motion must be made before the judge before whom the action was tried — when not applicable.] The object of the rule that a motion for an extra allowance should be made at a term held by the judge

who presided at the trial was that he might be possessed of the facts and circumstances transpiring at the trial; such rule has no application to a case in which the complaint was dismissed on motion and there was no protracted trial, and where the judge before whom the motion for an allowance is made has almost as much information as to the nature of the issue and what transpired on the occasion of the dismissal as the trial judge. (Wilber v. Williams, 4 App. Div. 444 [1896].)

—— **Waiver of objection that application was made to wrong judge.]** The objection that application for extra allowance was not made to proper court or judge, is not one that goes to the jurisdiction of the court. It is a rule of practice solely, and may be waived by the adverse party. The objection is deemed waived if not taken at the time of the argument. (Wiley v. Long Island Railroad, 88 Hun, 177 [1895].)

—— **Motion, where made.]** A motion for an additional allowance can only be made in the branch of the court where the trial was had. (Toch v. Toch, 9 App. Div. 501 [1896].)

—— **It must be to the court, and not to a justice at Chambers** (Mann & Others v. Tyler & Others, 6 How. Prac. 235 [Sp. T. 1851]), **except in the first district.]** (Main v. Pope, 16 How. Prac. 271 [Sp. T. 1858]. See, also, Abbey v. Wheeler, 57 App. Div. 414 [1901].)

—— **Extra allowance by the General Term unauthorized.]** Where at the end of a trial both sides ask for the direction of a verdict and the court orders the jury to find for the plaintiffs, exceptions to be heard in the first instance at the General Term, the power of the General Term ends with the overruling of the exceptions and directing judgment for the plaintiffs, and an allowance to them by it is unauthorized. (Moskowitz v. Hornberger, 20 Misc. Rep. 558 revg. 19 id. 429 [1897].)

LIMIT — Fees of a special guardian.] The fees and compensation of a special guardian on the sale of an infant's real estate are to be determined by the court. (Matter of Matthews, 27 Hun, 254 [1882].)

—— **Not limited by the Code.]** The power of the court to provide for the compensation of a guardian *ad litem* is not limited to the sum of $2,000 fixed by section 3254 of the Code of Civil Procedure. (Weed v. Paine, 31 Hun, 10 [1883].)

—— **Limitation of — to $2,000.]** Where both sides are successful, the court has power to award additional allowances not exceeding $2,000 to each side, or $4,000 in the aggregate. (Weed v. Paine, 31 Hun, 10 [1883]; Code of Civil Procedure, § 3254.)

—— Aggregate amount limited. (Weed v. Paine, 31 Hun, 10 [1883].)

—— **Limit in foreclosure — it cannot exceed $200.]** Where the chief purpose of an action to foreclose a mortgage upon both real and personal property is to foreclose a mortgage upon real property, the allowance granted cannot exceed the sum of $200, although the case is difficult and extraordinary. (Waterbury v. Tucker & Carter Cordage Co., 152 N. Y. 610 [1897].)

—— **Application for — notice.]** Notice of an application for an extra allowance is not necessary, where the judge who tries the cause makes the order at the same term. (Mitchell v. Hall, 7 How. Prac. 490 [Sp. T. 1853].) If not

made then, notice should be given as in other cases. (Saratoga & Washington R. R. Co. v. McCoy, 9 How. Prac. 339 [Sp. T. 1853]; Mann v. Tyler, 6 id. 235 [Sp. T. 1851]; Howe v. Muir, 4 id. 252 [Sp. T. 1850].)

—— **The papers must show the facts.]** Motions for extra allowances must be made upon papers showing the facts upon which the claim is based. (Gori v. Smith, 6 Rob. 563 [Gen. T. 1867]; S. C., 3 Abb. [N. S.] 51.)

—— **An attorney compelled to repay an unlawful allowance in a partition suit.]** An attorney for the plaintiff, in an action of partition, who has received an extra allowance exceeding the amount permitted by the statute, may be compelled to return the excess to the referee. (Cooper v. Cooper, 27 Misc. Rep. 595 [1899].)

WHEN MADE.] The application should be made at the trial, on the coming in of the verdict, or in any event during the term at which the trial is had (Flint v. Richardson, 2 Code R. 80 [Sp. T. 1849]), but not until all the litigation is ended. (Powers v. Wolcott, 12 How. Prac. 565 [Sp. T. 1856].)

—— **Cannot be made after the costs are adjusted.]** A motion for an additional allowance cannot be granted after the adjustment of the costs of the action; the effect of such adjustment is not changed by the fact that other costs awarded on an application to open the default are still unadjusted. (Jones v. Wakefield, 21 Wkly. Dig. 287 [Sup. Ct. 1885].)

—— **Before adjustment of costs.]** It must be made before costs have been adjusted and judgment entered. (Clark v. The City of Rochester, 29 How. Prac. 97 [Gen. T. 1869]; affd., Id. 111, 112; 34 N. Y. 355 [1865]; Martin v. McCormick, 3 Sandf. 755 [Sp. T. 1851]; S. C., 1 Code R. [N. S.] 214.) The contrary decision made in Beals v. Benjamin, 29 How. Prac. 101 [Sp. T. 1864], was reversed at General Term. (Id. 111, 112.)

—— **Additional allowance must be before costs are taxed.]** An application for an extra allowance must be made before the costs are taxed and judgment entered in the trial court; it is too late to make it after the judgment has been affirmed on appeal, although before its entry under the order of affirmance. (Winne v. Fanning, 19 Misc. Rep. 410 [1897].)

—— **Receiving costs — effect of.]** Receiving costs on the discontinuance of an action does not necessarily prejudice a pending motion for an extra allowance. (Moulton v. Beecher, 1 Abb. N. C. 245 [Sup. Ct. 1876].)

—— **After judgment, too late.]** It is too late after judgment, at the General Term, on appeal. (Van Rensselaer v. Kidd, 5 How. Prac. 242 [Sp. T. 1850].)

—— **Motion made after judgment absolute in Court of Appeals.]** A motion for an additional allowance may be made after a judgment absolute has been ordered by the Court of Appeals. (Parrott v. Sawyer, 26 Hun, 466 [1882].)

For note on additional allowance, see Bank of Mobile v. Phœnix Insurance Co. (8 N. Y. Civ. Proc. R. 212–216).

—— **No additional allowance unless there has been a trial.]** It would seem that where, in a partition suit, which is equitable in nature, the issues joined have been sent to a Trial Term for a jury trial, where the trial justice dismisses the complaint so that there has been no trial, the successful party is not entitled to an extra allowance. (Toch v. Toch, 9 App. Div. 501 [1896].)

WHEN GRANTED—Not in special proceedings.] The provision for an extra allowance applies to actions only, and not to special proceedings. (Rensselaer & Saratoga R. R. Co. v. Davis, 55 N. Y. 145 [1873]; Matter of Holden, 126 id. 589 [1891]; German Savings Bank v. Sharer, 25 Hun, 409 [1881]; Matter of Simpson, 20 id. 459 [1882].) See, however, Code of Civil Procedure, § 3253.

——**In special proceedings on a motion for favor.]** The statutes authorizing extra allowance do not apply to special proceedings, and such allowance cannot be given under an order giving costs; in such a case the limitation to those for similar services, etc., in actions controls, yet that restriction does not apply to a motion for favor, and the court in granting such a motion is not limited to taxable costs and disbursements as a condition. (New York, West Shore & Buffalo Ry. Co. v. Thorne, 1 How. Prac. [N. S.] 190 [Sup. Ct. Gen. T. 1884].) See, however, Code of Civil Procedure, § 3253.

——**Not granted when plaintiff was guilty of misconduct nor against an insolvent savings bank.]** An additional allowance should not be granted against a defendant which has been misled by plaintiff's conduct into interposing its defense, nor against a savings bank where its assets are not sufficient to pay its depositors in full. (Kelly v. Chenango Valley Sav. Bank, 45 N. Y. Supp. 658.)

——**When granted to codefendants.]** Where, in an action brought by trustees to enjoin the operation of an elevated railroad and for damages to the trust property, the beneficiaries, upon their refusal to join in the action, have been made parties defendant, the court may grant them an extra allowance as against the railroad company. (Roberts v. N. Y. Elevated R. R. Co., 12 Misc. Rep. 345 [1895].)

——**But one allowance, though there be several trials.]** Only one extra allowance can be recovered, although the case may have been tried several times. (Flynn v. Equitable Life Assn. Society, 18 Hun, 212 [1879].)

——**Second trial.]** When made on a second trial, although not difficult. (Howell v. Van Sicklen, 4 Abb. N. C. 1 [Court of Appeals, 1877].)

——**Actions in which the court has power to grant an extra allowance.]** In all actions which are difficult or extraordinary, when a defense has been interposed and a trial had. (Coates v. Goddard, 2 J. & S. 118 [Supr. Ct. 1871].)

——**Case both difficult and extraordinary.]** The case must be both difficult and extraordinary to authorize an extra allowance. It must involve something unusual, and be such as to require more than ordinary labor and previous preparation by counsel. (Duncan v. De Witt, 7 Hun, 184 [1876]; Swan v. Stiles, 94 App. Div. 117.)

——**Proof of value necessary.]** In an action brought by an abutting owner against a corporation operating a railroad on a street without authority, the value of the subject-matter must be shown in order to afford a basis for an additional allowance to plaintiff. (Black v. Brooklyn Heights R. R. Co., 32 App. Div. 468 [1898].)

——**Additional allowance, affected by the amount involved.]** In determining whether or not an additional allowance should be granted, the amount

involved in the action may be considered, as the fact that a large amount depends upon its decision naturally increases the anxiety and responsibility of the attorney and justifies the employment of eminent counsel. (Gooding v. Brown, No. 2, 35 Hun, 153 [1885].)

—— **Power of court.]** The power to grant additional allowance is not affected by stipulation of settlement two days before trial. (People v. Bostman, 180 N. Y. 1.)

—— **Offer, after a defense is interposed, to allow judgment, and acceptance thereof.]** The court has power, notwithstanding such offer and acceptance, to grant an extra allowance. (Coates v. Goddard, 2 J. & S. 118 [Supr. Ct. 1871].)

—— **When imposed, on application to discontinue.]** It is proper in difficult and extraordinary cases to require payment of an allowance, in addition to costs, as a condition of leave to discontinue. (Robbins v. Gould, 1 Abb. N. C. 133 [Sup. Ct. 1876]; Moulton v. Beecher, Id. 245.)

—— **Basis of.]** Can be granted only on a money basis upon which a percentage can be calculated. (Coates v. Goddard, 2 J. & S. 118 [Supr. Ct. 1871].)

—— **Trade mark — allowance based thereon.]** In a difficult and extraordinary action brought to restrain the infringement of a trade-mark, of which the value and the profits therefrom are proved, an extra allowance is proper. (Waterman v. Shipman, 47 N. Y. St. Rep. 418 [Sup. Ct. Gen. T. 1892].)

—— **Basis furnished by evidence at the trial.]** In an action against an elevated railroad company plaintiff demanded damages of $250,000 — and upon the trial the value of his property was proved to be $125,000 — which was the sum named in his claim of damage. Held, that while the demand in the complaint being denied in the answer afforded no basis for computing an additional allowance, the evidence at the trial did so. (Israel v. Metropolitan R. R. Co., 10 Misc. Rep. 722 [1895].)

—— **Plaintiff's claim may be the basis for an extra allowance to the defendant.]** Where in an action for the dissolution of a partnership and an accounting, no specific sum is demanded, but the plaintiff claims to have advanced $9,000, no part of which has been paid by the defendant, who has given his notes therefor as for advances made in his behalf, such amount affords a basis for an additional allowance to the successful defendant. (Proctor v. Soulier, 8 App. Div. 69 [1896].)

—— **Basis shown subsequently by affidavit.]** The basis for an extra allowance is the value of the subject-matter involved, and where no proof of this is made at the trial of an equity action it may be shown afterward by affidavit. (Hayden v. Matthews, 4 App. Div. 338 [1896].)

—— **Additional allowance refused where no damages were demanded in the complaint, there being no basis therefor.]** Where, in an action brought to obtain an injunction against the diverting or polluting of the water of a stream, the complaint alleges that the defendant so operated his salt works as to justify the relief prayed for, but no damages are demanded, the defendant is not, upon a dismissal of the complaint, entitled to an extra allowance upon the basis of the difference between the value of his salt works as they

were, and their value if the injunction were granted, which would depreciate nine-tenths, under a claim that this was the "subject-matter involved," within the Code of Civil Procedure, section 3253; as such, this damage would be incidental merely, and there is no basis upon which to estimate an allowance. (Godley v. Kerr Salt Co., 3 App. Div. 17 [1896]. See, also, Meyer Rubber Co. v. Lester Shoe Co., 92 Hun, 52 [1895].)

—— **Short cause, no basis for extra allowance.]** An ordinary action tried as a short cause within an hour, the record of which discloses nothing difficult or extraordinary, affords no basis for an extra allowance. (Gillespy v. Bilbrough, 15 App. Div. 212 [1897].)

—— **Increase of extra allowance made on uncertain evidence set aside.]** An increased extra allowance granted in an action to charge certain lands with an annuity is not justified when based upon the valuation of the annuity as derived from uncertain evidence of the annuitant's age. (Arthur v. Dalton, 14 App. Div. 115 [1897].)

—— **Basis in an action against a municipal corporation relative to a right of way.]** Where a final judgment is entered restraining a city from laying out a street across land of a railroad company already condemned for its use, the basis for an additional allowance is simply the expense of a suitable crossing at grade, and not the incidental damage likely to be occasioned. (Rochester & Honeoye Valley R. R. Co. v. City of Rochester, 17 App. Div. 257 [1897].)

—— **Where a lease is not a basis therefor.]** Where the relief sought in an action is the possession of premises under a lease of which plaintiff is assignee, and of the value of which no proof is adduced, there exists no basis for the computation of an extra allowance to plaintiff. (H. Koehler & Co. v. Brady, 22 App. Div. 624 [1897].)

—— **Basis where recovery is had against one defendant only.]** In an action on a Lloyds policy of insurance, which provides that suit may be brought against one indemnitor only, the others being bound by the judgment therein, the plaintiff, upon recovering against one indemnitor, is only entitled to a extra allowance based upon the proportion for which he is liable. (Laird v. Littlefield, 34 App. Div. 43 [1898].)

—— **Trade-mark, not in itself a basis for an allowance.]** A trade-mark has not in itself, as distinct from the value of the article of which it is the trade-mark, any money value which can constitute a money basis on which to compute an extra allowance. (Coates v. Goddard, 2 J. & S. 118 [Supr. Ct. 1871].)

—— **Trade-mark — value of subject-matter must be shown.]** An extra allowance granted in an action to restrain the use of plaintiff's trade-mark will be set aside by the General Term where there is no allegation in the complaint, nor any testimony in the record, as to the value of the subject-matter involved. (De Long v. De Long Hook & Eye Co., 89 Hun, 399 [1895].)

—— Where the value of the subject-matter is not shown, and there is no evidence or admission from which the court can compute it, no additional allowance can be granted. (Smallwood v. Schwietering, 10 Misc. Rep. 103 [1894].)

——**In an equity action extra allowance should be a reasonable counsel fee.**] While in an equity action for an injunction and an accounting for the infringement of a trade-mark the basis for computing an extra allowance is not the amount of the damages recovered merely, but the value of the trade-mark, the allowance should, under the Code of Civil Procedure, section 3253, be what the court may deem a reasonable counsel fee in the cause. (Perkins v. Heert, 14 Misc. Rep. 425 [1895].)

——**To compel the lowering of a dam.**] In an action brought to compel a party to lower a dam which sets back water upon the lands of the plaintiff and to recover damages, an additional allowance may be computed upon the damages recovered, but not upon the value of the land. (Rothery v. N. Y. Rubber Co., 90 N. Y. 30 [1882].)

——**Action by a taxpayer.**] Extra allowance against a taxpayer sustained. (Hart v. Mayor, etc., of N. Y., 16 App. Div. 227 [1897]; Gordon v. Strong, 15 id. 519 [1897].)

——**Allowance upon a corporate franchise.**] How an additional allowance is to be computed upon a corporate franchise. (Conaughty v. Saratoga County Bank, 28 Hun, 373 [1882].)

——**Action by the Attorney-General to annul a charter.**] In an action brought by the Attorney-General to annul the charter of a savings and loan association in which the complaint was dismissed, the Special Term is justified in granting an extra allowance of $500 upon affidavits to the effect that the value of the franchise in question was at least $20,000; that the case was difficult and extraordinary, and giving a detailed statement of the time spent in conducting the defense. (People v. Rochester Dime Savings & Loan Assn., 7 App. Div. 350 [1896].)

——**Extra allowance improper in special proceeding.**] An order for an extra allowance in a proceeding to acquire the franchises and property of a water company, instituted, not under the General Condemnation Law, but pursuant to Laws of 1892, chapter 481, cannot be sustained under Code of Civil Procedure, section 3372, nor under section 3240, which authorizes costs in special proceedings. (Matter of City of Brooklyn, 88 Hun, 176 [1895].)

——**Basis for extra allowance to a successful defendant in an action for an injunction.**] In an action for an injunction against laying a private subway for electrical apparatus, proof that the annual rental for the use by the defendant of a subway constructed by the plaintiff pursuant to statute would be $700 per mile, and that the value of the subway to be constructed would be $60,000, justifies the granting of an extra allowance to the defendant succeeding in the action. (Empire City Subway Co. v. Broadway & Seventh Ave. R. R. Co., 87 Hun, 279 [1895].)

——**In an action to dissolve a corporation.**] How computed in an action to dissolve a corporation. (Peoule v. Rockaway Beach Improvement Co., 28 Hun, 356 [1882]].)

——**Action to recover the interests of a corporation in transferred property.**] Where stockholders of a corporation seek to recover the value of its interest in certain boats transferred to one of the defendants which the latter has allowed to become forfeited by the omission of a payment under a con-

ditional contract of purchase, and demand such an amount as will represent the earnings of the boats, stated in the complaint and an affidavit as about $500,000, a basis for an allowance to the defendants succeeding in the action is afforded under Code of Civil Procedure, section 3253. (Hart v. Ogdensburg & Lake Champlain R. R. Co., 89 Hun, 316 [1895].)

—— **Allowance in an action on notes.]** Where, in an action on promissory notes, the full face value is demanded on the assumption that they are all business paper, and one note is an accommodation note on which the whole amount is not due, the cause being otherwise a suitable one, and there being no offer of judgment by the defendant, an additional allowance to plaintiff is proper. (State Bank of Lock Haven v. Smith, 85 Hun, 200 [1895].)

—— **Partition suit — allowance in.]** Act amending section 3253, Code of Civil Procedure, in relation to extra allowances, by transferring actions for partition from the first to the second subdivision. (Laws of 1899, chap. 299.)

—— **An extra allowance in partition.]** In an action for partition of lands, part of a residuary estate, the devise of which was sustained against plaintiff's contention, an additional allowance of $150 was granted and sustained upon appeal. (Preston v. Howk, 3 App. Div. 43 [1896].)

—— **Allowance in a partition suit when a defense has not been interposed.]** An answer in partition which demands relief against a codefendant, but does not tend to defeat the plaintiff's claim, does not present a case "where a defense has been interposed," within section 3253 of the Code, as amended in 1898, and in such case the aggregate allowances cannot exceed $200. (Defendorf v. Defendorf, 26 Misc. Rep. 677 [1899].)

—— **Only the pecuniary importance of the litigation considered.]** To justify an extra allowance, the importance of the litigation is only to be considered so far as it has a pecuniary basis. If no money value can be placed upon the subject-matter involved, an allowance is not authorized. (Conaughty v. Saratoga County Bank, 92 N. Y. 401 [1883]; People v. Albany & S. R. R. Co., 5 Lans. 25 [Gen. T. 1871]; Weaver v. Ely, 83 N. Y. 89 [1880].)

—— **Action for the reformation of an instrument.]** An additional allowance cannot be granted in an action for the reformation of an instrument merely. (Heert v. Cruger, 14 Misc. Rep. 508 [1895].)

—— **A trial not necessary to the granting of.]** A trial is not a necessary element for the granting of an extra allowance when a defense has been interposed in a difficult and extraordinary case; nor is it necessary that a judgment should be actually entered. (Coffin v. Coke, 4 Hun, 618 [1875].)

—— **Not granted on a leasehold nor where no defense has been interposed.]** In an action to foreclose a mortgage upon a leasehold, an additional allowance cannot be granted under Code Civ. Prov., § 3253, subd. 1, nor can an allowance be granted under subdivision 2 where no defense has been interposed. (Barnes v. Meyer, 41 N. Y. Supp. 210 [1896].)

—— **Allowance where the subject-matter is a two years' lease.]** What must be shown to justify an allowance where the subject-matter involved is a two years' lease, subject to rent. (Heilman v. Lazarus, 90 N. Y. 672 [1882].)

—— **A demurrer is a defense.]** *Semble*, that a demurrer is a defense within the meaning of that term as used with regard to extra allowances. (Winne v. Fanning, 19 Misc. Rep. 410 [1897].)

—— **Plaintiff not entitled to an extra allowance where he is not the successful party.]** Where defendant conceded plaintiff's right to recover the sum demanded, but interposed a counterclaim on which he was awarded a substantial recovery, the amount of which was deducted from the sum conceded to be due to plaintiff, an order for an additional allowance for plaintiff should be reversed. (Commercial Nat. Bk. of Chicago v. Hand, 27 App. Div. 145 [1898].)

—— **Allowed only where general costs are recovered.]** Where a party, by the final judgment, does not recover general costs, but costs of the appeal only, he is not entitled to an additional allowance. (Savage v. Allen, 2 N. Y. Sup. Ct. R. 474 [Gen. T. 1874].)

—— **Indemnity — allowance is granted as.]** An additional allowance is made by way of indemnity to the party succeeding in the litigation. The amount to be allowed must be fixed by the court, subject to the limitation in the statute that the maximum shall not exceed five per cent "on the amount of the recovery, claim or subject-matter involved." (Burke v. Candee, 63 Barb. 552 [Sp. T. 1872].)

—— **A contingent interest of the attorney in the recovery where the recovery is large militates against an additional allowance.]** An extra allowance should not be awarded in an action against a railroad corporation where the attorney for plaintiff has a contingent interest in the amount recovered, which is a large one, and the case is not actually extraordinary and difficult. (Allen v. Albany Ry., 22 App. Div. 222 [1897].)

—— **Premature application.]** A motion for an extra allowance in an action against an administrator is premature, if made before the right to recover the ordinary taxable costs has been determined. (Mersereau v. Ryers, 12 How. Prac. 300 [Sp. T. 1856].) It seems that it might be made at the same time and upon the same papers with a motion for the ordinary costs. (*Ib.*)

—— **Second motion for an additional allowance, when irregular.]** A second motion for an additional allowance is irregular and properly denied when made without leave of the court after denial of the former motion. (Manhattan Ry. Co. v. Klipstein, 84 Hun, 579 [1895].)

—— **Discretionary.]** As a rule, the granting or withholding of an extra allowance is discretionary with the court to which the application is made. (Riley v. Hulbert, 13 N. Y. Wkly. Dig. 101 [1881]; Morss v. Hasbrouck, Id. 393 [1881].)

—— **Interference by appellate court.]** An extra allowance is so much within the discretion of the trial judge that an appellate court seldom intervenes. The General Term will decline to interfere with an order denying an extra allowance, but providing for a renewal of the motion upon certain contingencies, where the appeal book does not contain all the papers used upon the motion. (Meyer Rubber Co. v. Lester Shoe Co., 86 Hun, 473 [1895]; Eames Vacuum Brake Co. v. Prosser, 88 id. 343 [1895].)

—— **An appellate court will only interfere in the event of an abuse of discretion.]** The granting of an additional allowance is discretionary with the judge to whom application therefor is made, and the appellate court will interfere only in case of an abuse of discretion. (Proctor v. Soulier, 8 App. Div. 69 [1896].)

—— **Costs.]** Extra allowance, when granted, forms part of. (Coates v. Godard, 2 Jones & S. 118 [Supr. Ct. 1871].)

—— **In murder trial.]** Allowance may be made for each of several trials. (People v. Montgomery, 101 App. Div. 338.)

—— **Power of court to grant.]** When court has power independent of statute to modify its judgment. (Cooper v. Cooper, 51 App. Div. 595, 164 N. Y. 576.)

—— Section 3253 does not authorize granting of additional allowance of more than $200 in action to foreclose mortgage. (Waterbury v. Ardage Co., 152 N. Y. 610.)

—— Applies only to action in which answer or demurrer interposed. (People v. F. R. R. Co., 133 N. Y. 239.)

—— No allowance in mandamus proceedings to reinstate employee, (People v. Hertle, 46 App. Div. 505.)

—— Section 3253 authorizes extra allowance of five per cent. to be made to defendant in partition. (Crossman v. Wyckoff, 64 App. Div. 554. See United Press v. N. Y. Press Co., 164 N. Y. 406.

—— Court may award more than $200 additional costs in foreclosure — when. (L. I. L. & T. Co. v. L. I. C. & N. R. Co., 85 App. Div. 36.)

—— When an action may be difficult but not extraordinary in the purview of the statute. (Smith v. Lehigh Val. Ry. Co., 77 App. Div. 47. See, also, Standard Trust Co. v. N. Y. C. & H. R. R. Co., 178 N. Y. 407.)

—— Difficult and extraordinary case resulting over counterclaim does not authorize extra allowance to plaintiff. (Huber v. Clark, 105 App. Div. 127.)

—— Applicable to either questions of law or fact. (Am. Fruit Product Co. v. Ward, 113 App. Div. 319; Schlegel v. R. C. Church of Brooklyn, 124 App. Div. 502; Matter of Water Supply in N. Y., 125 App. Div. 219.)

—— No extra allowance granted where issue raised by answer of one defendant not yet tried. (Bush v. O'Brien, 52 App. Div. 452.)

—— Court cannot award parties in the aggregate more than five per cent. on value of subject-matter. (Doremus v. Crosby, 66 Hun, 125. See, also, Kirsch v. Macomber, 44 St. Rep. 654.)

—— Under section 3262, taxation does not apply to items the amount of which depends upon agreement. (McKeon v. Horsfall, 88 N. Y. 429. See Cassidy v. McFarland, 139 N. Y. 201.)

—— Court cannot make an extra allowance to the petitioners in a proceeding for the voluntary dissolution of a corporation. (Matter of White Plains, etc., Ry. Co., 133 App. Div. 297.)

—— Under Code, section 2562, executors are entitled to an allowance of ten dollars per day while preparing their account. (Matter of Martin, 124 App. Div. 793.)

REFEREE — Where the action has been tried before a referee, the application must be made to a Special Term.] (Osborne v. Betts, 8 How. Prac. 31 [Sp. T. 1853]; Howe v. Muir, 4 id. 252 [Sp. T. 1850]; Sackett v. Bull, Id. 712 [Sp. T. 1849].)

—— Referee's certificate — not sufficient unless facts be shown to court.] A referee's certificate, "that the investigation and trial of the cause involved difficult questions of law, and which required and evidently received much examination and preparation on the part of the counsel of the respective parties," is not such evidence as to authorize a court to make an additional allowance. Facts must be presented to the court so that it may form its own opinion as to the nature of the case. (Gould v. Chapin, 4 How. Prac. 185 [Sp. T. 1849]; Main v. Pope, 16 id. 271 [Sp. T. 1858]; Gori v. Smith, 6 Rob. 563.)

—— Additional allowance granted on the certificate of a referee.] The defense interposed in an action to recover $19,354, for goods sold to defendants and delivered to various customers of theirs at different times and in different places, as directed by them, put in issue the sale and delivery of more than 300 items, proof of which was required and made, and the referee gave judgment for $200,000 in favor of plaintiff, and certified that the case was a difficult and extraordinary one. Held, that an additional allowance of $500 was proper. (National Lead Co. v. Dauchy, 22 Misc. Rep. 372 [1898].)

APPEAL — To Court of Appeals.] An order granting an extra allowance when it does not exceed the limits prescribed by the Code is not reviewable in the Court of Appeals. (Southwick v. Southwick, 49 N. Y. 510 [1872]; Krekeler v. Ritter, 62 id. 375 [1875].)

—— Does not lie from an order of the General Term, reversing an allowance by a surrogate.] A decision of a surrogate granting an allowance is the subject of appeal to the General Term on the merits (Lain v. Lain, 10 Paige, 191; Wilcox v. Smith, 26 Barb. 316), and may be reviewed by that court, and if without justification on the facts and circumstances of the case, reversed entirely or modified and reduced, and an order thereon resting in the discretion of that court cannot be reviewed in the Court of Appeals. (Noyes v. Children's Aid Society, 70 N. Y. 481 [1877].)

—— An order for an extra allowance affects a substantial right, and is appealable to the General Term.] (People v. N. Y. C. R. R. Co., 29 N. Y. 418 [1864].)

—— Additional allowance — discretion of the trial court not disturbed.] An additional allowance is made by way of indemnity to the successful party, and the General Term will not ordinarily interfere with the discretion exercised in granting it (Meyer Rubber Co. v. Lester Shoe Co., 86 Hun, 475 [1895]. See, also, Sheridan v. Interborough R. T. Co., 101 App. Div. 534; Schiff v. Tamor, 104 App. Div. 42.)

—— When Appellate Division cannot pass upon motion for extra allowance.] The Appellate Division in which exceptions have been ordered heard in the first instance cannot pass upon a motion for an extra allowance of costs, as that question must be determined in the trial court before their taxation. (Riverside Bank v. Jones, 75 App. Div. 531.)

RULE 46.

Motion to Amend a Justice's Return on Appeal where the County Court cannot Act — When to be Noticed.

On appeal from a justice's judgment, where a County Court has not jurisdiction, by reason of relationship, etc., a notice of motion for an order to compel the justice to amend his return may be given in twenty days after the date of the certificate of the county judge, and not after that time.

Rule 53 of 1858. Rule 57 of 1871. Rule 57 of 1874. Rule 48 of 1877. Rule 45 of 1880. Rule 45 of 1884. Rule 45 of 1888. Rule 46 of 1896.

CODE OF CIVIL PROCEDURE.

§ 3053. Return of justice of the peace on appeal from a judgment.
§ 3054. Return — when justice is out of office.
§ 3055. Further return — how compelled.
§ 3056. Proceedings when justice dies, etc., before making a return.

—— **Facts stated in return of justice cannot be controverted by affidavit.]** (Thompson v. Sheridan, 80 Hun, 33.)

—— **When writ will not issue.]** (People v. Smith, 184 N. Y. 96)

—— **An amended return is proper to show whether the justice attended at the adjourned hour.]** (Flint v. Gault, 15 Hun, 213.)

—— **Order of county court directing amended return may be reviewed on appeal.]** (Barber v. Stettheimer, 13 Hun, 198.)

—— **Section 3056 applies to appeal from Municipal Court.]** (Walker v. Baerman, 44 App. Div. 587.)

RULE 47.

Limitations as to Hearing of Counsel.

At the hearing of causes at the Appellate Division or at Special Term, not more than one counsel shall be heard on each side, and then not more than one hour each, except when the court shall otherwise order.

On appeals from orders and on non-enumerated motions, but one counsel on each side shall be heard, and not more than thirty minutes each, unless the court shall otherwise order.

The Appellate Division in any department may make such

further or different regulations upon these subjects as it may deem proper.

Rule 54 of 1858. Rule 58 of 1871, amended. Rule 58 of 1874, amended. Rule 49 of 1877. Rule 46 of 1880. Rule 46 of 1884. Rule 46 of 1888, amended. Rule 47 of 1896.

See notes under Rule 29.

RULE 48.

Stay of Proceedings, for Change of Venue; Affidavits, on Motion to Change Venue.

No order to stay proceedings for the purpose of moving to change the place of trial shall be granted unless it shall appear from the papers that the defendant has used due diligence in preparing the motion for the earliest practical day after issue joined. Such order shall not stay the plaintiff from taking any step, except subpœnaing witnesses for the trial, without a special clause to that effect.

On motions to change the place of trial, the moving party shall state the nature of the controversy and show how his witnesses are material, and the grounds of his belief that the testimony of such witnesses will be favorable to his contention, and shall also show where the cause of action arose, and such facts shall be taken into consideration by the court in fixing the place of trial.

Rule 58 of 1858. Rule 59 of 1871. Rule 59 of 1874, amended. Rule 50 of 1877. Rule 47 of 1880. Rule 47 of 1884. Rule 47 of 1888. Rule 59 of 1858. Rule 60 of 1871. Rule 60 of 1874, amended. Rule 51 of 1877. Rule 48 of 1880. Rule 48 of 1884. Rule 48 of 1888. Rule 48 of 1896. Rule 48 as amended, 1910.

See notes as to stay under Rule 37.

CODE OF CIVIL PROCEDURE.

§ 775. Stay of proceedings — when not to exceed twenty days.

The following provisions are confined to cases in the Supreme Court:

§ 982. Certain actions to be tried where the subject thereof is situated.

§ 983. Other actions where the causes thereof arose.

§ 984. Other actions according to the residences of the parties.

§ 985. Place of trial if the proper county be not designated.

§ 986. Defendant may demand change of place of trial — proceedings thereon.

§ 987. When the court may change the place of trial.

§ 988. Effect of changing the place of trial — transfer of papers.

§ 989. Order to change the place of trial — when it takes effect — except for purposes of appeal therefrom.

CHANGE OF VENUE — The established rules will not be relaxed.] The established rules as to the contents of affidavits to be used on motions to change the place of trial will not be relaxed. (Carpenter v. Continental Ins. Co., 31 Hun, 78 [1883].)

—— **Rules must be strictly observed.]** The defendants upon an application to change the place of trial for the convenience of witnesses must strictly comply with the requirements of the decisions. (John T. Noye Mfg. Co. v. Whitmore, 23 Wkly. Dig. 524 [Sup. Ct. 1885].)

—— **The witness must swear to advice of counsel.]** The affidavit for a change of venue must state that the party is advised by counsel that he cannot safely proceed to trial without the testimony of each of the witnesses named A mere statement by the party that he cannot do so is insufficient. (Randerson v. White Star Towing Co., 26 Misc. Rep. 305 [1899].)

—— **Where neither party resides in the county of the venue.]** Where a plaintiff has laid the venue of an action in a county in which neither he nor the defendant resides, he should not, by consenting to remove the place of trial to his own county, be allowed to defeat an application by the defendant for a change of venue to the county of the latter's residence. (Loretz v. Metropolitan St. R. Co., 34 App. Div. 1 [1898].)

—— **Affidavit should state facts to be proved by.]** The affidavits should show how the witnesses are material; they should show distinctly what facts are to be proved by the several witnesses named, specifying them, so that the court may judge of their materiality. (Price v. Fort Edward Water Works Co., 16 How. Prac. 51 [Sp. T. 1857].)

—— **The affidavit should disclose the grounds of the witnesses' knowledge.]** A moving affidavit which alleges that defendant expects to prove certain facts by the witnesses named, but fails to state that the facts can be proved by them, and does not disclose grounds showing the probability thereof, is insufficient. (Lyman v. Grammercy Club, 28 App. Div. 30 [1898].)

—— The moving and opposing papers on such an application should disclose the occupation and residence by street and number of every person designated therein as a material witness, when such person resides in a city. (*Ib.*)

—— **What is a sufficient affidavit.]** An affidavit used on a motion to change the venue for the convenience of eight witnesses, which stated "that this defendant has conversed with the several witnesses herein named, and each and every witness has a vivid recollection of the different conversations had between this defendant and plaintiff, at the times herein mentioned, and each and every witness so named is prepared to give testimony on the trial of this action as herein set forth, and the deponent avers that he can prove on the trial of this cause all of the material facts as herein set forth by each of the respective witnesses herein named," sufficiently shows that the defendant can prove what he expected to by the witnesses. (Rheinstrom v. Weir, 5 App. Div. 109 [1896].)

—— **Affidavit, when informed and defective.]** In an action brought in the county of Monroe to recover damages for a personal injury alleged to have

been received by the plaintiff through the negligence of the defendants' servant in running against him with a coach and horses on a street in the city of New York, the defendants moved to change the place of trial to the county of New York on the ground of the convenience of witnesses. The moving affidavit, made by one of the defendants, which was not aided by the pleadings, failed to allege any statement of the facts to counsel or the advice of counsel, and failed to show any reason for the belief of the affiant that the proposed witnesses would testify as stated, or to disclose facts sufficient to enable the court to ascertain therefrom that more than one of the proposed witnesses residing in the county of New York were material and necessary witnesses. Held, that the affidavit was too informal and defective to warrant the granting of the motion. (Chapin v. Overin, 72 Hun, 514 [1893].)

—— **To change the place of trial for convenience of witnesses — what the affidavit should contain.]** Affidavit and notice to change venue for convenience of witnesses should set out the grounds for the belief that the witnesses are material. (Kelly v. Matham, 2 N. Y. Wkly. Dig. 173 [Sup. Ct. 1875].)

—— **In partition suit.]** If in a partition action defendant's witnesses are many more than those for the plaintiff, and all reside in the county where the testator resided, but not in the same county where the venue is laid, a motion may be granted changing the place of trial to the county in which they reside; and the order of the court allowing this change of venue should be sustained, unless it is apparent that this discretion has been misused, and also although the property sought to be partitioned is almost within the county where the venue is laid. (Nelson v. Nelson, 50 St. Rep. 446 [Sup. Ct. [1892].)

—— **In a replevin action.]** In an action of replevin to recover goods sold to defendant's transferrer, the sale being disaffirmed on the ground of fraud, and the sale and transfer having been made in another county than that in which suit was brought, a change of venue to the county where the transactions took place is properly granted. (Zenner v. Dexter, 92 Hun, 195 [1895].)

—— **Assault — proof of condition after it.]** Where, in an action for assault, the defense is based upon an allegation that the assault was made by plaintiff and not by defendant, the latter is entitled, upon motion, to a change of venue for the convenience of witnesses, even if they can only testify in regard to the condition of defendant after assault, that being material testimony. (Banks v. Bensky, 27 St. Rep. 135 [Sup. Ct. 1889].)

—— **Affidavit should state what witness will prove.]** The affidavit should state what is expected to be proved by the several witnesses. (American Exchange Bank v. Hill, 22 How. Prac. 29 [Sp. T. 1861]; Price v. Fort Edward Water Works Co., 16 id. 51 [Sp. T. 1857].)

—— **Word "necessary" need not be used in the affidavit.]** On an application made by a defendant to change the place of trial, on the ground of the convenience of witnesses, if the moving affidavit states that each and every of the witnesses mentioned are material witnesses for the deponent on the trial of the cause, and that without the testimony of each and every one of

them the moving party cannot safely proceed to trial, as he is advised by his counsel and believes, he shows that the witnesses are necessary as well as material, although the word "necessary" is not used in the affidavit. (Smith v. Mack, 70 Hun, 517 [1893].)

—— **Affidavits failing to state names, residences and that witnesses would testify are insufficient.]** Affidavits in support of a motion to change the venue which fail to state the names and residences of the witnesses, and that they will testify to the facts alleged to be material to the defense, are insufficient. (Lyman v. Corey, 28 App. Div. 623 [1898].)

—— **Affidavit must show material facts.]** Upon a motion to change the place of trial for the convenience of witnesses, an affidavit must disclose grounds which show that material facts can probably be proved by such witnesses. (Tuska v. Wood, 30 N. Y. Supp. 523 [Sup. Ct. 1894].)

—— **Expectations not sufficient.]** An application for change of venue should not be granted when the applicant simply states his expectations without showing upon what they are based. (Imgard v. Duffy, 73 Hun, 255 [1893].)

—— **What statement of expectation in the affidavit is sufficient.]** Wherever, from an inspection of the papers upon a motion for a change of venue, it appears that there is a reasonable ground for the expectation of the moving party that he will be able to prove by the witnesses the facts stated, that is, that the witnesses must necessarily know the facts, the court may fairly conclude in the exercise of its discretion that the statement of such expectation is the equivalent of a positive statement of ability, even where the affidavits of the witnesses are not produced on the motion. (Hayes v. Garson, 25 App. Div. 115 [1898.])

—— **Affidavit in third department need not state to what witnesses will testify.]** Upon a motion in the third department to change the venue for the convenience of witnesses, it is not held absolutely necessary to state the ground of affiant's expectation that the witnesses will testify to the facts to which it is alleged they will testify, though a failure to do so may be considered in passing upon the merits of the motion. (Bell v. Whitehead Bros. Co., 5 App. Div. 555 [1896].)

—— **What is an insufficient affidavit.]** A motion by a defendant for a change of venue must be made on a sufficient affidavit of merits; it is not sufficient that he expects to prove certain things by his witnesses, instead of stating that he can prove them. (White v. Hall, 8 App. Div. 618 [1896].)

—— **Third department — failure to allege grounds of expectation of testimony.]** Failure to allege the grounds of the defendant's expectations that the witnesses named by him will testify to the facts stated, is not, in the third department, a fatal defect in the papers upon which he moves for a change of venue. (Sinnit v. Cambridge Valley Agricultural Soc. & S. B. Assn., 27 App. Div. 318 [1898]; McPhail v. Ridout, 83 Hun, 446 [1894].)

—— **Information of the affiant, not disclosed.]** It is not necessary that it should be stated in the moving affidavit what information the affiant had,

which enabled him to state that the several persons named as necessary witnesses would testify to the facts as set forth in the affidavit. (Smith v. Mack, 70 Hun, 517 [1893]; Myers v. Village of Lansingburgh, 54 id. 623 [1889].)

—— **Important to show their materiality.]** Very little reliance can be placed upon an allegation of the materiality of witnesses, unless it can be shown wherein they are material. But the place of trial may be changed upon such an affidavit where no witnesses are sworn to reside in the county where the venue is laid. (People v. Hayes, 7 How. Prac. 248 [Sp. T. 1852].)

—— **As to the materiality of the witnesses.]** (Anonymous, 3 Wend. 425 [Sp. T. 1830]; Constantine v. Dunham, 9 id. 431 [Sp. T. 1832]; People v. Hayes, 7 How. Prac. 248 [Sp. T. 1852].)

—— **That the party cannot safely proceed to trial.]** (Anonymous, 3 Wend. 425 [1830]; Constantine v. Dunham, 9 id. 431 [1832].)

—— **That he has a defense upon the merits.]** (Chemung Canal Bank v. Bd. Supervisors, 1 How. Prac. 162 [Sp. T. 1845].)

—— **That he has stated his case to his counsel.]** (Lynch v. Mosher, 4 How. Prac. 86 [Sp. T. 1849].)

—— **That he has stated to his counsel the facts that he expects to prove by his witnesses.]** (Dennison v. Seymour, 9 Wend. 9 [1832].)

—— **As to the names of the witnesses.]** (Anonymous, 6 Cow. 389 [Sp. T. 1826].)

—— **Should be made by the defendant himself.]** The affidavit to change the venue for the convenience of witnesses should be made by the defendant himself, except under peculiar circumstances. (4 Hill, 62, note [1842].)

—— **Upon what facts motion granted.]** Where the plaintiff does not swear that any witnesses reside in the county where the venue is laid, but his affidavit tends to show that no real defense exists, and the defendant swears that nineteen witnesses reside in another county, the motion should be granted. (Wiggin v. Phelps, 10 Hun, 187 [1877].)

—— **Upon what a decision will be based.]** What principles will govern the court in deciding with reference to a change of venue. (King v. Vanderbilt, 7 How. Prac. 385 [Circuit, 1852].)

—— Where a defendant moving to change place of trial shows that the contract was made to be performed in the county of his residence, where the greater number of witnesses resided, while the plaintiff and a single witness besides himself resided in the county where the venue was laid, the place of trial should be changed. (Jacobson v. German American Button Co., 124 App. Div. 251; Lewis v. Phœnix Cap Co., 115 App. Div. 188.)

—— Where cause of action on contract arose wholly in the county of New York, and all the witnesses reside in that county or in Kings, with the exception of the plaintiff, who laid in the venue in Schenectady county, the place of trial should be changed to one of the other counties. (Shapiro v. Klar, 136 App. Div. 91.)

—— Where plaintiff in negligence action lays the venue in a county of which he is not a resident, the defendant is entitled as a matter of right to have the venue changed to the county of its residence irrespective of the convenience of witnesses. (Lageza v. Chelsea Fibre Mills, 135 App. Div. 731.)

—— **Stay of proceedings.]** Section 775 not applicable to stay for purposes of motion for reargument (F. B. N. Co. v. Mackey, 158 N. Y. 683), or to order extending time to amend answer (Condon v. Church of St. Augustine, 14 Misc. Rep. 181).

CONVENIENCE OF WITNESSES — The greatest number of witnesses.] How far the court will decide in favor of the party who swears to the greatest number of witnesses. (Sherwood v. Steele, 12 Wend. 294 [Sp. T. 1835]; Austin v. Hinckley, 13 How. Prac. 576 [Sp. T. 1856]; Wood v. Bishop, 5 Cow. 414 [Sp. T. 1826]; Benedict v. Hibbard, 5 Hill, 509 [Sp. T. 1843]; Weed v. Halliday, 1 How. Prac. 73 [Sp. T. 1845].)

—— **Seventy-eight witnesses — regarded as a fraud.]** Where the defendant swore to seventy-eight witnesses that were material to his defense in an action of assumpsit, it was regarded by the court as a fraud, and the motion was denied. (Garbutt v. Bradner, 1 How. Prac. 122 [Sp. T. 1845]. See Wallace v. Bond, 4 Hill, 556 [Sp. T. 1842].)

—— **In the county where the witnesses reside — independent of their distance from courthouse.]** The trial should be had in the county where the witnesses reside, even though they may be required to travel a greater distance than to the courthouse in an adjoining county in attending court. (People v. Wright, 5 How. Prac. 23 [Sp. T. 1850]; Hull v. Hull, 1 Hill, 671 [1841]; Beardsley v. Dickinson, 4 How. Prac. 81 [Sp. T. 1848].)

—— **Convenience of resident witnesses alone considered.]** The convenience of resident witnesses will alone be considered in deciding the motion to change the venue. (Rathbone v. Harman, 4 Wend. 208 [1830]; Williams v. Fellows, 9 id. 451 [1832]; Hull v. Hull, 1 Hill, 671 [1841].)

—— **Witness outside the State — not considered.]** The convenience of witnesses who reside outside of the State will not be considered upon a motion to change the venue. (Bowles v. Rome, Watertown, etc., R. R. Co., 38 Hun, 507 [1886].)

—— **That it will inconvenience the plaintiff, not considered.]** Where a change of venue of an action to the county where the cause of action arose will promote the convenience of witnesses, the fact that such change will involve inconvenience to the plaintiff does not operate to prevent it. (Hedges v. Bemis, 38 App. Div. 349 [1899].)

—— **Residence of those acquainted with facts considered before that of experts.]** An order made in an action on the defendant's motion changing the venue from New York to Hamilton county for the convenience of witnesses, should be reversed where it appears that though he is a resident of the latter county, he has an office in New York and that the witnesses whose convenience he seeks to serve are expert witnesses by whom he "expects to prove" the value of lands upon which the mortgages in question are a lien and that all the other witnesses acquainted with the particular facts of the case reside in New York. (Bushnell v. Durant, 83 Hun, 32 [1894].)

—— **Venue not retained for convenience of expert witnesses.]** The convenience of expert witnesses is not to be consulted in fixing the place of trial. (Adriance, Platt & Co. v. Coon, 15 App. Div. 92 [1897].)

—— **Convenience of witnesses where a village is defendant.]** In an action against a village brought by the widow of an attorney to recover for legal services as his administratrix, the complaint alleged, among other things, the advising with village trustees, and consulting and advising with officers of the defendant in the matter of the construction of a system of water works for the defendant village. Held, that the convenience of witnesses would be subserved by changing the place of trial to the county in which the village was situated. (Harrington v. Village of Warsaw, 4 App. Div. 181 [1896].)

—— **Where the proper venue for convenience of witnesses is doubtful the place where the action arose may control.]** When it is uncertain in which county a transitory action should be tried for the convenience of witnesses, the venue should be changed to the county where the cause of action arose, though it be originally laid in the county of plaintiff's residence and the county to which it is removed is not that of the defendant's residence. (Hausmann v. Moore, 7 App. Div. 459 [1896].)

—— **Venue not changed from Westchester to New York county for the convenience of witnesses.]** The venue will not be changed from Westchester to New York county upon the ground of convenience of witnesses. (Brink v. Home Ins. Co., 2 App. Div. 122 [1896].)

—— Nor from any rural county to New York or Kings. (Quinn v. B. H. R. Co., 88 App. Div. 57; Hirschkind v. Mayer, 91 App. Div. 416.)

—— **Westchester county — portion annexed to New York.]** The portion of Westchester county annexed to the city and county of New York by Laws 1895, chaper 934, still continues to be a part of Westchester county for the purpose of determining the venue of an action under the Code of Civil Procedure, section 984. (Zeimer v. Rafferty, 18 App. Div. 397 [1897].)

—— **Change of venue from Queens to New York county — when granted.]** While the place of trial will not be changed from Queens county to the county of New York, merely to suit the convenience of witnesses, yet where the cause of action arose in the latter county, and both plaintiff and defendant reside there, a change of venue is proper. (Navratil v. Bohm, 26 App. Div. 460 [1898].)

—— **Change to New York county from a rural county.]** The rule that the trial of an action will not be transferred from a rural county to the city of New York, if such rule exists, does not apply to a motion to change the place of trial from Erie county to the county of New York. (Osterhout v. Rabe, 39 App. Div. 413 [1899].)

—— **When venue changed from Rensselaer to Albany county.]** Venue changed from Rensselaer county to Albany county, in which the cause of action arose, and a majority of the witnesses resided. (Fielding v. Cohoes Masonic Temple Assn., 23 Misc. Rep. 52 [1898].)

—— **Changing venue for convenience of witnesses in action for malicious prosecution.]** The court may, under the Code of Civil Procedure (§ 987), for the convenience of witnesses, change the place of trial of an action for malicious prosecution to a county in which neither party resides. (Herbert v. Griffith, 2 App. Div. 566 [1896].)

—— **Place decided by the number of witnesses.]** When it appears from the moving papers that defendant's witnesses outnumber those of the plaintiff, his motion for a change of venue should be granted, and it is not a sufficient ground for denial that a promise be given that the witnesses will be examined before a referee in the county in which they reside, but where the necessary witnesses are the same in number on both sides the trial should be had in the county in which the subject-matter of the action is located. (Belding v. Ladd, 27 St. Rep. 296 [Sup. Ct. 1889].)

—— **Venue where defendant's witnesses are more numerous.]** An action for the conversion of moulding sand taken in Saratoga county and shipped away by the defendant, who claimed to have owned the sand, all of defendant's witnesses residing in Saratoga county, and only a part of plaintiff's in Greene county, where the venue was laid, held, to be properly removed for trial to Saratoga county. (Bell v. Whitehead Bros. Co., 5 App. Div. 555 [1896].)

—— **Conflicting applications.]** The defendant is entitled to a change of venue when proper, although the plaintiff has made an independent motion to retain the place of trial for the convenience of witnesses. (Stimson v. Stimson, 29 St. Rep. 21 [Sup. Ct. 1890].)

—— **What may be shown in the opposing affidavits.]** As to what the plaintiff may show in his opposing affidavit. (See Gilbert v. Chapman, 1 How. Prac. 54 [Sp. T. 1844]; Spencer v. Hurlburt, 2 Caines, 374 [Sp. T. 1805]; Anon., 7 Cow. 102 [Sp. T. 1827]; Onondaga Co. Bank v. Shepherd, 19 Wend. 10 [1837]; Sherwood v. Steele, 12 Wend. 294 [1835].)

—— **Change of venue to county plaintiff's residence on defendant's motion that it be changed to the defendant's county.]** Where an action is brought in a county in which neither of the parties reside, it is improper for the court, on motion of the defendant to change the venue to the county in which he resides, to change it to the county of plaintiff's residence. (Loretz v. Metropolitan St. R. R. Co., 34 App. Div. 1 [1898].)

—— **Opposing affidavit — when insufficient.]** An affidavit in opposition to a motion for change of venue, which merely states the party's belief as to the materiality of his witnesses, but does not aver that he has stated the facts to counsel, or been advised by him on that subject, is insufficient. (Sinnit v. Cambridge Valley Agricultural Society & Stock Breeders' Assn., 27 Misc. Rep. 586 [1899].)

—— **Where all the defendants do not join in the motion the reason must appear.]** Where a motion to change the place of trial for the convenience of witnesses was made by two of four defendants, held, that it should be denied in the absence of evidence as to why the other defendants had not united in the application. (Bergman v. Noble, 10 Civ. Proc. R. 190 [Sup. Ct. 1886]; Welling v. Sweet, 1 How. Prac. 156 [Sp. T. 1845]; Lyman v. Gramercy Club, 28 App. Div. 30 [1898].)

—— **Motion should be on notice to all the parties.]** An action brought by a citizen of the State to cancel a grant of a right of way by the Forest Commission, should, in accordance with Code of Civil Procedure (§ 982), be tried in the county where the lands in question are situated; but a motion made to change the venue to such county should be made upon due notice to all the parties to the action. (Sherman v. Adirondack Ry. Co., 92 Hun, 39 [1895].)

——**Notice to other defendants.]** As to notice to the other defendants, where a motion is made by only one of several defendants. (See Chace v. Benham, 12 Wend. 200 [1834]; Welling v. Sweet, 1 How. Prac. 156 [Sp. T. 1845].)

——**No distinction between actions ex contractu and ex delicto.]** In regard to motions to change the place of trial there is no distinction between actions *ex contractu* and actions *ex delicto*. (Sailly v. Hutton, 6 Wend. 508 [1830].)

——**Motion "to change the venue, or place of trial," good.]** A notice of motion in the alternative, "to change the venue or place of trial," is sufficient. (Hinchman v. Butler, 7 How. Prac. 462 [Sp. T. 1852].)

——**By whom to be made.]** By whom the motion to change the venue should be made. (Mairs v. Remsen, 3 C. R. 138 [Sp. T. 1850]; Legg v. Dorsheim, 19 Wend. 700 [1839].)

——**The venue can only be changed in the cases specified.]** The place of trial in the Supreme Court can only be changed in the cases specified in the statute. (Birmingham Iron Foundry v. Hatfield, 43 N. Y. 224 [1870].)

——**Practice as to motions to change to proper county, and to change for the convenience of witnesses.]** The right of the defendant to have a cause moved to the proper county cannot be met by affidavits as to the convenience of witnesses. If the convenience of witnesses requires that the trial be had in a particular county, a separate motion upon such grounds must be made. (Veeder v. Baker, 83 N. Y. 156 [1880]; Gifford v. Town of Gravesend, 8 Abb. N. C. 246.)

——**When motion may be made.]** When the place of trial of an action is not laid in the proper county, the defendant, under the provision of the Code of Civil Procedure (§ 986), which requires a demand for trial in the proper county to be served with or before service of the answer, retains the right to insist that the trial shall be so had until he has finally defined the issues to be tried, and, therefore, when he avails himself of the right to serve an amended answer, a demand that the trial be had in the proper county served with the amended answer is sufficient. (Penniman v. Fuller & Warren Co., 133 N. W. 442.)

——**When premature.]** It is premature to make a motion to change the place of trial for convenience of witnesses, where a demurrer is interposed to the merits of the defense. (Moore v. Pillsbury, 43 How. Prac. 142 [Sp. T. 1872].)

——**Appearance and demand, when necessary.]** An appearance and demand are necessary before a motion can be made, on the ground that the action was not brought in the proper county. (Van Dyke v. McQuade, 18 Hun, 376 [1879].)

——**Demand for change not necessary.]** It is not necessary, before making a motion to change the venue for the convenience of witnesses, to make a demand in writing to have the trial in the proper county. (Hinchman v. Butler, 7 How. Prac. 462 [Sp. T. 1852].)

——**Denied if made for delay.]** The motion will be denied where it appears that it is made for the purpose of delay. (Kilbourn v. Fairchild, 12

Wend. 29 [1835]; Haywood v. Thayer, 10 id. 571 [1833]; Garlock v. Dunkle, 22 id. 615 [1840].)

—— **That plaintiff will lose a term, not ground for denial.]** The fact that the plaintiff will lose a term by reason of a change of venue, where the defendant is not guilty of laches, is no reason for refusing such change. (Garlock v. Dunkle, 22 Wend. 615 [1840].)

—— **When a change will delay the trial.]** When it is apparent that a change of venue will delay the trial of a case, and that it will not be for the convenience of plaintiff's witnesses, they being in the majority, defendant's motion to change the place of trial should not be granted. (Fowler v. Third Ave. R. R. Co., 29 St. Rep. 285 [Sup. Ct. 1890].)

—— **In an action for unlawful arrest.]** Where it appears that all the material witnesses reside in the county where the cause of action arose, venue will be changed to that county. (Archer v. McIlravy, 86 App. Div. 512 [1903].)

—— **Place of trial, New York county, after annexation.]** (Haukins v. Pelham, etc., Co., 158 N. Y. 417.)

—— **As to cities of the second class.]** (See Czarnowski v. City of Rochester, 55 App. Div. 388.)

—— **Notice to codefendant who has not appeared — when not required.]** (North Shore Indust. Co. v. Randall, 108 App. Div. 232.)

—— **Proper place of trial.]** (See Miles & Gibb v. Starin, 119 App. Div. 336; Chappel v. Chappel, 125 App. Div. 127; Veeder v. Baker, 83 N. Y. 156; Conley v. Carney, 126 App. Div. 337.)

—— **Court cannot of its own motion change place of trial of transitory action.]** (Phillips v. Tietien, 108 App. Div. 9.)

—— **Demand for change of place of trial may be served with amended answer.]** (Peniman v. F. & W. Co., 133 N. Y. 442. Harman v. Van Ness, 58 App. Div. 160.)

—— **Change of venue to proper county, one of right.]** (Sheperd v. Squire, 76 Hun, 598. See, also, Carpenter v. Cont. Ins. Co., 31 Hun, 78; Nat. Com. Co. v. H. R. W. Co., 63 App. Div. 613.)

—— **Foreign corporation cannot become resident of this State.]** (Shepard & Morse Lumber Co. v. Hurleigh, 27 App. Div. 101.)

—— **Action against railroad company may be brought in county where road is operated, although plaintiff did not live there, and principal office of company was in another county.]** (Poland v. United States Trac. Co., 88 App. Div. 281; affd., 177 N. Y. 557.)

—— **Term residence discussed.]** (Washington v. Thomas, 103 App. Div. 423.)

PLEADINGS AS FIXING THE VENUE — Variance as to venue between the summons and complaint.] The mere inadvertence of an attorney in naming a different place of trial in the complaint from that mentioned in the summons will not effect a change of the venue if he move promptly to correct it. (Fisher v. Ogden, 12 App. Div. 602 [1897].)

—— **The complaint controls.]** Where the place of trial designated in the complaint varies from that in the summons the former controls; and where

the cause is placed on the calendar of the county mentioned in the summons only, it may be struck therefrom on defendant's motion if the complaint refers to a different place of trial. (*Ib.*)

NOTICE OF TRIAL — Effect of.] A party by noticing a case for trial at a certain term and then appearing and securing a continuance, waives his right to subsequently move for a change of venue. (Coleman v. Hayner, 92 App. Div. 575.)

PLACE — place of transaction.] The trial should be had in the county where the principal transaction between the parties occurred, and where it appears that the largest number of the witnesses, acquainted with the facts, reside. A majority of witnesses should not necessarily control. (Jordan v. Garrison, 6 How. Prac. 6 [Sp. T. 1851]; Goodrich v. Vanderbilt, 7 id. 467 [Sp. T. 1852].)

—— County in which the transaction took place favored.] On a motion made to change the place of trial of an action, it is proper for the Special Term to give weight to the circumstance that the cause of action arose in the county to which the venue is sought to be changed and that the principal transactions involved in the decision of fact took place in such county. (Payne v. Eureka Elec. Co., 88 Hun, 250 [1895].)

—— When the venue will be changed to the place of the transaction.] An order changing the venue of an action should be granted when it is apparent that the cause of action arose in the county to which it is sought to remove the action, and when it is also shown by the affidavits that it would be for the convenience of a majority of the necessary witnesses to have the place of trial changed. (Lyon v. Davis, 27 St. Rep. 517 [Sup. Ct. 1889].)

—— The place of trial may be fixed by stipulation.] Where the parties to a contract so stipulate therein the place of trial in any litigation arising under it must be that named in the contract. (Greve v. Ætna Live Stock Ins. Co., 81 Hun, 28 [1894].)

—— Where the preponderance of witnesses are in the county of the transaction.] The place of trial should be changed for the convenience of witnesses to the county in which the cause of action originated, where there is apparently a preponderance of witnesses residing in such county. (Kubiac v. Clement, 35 App. Div. 186 [1898].)

—— When the place of the transaction determines the venue.] An order should direct that the venue be laid in the county in which the subject-matter of the action is located, when upon motion to change the place of trial for the convenience of witnesses the affidavits do not agree. (Maynard v. Chase, 30 St. Rep. 348 [Sup. Ct. 1890].)

—— It controls where the number of witnesses is the same.] Where the number of witnesses on each side is the same, the place of transaction will control in deciding a motion for change of venue. (Osterhout v. Rabe 39 App. Div. 413 [1899].)

—— Where the transactions occurred in two counties.] One Osborn, a resident of Westchester county, assigned a crop of growing tobacco to one Stephens as security for a debt, and afterward sold such crop and applied the proceeds to his own use. Stephens, after the sale, agreed to loan the proceeds

thereof to Osborn's wife on her note for four months, and did so. The note was not paid, and Osborn was arrested upon a criminal charge of larceny in Westchester county, and taken to Tompkins county, where he was discharged.

In an action brought by Osborn against Stephens for malicious prosecution the venue was laid in Westchester county.

Held, that it could not be said that the place of the transaction was entirely in Tompkins county, and that an order changing the place of trial to Tompkins county for the convenience of witnesses should be reversed. (Osborn v. Stephens, 74 Hun, 91 [1893].)

—— **Convenience of witness preferred to place of contract.]** Even if the contract in question was made in the county in which an action is brought, defendant's motion to change the venue should be granted if it is apparent that such change would be more convenient for the witnesses. (Perry v. Boomhouer, 43 St. Rep. 375 [Sup. Ct. 1892].)

—— **Other considerations besides convenience of witnesses.]** Upon the decision of a motion to change the place of trial of an action for the convenience of witnesses there are other controlling considerations to be taken into account besides the number of the necessary witnesses of the parties. (Tuthill v. Long Island R. R. Co., 75 Hun, 556 [1894]; Payne v. Eureka Electric Co., 88 id. 250 [1895].)

—— **Fair and impartial trial — what proof that it cannot be had required.]** When an accused person applies to change the place of trial he must make a clear case that, by reason of popular passion or prejudice, he cannot have a fair and impartial trial in the county where the venue is laid. Affidavits stating the belief of persons that a fair trial cannot be had are not sufficient. Facts and circumstances must be stated. (People v. Sammis, 3 Hun, 560 [1875].)

—— **Proof required as to an impartial trial being impossible.]** Defendant's motion to change the place of trial should not be denied because the plaintiff, in order to retain the venue, claims that a trial cannot fairly and impartially be had in the county to which defendant has applied to remove the action, when it is not positively shown from plaintiff's affidavit why an impartial trial cannot there be had. (People v. Snaith, 8 N. Y. Supp. 668 [Sup. Ct. 1899].)

—— **When a matter of right.]** The application for a change of the place of trial of an action from the county in which the action was brought, wherein none of the parties thereto resided, to the proper county, if the demand for the change of the place of trial be served in time, is one of right. (Ganz v. Edison Electric Illuminating Co., 79 Hun, 409 [1894].)

—— **When it should be changed upon demand.]** An action must be tried in the county in which one of the parties resided at the time of the commencement thereof, and where the summons in an action designated the county of Monroe, in which none of the parties resided, as the place of trial, and two of the plaintiffs resided in the county of Herkimer, the place of trial should be changed from the county of Monroe to the county of Herkimer, upon proper demand, and the fact that the defendants were nonresidents of the State does not deny to them the benefit of the statute providing for the

change of the place of trial of the action to a proper county. (Shepard v. Squire, 76 Hun, 598 [1894].)

—— **When court, on motion to change for convenience of witnesses, cannot change because improper county is named.]** On a motion to change the place of trial for the convenience of witnesses, a court cannot order a change for the reason that the proper county is not designated in the summons, where no pervious demand to have such change has been made. (Couch v. Lasher, 17 How. Prac. 520 [Gen. T. 1859].)

—— **Demand to change not defeated by a stipulation.]** Place of trial of an action to set aside as fraudulent a general assignment covering real estate. The right to demand a change of venue cannot be defeated by an offer by the plaintiff to stipulate not to attempt to reach the real estate. (Wyatt v. Brooks, 42 Hun, 502 [Gen. T. 1886]; Smith v. Averill, 1 Barb. 28 [Sp. T. 1847]. Offer to pay expenses of witnesses. (Worthy v. Gilbert, 4 Johns. 492 [Sp. T. 1809]; Rathbone v. Harman, 4 Wend. 208 [Sp. T. 1830].)

—— **Stipulation as to evidence.]** How far a change will be prevented by a stipulation to give no evidence, except of matters occurring in the county where the venue is laid. (Smith v. Averill, 1 Barb. 28 [Sp. T. 1847].)

—— **A stipulation that witnesses would swear as stated not accepted.]** Upon appeal from an order which denied a motion for change of venue, the appellant having shown that all the transactions in question took place and all the witnesses resided in the county to which it was desired to change the place of trial, it was held that the order should be reversed and that a stipulation stating that witnesses would testify as the moving papers alleged they would could not be substituted for their presence and testimony. (Wright v. Burritt, 45 St. Rep. 9 [Sup. Ct. 1892].)

—— **A stipulation as to the date of issue — it does not bar a change of venue.]** A stipulation, given by the defendant on obtaining an extension of time to answer that the date of issue should be that on which service of the answer was due, does not prevent the defendant obtaining a change of venue. (Perkins v. Commercial Advertiser Assn., 89 Hun, 24 [1895].)

—— **Offer to pay expense of adversary's witnesses.]** How far the plaintiff will be allowed to retain the venue, where he offers to pay the expenses of bringing the defendant's witnesses to that county, considered. (Worthy v. Gilbert, 4 Johns. 492 [Sp. T. 1809]; Rathbone v. Harman, 4 Wend. 208 [Sp. T. 1830].)

—— **Stipulation that the witnesses will testify to the facts claimed.]** A motion to change the venue on the ground of convenience of witnesses should not be denied because the opposing party stipulates that the witnesses named will testify to the facts claimed, as the stipulations, to be available for that purpose, must be to the effect that the facts sought to be established will be admitted on the trial. (Ingal v. Stoddard, 35 App. Div. 539 [1898].)

—— **Changed on condition that certain testimony be taken by deposition.]** In an action brought in New York county to recover damages for the conversion of personal property alleged to have belonged to a decedent, residing in Clinton county at the time of his death, where all the transactions out of which the alleged cause of action arose occurred in Clinton county, a motion

was made by the defendant to change the place of trial to Clinton county on the ground of the convenience of witnesses. The plaintiff swore to six material witnesses residing in New York city, and the motion was denied.

Held, that the defendant made out a case for a change of venue from New York to Clinton county;

That the motion should have been granted upon condition that the defendant stipulated that the evidence of the witnesses residing in New York city be taken (if the plaintiff so elected) by deposition. (Dunham v. Parmenter, 74 Hun, 559 [1893].)

—— **Demand to change venue must accompany the answer — effect of default in serving an answer.]** Demand to change place of trial must accompany the answer under the Code of Civil Procedure, section 986, and the answer be served in time; and if a default be made in answering and be opened this does not retire the party in default in which he can insist on the change as a legal right. (Spaulding v. American Wood Board Co., 5 App. Div. 621 [1896].)

—— **May be changed to promote ends of justice.]** But this is in the discretion of the court. (Kavanaugh v. Mercantile Trust Co., 94 App. Div. 575.)

GAME LAWS — Venue of action brought under the game laws.] Section 983 of the Code of Civil Procedure, providing that actions to recover a penalty or forfeiture imposed by statute must be brought in the county where the cause of action or some part thereof arose, has no application to actions brought under chap. 534 of the Laws of 1879 to recover penalties for violations of the game laws, which may be brought in the county where the penalty was incurred or in an adjoining county. (Leonard v. Ehrich, 40 Hun, 460 [1886].)

EXCISE LAW — Power of Supreme Court to change the venue is not divested thereby.] The provisions of the Liquor Tax Law, authorizing the State commissioner to maintain an action in any court of record, in any county, for the recovery of the penalty for the breach of any condition of any bond, do not divest the Supreme Court of the power to change the place of trial, and such power may be exercised for the convenience of witnesses. (Lyman v. Gramercy Club, 28 App. Div. 30 [1898].)

LACHES — Motion must be made with diligence.] A motion to change the place of trial for any reason must be made with reasonable diligence after issue has been joined in the action. (Darragh v. McKim, 2 Hun, 337 [1874]; Haines v. Reynolds, 97 App. Div. 19.)

—— **Limit of time to move.]** Section 986 of the Code of Civil Procedure limits defendant's time to move for a change of venue to the proper county, even when the answer is stricken out as frivolous, and upon appeal the order is reversed. (Taylor v. Smith, 32 St. Rep. 843 [Sup. Ct. 1890].)

—— **Removal of a cause from a local court to the Supreme Court.]** After the lapse of seven years from the joining of issue, it is too late to change the place of trial from a local court to the Supreme Court for the convenience of witnesses. (Quinn v. Van Pelt, 12 Hun, 633 [1878].)

—— **When denied for laches.]** Where a motion was made, over one year after the joining of issue in an action, to change the place of trial thereof

for the convenience of witnesses, the defendant is chargeable with laches, and the motion is properly denied, and the fact that a whole year was consumed in fruitless attempts to change the venue upon other grounds is no excuse for the delay in making such motion. (Becker v. The Town of Cherry Creek, 77 Hun, 11 [1894].)

—— **The motion need not be made within ten days after a failure to consent.]** A motion to change the place of trial on the ground of convenience of witnesses need not be made within ten days after failure to consent thereto, as laid down in section 986 of the Code. (Kubiac v. Clement, 35 App. Div. 186 [1898].)

—— **A motion is too late after a stipulation fixing the time of trial.]** After a defendant, as a condition of postponement, has stipulated to try the cause at a specified term, it is too late to move for a change of venue. (Rodie v. Verdon, 22 Misc. Rep. 409 [1898].)

WAIVER — Stipulating to accept short notice of trial is a waiver of objections to the venue.] A defendant by giving a stipulation, upon receiving an extension of time, that he will take short notice of trial for a certain circuit in the county in which the action was brought, waives the objection that the action had not been brought in the proper county. (Haiz v. Starin, 1 St. Rep. 553 [Sup. Ct. 1886].)

RESIDENCE — By street and number and occupation should be stated.] The moving papers on a motion for a change of venue should, where the material witnesses are residents of a city, show their residence by street and number and also their occupations. (Dean v. Cunningham, 27 Misc. Rep. 31 [1899].)

—— **Not necessary to state, other than county.]** Where the affidavit states the county in which the witnesses reside, it is sufficient. It is unnecessary to specify the city, town or village. (Bleecker v. Smith, 37 How. Prac. 28 [Sp. T. 1869].)

—— **County of residence — decision.]** The motion to change the venue will be decided by the county in which the witnesses reside, and not by the distances they will have to travel in order to come to the place of trial. (Hull v. Hull, 1 Hill, 671 [1841]; People v. Wright, 5 How. Prac. 23 [Sp. T. 1850]; Beardsley v. Dickinson, 4 id. 81 [Sp. T. 1848].)

—— **Residence in adjoining State.]** The residence of a large number of witnesses, in an adjoining State is not a ground for retaining the place of trial in an adjacent county. (Peet v. Billings 2 Wend. 282 [1829]; Bank of St. Albans v. Knickerbocker, 6 id. 541 [1831].)

—— **Meaning of "resided" in section 984 of the Code of Civil Procedure.]** The word resides means a permanent residence, one's home, as distinguished from a mere stopping place. It is nearly synonymous with "domicile." (Washington v. Thomas, 103 App. Div. 423.)

MOTION — Where made.] A motion to change the place of trial for the convenience of witnesses should be made in the judicial district designated in the complaint, or in a county adjoining it. (Bangs v. Selden, 13 How. Prac. 163 [Sp. T. 1856]; Askins v. Hearns, 3 Abb. 184.)

CHANGED VENUE — Proper place to move to open a default.] Where the place of trial of an action brought by a judgment-creditor of a corporation to sequestrate its property was changed by order to another county, in which was its legal residence, a motion to open a default taken in the former county is properly made in the county to which venue had been removed. (Croll v. Empire State Knitting Co., 17 App. Div. 282 [1897].)

AMENDED COMPLAINT — Place of trial cannot be changed in an amended complaint.] The summons and complaint designated Albany county as the place for trial, in which neither party resided. Defendant demanded that the place of trial be changed to Kings county, where it had its principal place of business. Plaintiff thereupon served an amended complaint, designating Rensselaer county, where he resided, as the place of trial. Held, that as the complaint could only be amended without prejudice to the proceedings already had, the amendment could not defeat defendant's application, which should be granted. (Rector v. Ridgewood Ice Company, 38 Hun, 293 [1885].)

—— An amendment of pleading — changing place of trial — pending motion therefor.] An amendment of pleadings, of course, changing the place of trial, prevents the hearing in the original county of a pending motion to change the place of trial, on the ground that a fair and impartial trial cannot be had there, but the motion may be made in the county designated by the amendment. (Moulton v. Beecher, 1 Abb. N. C. 193, 237 [Sup. Ct. 1876].)

APPEAL — Order changing venue — appealability of, to General Term.] An order vacating an order of reference, and changing the place of trial, affects a substantial right, and is appealable to the General Term. The appeal is properly brought in the department in which the motion is made. (Hoffman v. Sparling, 12 Hun, 83 [1877]; Code of Civil Procedure, § 989; *contra*, Kellogg v. Smith, 7 Hun, 551 [1876]; McDonald v. McDonald, 14 id. 496 [1878].)

—— Decision of Special Term not disturbed on appeal.] The exercise of the discretion vested in the Special Term to change the place of trial of an action for the convenience of witnesses will not be disturbed upon appeal unless it clearly appears that such discretion was exercised improperly. (Payne v. Eureka Elec. Co., 88 Hun, 250 [1895].)

—— Review of exercise of discretion on appeal.] Where the Special Term, in the exercise of its discretion grants a change of venue, it will not be interfered with unless it is clearly evident that the discretion was improperly exercised. (Payne v. Eureka Electric Co., 88 Hun, 250 [1895].)

—— It is a matter largely in the discretion of the Special Term.] Motions to change the place of trial for the convenience of witnesses, are largely in the discretion of the Special Term, and its determination of such motions will not be reversed on appeal, unless it clearly appears that there was an abuse of that discretion, or that the court erred in coming to the conclusion it did. (McConihe v. Palmer, 76 Hun, 116 [1894].)

RULE 49.

Guardians ad Litem, Who to be.

No person shall be appointed guardian *ad litem*, either on the application of the infant or otherwise, unless he be the general

guardian of such infant, or is fully competent to understand and protect the rights of the infant, and has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defense or prosecution of the suit, and such ability shall be shown by affidavit stating facts in respect thereto. And no person shall be appointed guardian *ad litem* who is nominated by the adverse party.

Rule 59 of 1858, amended. Rule 61 of 1871. Rule 61 of 1874, amended. Rule 52 of 1877. Rule 49 of 1880. Rule 49 of 1884, amended. Rule 49 of 1888. Rule 49 of 1896.

CODE OF CIVIL PROCEDURE.

§ 428. Special guardian *ad litem* appointed for a defendant who is an infant, a lunatic, drunkard, etc.
§ 469. A guardian *ad litem* must be appointed for an infant plaintiff before the summons is issued.
§ 470. Application for the appointment of a guardian *ad litem* for infant plaintiff — notice to general guardian or person with whom infant resides.
§ 471. Application for the appointment of a guardian *ad litem* for infant defendant — notice to general guardian of infant or person with whom he resides.
§ 472. Guardian, how appointed a consent necessary — clerk, when to act.
§ 473. Appointment of guardian *ad litem* for absent infant defendant.
§ 474. Guardian *ad litem* not to receive property until security is given.
§ 475. What security required.
§ 476. The last two sections not applicable to general guardian who has been appointed guardian *ad litem* — additional security may be required of him.
§ 477. Guardian *ad litem* for infant defendant not liable for costs — unless charged therewith by the court.
§ 1535. Of infant, in an action for partition.
§ 1536. Bond required of a guardian in partition.
§ 1679. Guardian of an infant party cannot purchase at a sale — exception.
§ 1820. Guardian *ad litem* in an infant's action for a legacy.
§ 2352. On application to sell, etc., infant's real estate.
§ 2509. Surrogate's clerk, or other person employed in surrogate's office not to act as guardian in that court.
§ 2527. When appointed in Surrogate's Court for persons incompetent to protect their rights.
§ 3249. Of plaintiff — liability of, for costs.

§ 3251. Costs for procuring appointment of.
§ 3363. Guardian *ad litem* for infant or incompetent party to a condemnation proceeding.

GUARDIAN AD LITEM — For plaintiff need not be his general guardian.] That part of Rule 53 of 1854, requiring the guardian *ad litem* "to be the general guardian, or an attorney or other officer of the court," does not apply to a guardian for the plaintiff. (Cook v. Rawdon, 6 How. Prac. 23 [Sp. T. 1851].)

—— Appointment in violation of the rule.] An appointment in violation of Rule No. 49 of the Supreme Court will be set aside on the motion of any party or person interested. (Hecker v. Sexton, 43 Hun, 593 [1887].)

—— Infant married woman.] Where the infant is a wife, her husband is usually appointed, unless his interest is adverse to hers. (Disbrow v. Folger, 5 Abb. 53 [Sp. T. 1857]. See, however, Cook v. Rawdon, 6 How. Prac. 233 [Chamb. 1851].)

—— Guardian nominated by adverse party will be removed — power to appoint for nonresident infant.] Where the Supreme Court of the State of New York appoints a guardian *ad litem* nominated by the adverse party in express violation of Rule 49, the order appointing the guardian *ad litem* so nominated should be vacated and the general guardian of the infant may make such a motion.

Where an infant defendant, a resident of New Jersey, is, in this State, served with an order to show cause why a guardian *ad litem* should not be appointed to represent her in a special proceeding, the Supreme Court has the power upon the failure of the infant to apply for the appointment of a guardian *ad litem* prior to the return day, to appoint such a guardian *ad litem*. (Matter of Cutting, No. 1, 38 App. Div. 247 [1899].)

—— When irregularity in appointment of guardian ad litem will vacate proceedings thereon.] An order permitting a trustee to resign his trust and appointing a referee to state his accounts, should be reversed where it appears that the guardian *ad litem* representing the beneficiary of the trust, who was a nonresident infant over the age of fourteen years, was nominated by the adverse party, and that his appointment was, therefore, irregular under Rule 49. (Matter of Cutting, No. 2, 38 App. Div. 252 [1899].)

—— When irregularity in appointment of guardian will relieve purchaser under a judgment in partition.] A purchaser at a sale under a judgment in partition, will be relieved where it appears that guardians *ad litem* for infant defendants were connected in business with the attorney for adverse parties. (Parish v. Parish, 77 App. Div. 267.)

—— When necessary.] A guardian must be appointed where a creditor applies for payment from a fund in court in which an infant is interested. (Matter of Howe, 2 Edw. 484 [1835].)

—— Who to be appointed.] A person who is most likely to fully protect the rights of the infant is the one who should be appointed guardian. (Grant v. Van Schoonhoven, 9 Paige, 255 [1841].)

—— **Appointment vacated.]** The appointment of a guardian *ad litem*, nominated by the adverse party in a special proceeding, will be vacated. (Matter of Cutting, 38 App. Div. 247 [1899].)

—— **The guardian himself must be of full age.]** (Kellogg v. Klock, 2 Code R. 28 [Sp. T. 1849].)

—— **Guardian, who has appeared, must answer.]** A guardian who has appeared must put in an answer for the infant. (Farmers' Loan & Trust Co. v. Reid, 3 Edw. 414 [1840].)

—— **Removal of.]** Where the court clearly discovers that the interests of infants are committed to a guardian who is not likely to protect them, he should be removed and a proper one appointed. (Litchfield v. Burwell, 5 How. Prac. 341 [Sp. T. 1850].)

—— **Cannot settle an action.]** A guardian *ad litem* has power only to prosecute an action in which he has been appointed, and cannot settle the same unless authorized by the court; and his authority is limited to the subject-matter of that action. He has no general authority to bind the infant or his estate. (Christ v. Chetwood, 1 Misc. Rep. 418 [N. Y. City Ct. 1892]; Edsall v. Vandemark, 39 Barb. 589 [Gen. T. 1863].)

—— **Allowance of costs to.]** Costs may be allowed to a special guardian unsuccessfully contesting the probate of a will, but limited by and only as specified in the Code of Civil Procedure (§§ 2558–2561). (In re Budlong, 33 Hun, 235 [1885].)

—— **An allowance to a guardian on an ex parte application — improper.]** A surrogate cannot grant an allowance to a special guardian upon his *ex parte* application therefor. The provision as to costs and allowances should be inserted in the decree. (Matter of Budlong, 33 Hun, 235 [1884].)

—— **Power of the court to provide for the compensation of a special guardian.]** The power of the court to award to the guardian of an infant, to be paid out of the subject-matter of the action, such a compensation as appears to be reasonable for the services he has performed, is inherent in it and does not depend upon the provision of the Code of Civil Procedure, nor is it to be included in or limited by the sum of $2,000 fixed by section 3254 of the said Code as the limit of allowance. (Weed v. Paine, 31 Hun, 10 [1883].)

—— **Right of guardian to recover compensation from the father.]** A guardian *ad litem* is not entitled to recover his compensation from the father of infant children under an agreement with him, where in an action in which the father's interest is not identical with that of his children such guardian appears. (Thorn v. Beard, 39 St. Rep. 30 [Sup. Ct. 1891].)

—— **Disbursements of a brother appointed guardian ad litem before appointment.]** A brother appointed guardian *ad litem* of an infant girl, in proceedings for the sale of an interest in property owned by them in common, should be credited with the amount expended by him for her support before his appointment. (Hovell v. Noll, 10 Misc. Rep. 546 [1894].)

—— **Where no guardian has been appointed the complaint should be dismissed.]** Where it appears for the first time upon the cross-examination of plaintiff as a witness that plaintiff is an infant, and that no guardian *ad litem* has been appointed, a dismissal of the complaint is proper, and the court has no authority to deny an application for such dismissal and allow plaintiff to

file a petition for a guardian *ad litem, nunc pro tunc.* (Imhoff v. Wurtz, 9 Civ. Proc. R. 48 [Erie County Ct. 1886]. See, however, Smart v. Haring, 14 Hun, 276.)

—— **Failure to appoint a guardian in proceedings for the sale of land to pay debts does not deprive the court of jurisdiction.]** Sale of real estate to pay the debts of a deceased person. The failure to appoint a guardian for an infant does not deprive the Surrogate's Court of jurisdiction. (Jenkins v. Young, 43 Hun, 194 [1887].)

—— **Failure to appoint a guardian for an infant plaintiff in an action does not deprive the court of jurisdiction of the action.]** Upon the trial of this action the defendant first learned, from the cross-examination of the plaintiff, that at the time the action was commenced she was a minor, although she had become of age before the time of the trial. Held, that the omission to appoint a guardian for her did not affect the jurisdiction of the court, and that a motion to dismiss the complaint was properly denied. (Sims v. New York College of Dentistry, 35 Hun, 344 [1885].)

—— **Failure to appoint a guardian ad litem is an irregularity necessitating reversal.]** Failure to appoint a guardian *ad litem* for an infant defendant is an irregularity for which judgment entered against him must be reversed. (Frost v. Frost, 15 Misc. Rep. 167 [1895]; judgment modified in 16 id. 430.)

—— The defendant may raise the objection on appeal to the County Court without the interposition of a guardian *ad litem.* (*Ib.*)

—— **Infant regularly represented is concluded like any other party.]** An adjudication made in proceedings to which an infant regularly represented in accordance with the practice of the court is a party, has the same effect as a similar adjudication between adults. (Matter of Hawley, 100 N. Y. 206 [1885].)

—— **Infant who contests a will by guardian does not forfeit her interest under the will.]** In a proceeding instituted for the probate of a will in which an infant is a party, such infant will be bound by the adjudication therein made, and in the event of a contest made on behalf of such infant by his guardian *ad litem*, the contest is not such an act of the infant as will forfeit the benefit to him under the will in a clause revoking provisions in favor of any beneficiary who should contest the probate thereof. (Bryant v. Tracey, 27 Abb. N. C. 183 [Sup. Ct. 1891].)

—— **Clerk of court must give security as guardian.]** If the clerk of the court is appointed guardian *ad litem* for an infant defendant in an action of partition, he must give security. (Fisher v. Lyon, 34 Hun, 183 [1884].)

—— **Guardian cannot enforce money judgment until security is given.]** Where the plaintiff in an action by a guardian *ad litem* recovers a money judgment, the guardian must give the security required by section 474 of the Code of Civil Procedure and Rule 51 of the General Rules of Practice before the judgment can be enforced. (Wileman v. Met. St. R. Co., 80 App. Div. 53 [1903].)

—— **Liable for costs.]** The guardian *ad litem* for an infant plaintiff is liable for costs, though the Code does not require him to file security therefor. (Code of Civil Procedure, § 3249.)

—— Guardian *ad litem* for defendant is not. (Code of Civil Procedure, § 477.)

—— **Waiver of right to security for costs.**] The absolute right of a defendant to require an infant plaintiff to give security for costs where his guardian *ad litem* has given none is waived unless it is asserted before answer. (Dwyer v. McLaughlin, 27 Misc. Rep. 187 [1899].)

—— **Attachment for costs.**] The defendant, if successful, is entitled to an attachment against the person of the guardian for his costs. (Wice v. Commercial Fire Ins. Co., 8 Daly, 70 [1877]; Schoen v. Schlessinger, 7 Abb. N. C. 399 [Sp. T. 1879].)

—— **Liability of a plaintiff for the costs and disbursements of a guardian ad litem.**] Where a sale under a judgment of foreclosure has resulted in a deficiency, services rendered by a guardian *ad litem* for an infant defendant are for the infant's benefit, and the fact that the plaintiff in a foreclosure suit has requested such services will not make him liable personally for the costs and disbursements of the guardian *ad litem* which it has been adjudged should be paid out of the proceeds of the sale. (Hill v. Lee, 4 App. Div. 154 [1896].)

—— **Punished.**] A guardian who fails to protect the interests of the infant will be punished. (Knickerbocker v. Defreest, 2 Paige, 304 [1830].)

—— **For an infant beneficiary of a trust residing in New Jersey.**] The Supreme Court has power to appoint a guardian *ad litem* of an infant beneficiary of a trust, over the age of fourteen, residing in New Jersey but served in New York with an order in a special proceeding by the trustee to obtain a discharge from his trust, requiring the infant to show cause why a guardian *ad litem* should not be appointed to represent her in the proceeding, where the infant fails to apply. (Matter of Cutting, 38 App. Div. 247 [1899].)

—— **Purchase by a guardian ad litem of an infant's interest in property — presumption against its fairness.**] A purchase of an infant's interest by the guardian *ad litem* in partition raises a presumption that it was made in the individual interest of the guardian, and the burden is upon the latter to show that the purchase is not one prohibited by statute; unless it is shown to have been made for the benefit of the infant the sale is void, though confirmed by an order entered in the partition suit. (O'Donoghue v. Boies, 92 Hun, 3 [1895].)

—— **Who may apply for the appointment.**] An application to appoint a guardian *ad litem* may be made by a general guardian appointed in another State. (Freund v. Washburn, 17 Hun, 543 [1879].)

—— **Petition for appointment of a guardian, addressed to county judge, but entitled and entered as an order of the County Court.**] Where a petition for the appointment of a guardian *ad litem* for an infant plaintiff is addressed to the county judge, but the order of appointment, signed by the county judge, is entitled and entered as a County Court order, the order is valid as an order of the county judge. (Albrecht v. Canfield, 92 Hun, 240 [1895].)

—— **Application for appointment made too soon.**] The infants were personally served out of the State, under the order of publication, on October 31 and November 1, 1890. The application for appointment of guardian

ad litem on behalf of three of the infants was granted December 8, 1890, and for another March 10, 1891. Held, that as under the provisions of the Code (§§ 441, 471) the infant defendants could not make such an application until forty-two days had elapsed from the time when personal service was made, the court acquired no jurisdiction to make the appointment of guardian for the three infants; that they were not competent to waive, by any affirmative act, the restrictive provisions of the statute, and so, that an appearance by the guardian was not an appearance by the infants. (Crouter v. Crouter, 133 N. Y. 55 [1892].)

—— **Only after service of summons.]** A guardian *ad litem* for an infant defendant can only be appointed after the service of the summons. (Ingersoll v. Mangam, 84 N. Y. 622 [1881]; Code Civil Procedure, § 471.)

—— **Otherwise in an action for partition.]** (See Gotendorf v. Goldschmidt, 83 N. Y. 110 [1880]; Wood v. Martin, 66 Barb. 241 [Sp. T. 1873].)

—— **Waiver of defects of service by a guardian ad litem.]** An appearance and answer by a guardian *ad litem* is not a waiver of defects in the service of the summons. (Bingham v. Bingham, 3 How. Prac. [N. S.] 166 [Sup. Ct. Sp. T. 1884].)

—— **Effect of the infant's arriving at full age pending the suit.]** (Smart v. Harring, 14 Hun, 276 [1878]; Breese v. Metropolitan Life Ins. Co., 37 App. Div. 152 [1899].)

—— **Compensation of.]** In proceeding for discharge of testamentary trustees, where there is a question whether infant party has any interest in the *corpus* of trust fund, the compensation of the guardian *ad litem* limited to taxed costs. (Matter of Pitney, 186 N. Y. 540.)

—— **Who should bring action.]** Where cause of action exists in favor of infant, action should be brought by guardian *ad litem* and not by general guardian, unless general guardian is entitled to sue as trustee of express trust. (Schlieder v. Dexter, 114 App. Div. 417.)

RULE 50.

Guardian ad Litem, Duties of — What Affidavit Required to Entitle a Guardian to Compensation.

It shall be the duty of every attorney or officer of the court to act as the guardian of any infant defendant, in any suit or proceedings against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defense, when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable. But no order allowing compensation to guardians *ad litem* shall be made, except upon an affidavit to be made by such guardian,

if an attorney of the court, or if the guardian be not an attorney, then an affidavit to be made by an attorney of the court who has acted in the matter in behalf of such guardian, showing that he has examined into the circumstances of the case, and has, to the best of his ability, made himself acquainted with the rights of his ward, and that such guardian has taken all the steps necessary for the protection of such rights, to the best of his knowledge, and as he believes, stating what has been done by him for the purpose of ascertaining the rights of the ward.

Rule 61 of 1858, amended. Rule 62 of 1871. Rule 62 of 1874. Rule 53 of 1877. Rule 50 of 1880. Rule 50 of 1884. Rule 50 of 1888. Rule 50 of 1896.

See notes under Rule 49.

RULE 51.

Guardian, Bond of, Before Receiving Property.

No guardian *ad litem* for an infant party shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit (except such costs and expenses as may be allowed by the court to the guardian), unless he has given an undertaking executed by a surety company authorized to do business in this State, in double the amount of such money or property, or a bond secured by a mortgage on improved and unincumbered real property.

Neither shall the general guardian of an infant receive any part of the proceeds of a sale of real property belonging to an infant sold under a decree, judgment or order of the court until the guardian has given such further security for the faithful discharge of his trust as the court may direct. In case, however, such proceeds shall exceed the sum of five hundred dollars the court shall require the guardian to give a bond, in the penalty of double the amount to be paid to the guardian, such bond to be that of a surety company authorized to do business in this State or secured by mortgage on improved and unincumbered real property worth the amount of the penalty of the bond.

Rule 62 of 1858. Rule 63 of 1871. Rule 63 of 1874. Rule 54 of 1877. Rule 51 of 1880. Rule 51 of 1884. Rule 51 of 1888. Rule 51 of 1896. Rule 51, amended, 1910.

See notes under Rule 49.

RULE 52.

Appointment of General Guardian — Petition for.

Except in cases otherwise provided for by law, for the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upward, or some relative or friend, if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which such person bears to the infant, and the nature, situation and value of the infant's estate.

Rule 63 of 1858. Rule 64 of 1871. Rule 64 of 1874. Rule 55 of 1877, amended. Rule 52 of 1880. Rule 52 of 1884. Rule 52 of 1888. Rule 52 of 1896.

CODE OF CIVIL PROCEDURE.

§ 1563. Action for waste by ward, against his guardian.
§ 1679. Guardian of an infant defendant not to purchase at sale — exception.
§ 1590. General guardian of infant may apply for authority to agree to partition.
§ 2410. General guardian of infant may apply to have infant's name changed.
§§ 2821–2841. Appointment, removal and resignation of a general guardian.
§ 2842, etc. Guardian must file annual inventory and account — proceedings thereon, etc.
§§ 2851–2860. Guardians appointed by will or deed.

GUARDIANSHIP — Who entitled to.] Persons entitled to the guardianship in socage of infants owning lands. (See Laws of 1896, chap. 272, § 50.)

—— Right of a surviving parent to nominate a guardian by will or deed. (See Laws of 1896, chap. 272, § 51.)

—— **Trust company appointed where both parents are dead.]** Where both parents of a child eleven years old are dead, a trust company, instead of her maternal grandmother, may be appointed guardian of the infant's person and estate. (Matter of Beebe, 33 St. Rep. 999 [Sup. Ct. 1890].)

—— **A nonresident alien cannot be general guardian.]** A nonresident alien named as a guardian in the will of a resident is not entitled to have letters of guardianship issued to him. (Matter of Zeller, 25 Misc. Rep. 137 [1898].)

—— **For a nonresident.]** The Supreme Court cannot appoint a guardian for an infant who does not reside in this State and who has no property therein. (In the Matter of Hubbard, 82 N. Y. 90 [1880].)

—— **What to be stated in the application.]** The petition for the appointment should show which of the relatives of the infant reside in the county. (Matter of Feeley, Redf. 306 [1880]; Code of Civil Procedure, § 2822.)

—— **Powers of Surrogates' Courts over.]** The nature and extent of the jurisdiction of Surrogates' Courts over testamentary guardians considered. (In re Hawley, 104 N. Y. 250 [1887].)

—— **Appointment of, in Surrogate's Court — when notice unnecessary.]** Appointment of a guardian for an infant in a Surrogate's Court — no notice is required if the infant be present and consent. (Matter of Seabra, 38 Hun, 218 [1885].)

—— As to the surrogate's powers. (Matter of Hosford, 2 Redf. 168 [1877]; Code of Civil Procedure, §§ 2821, 2822.)

—— **Removal of guardian — surrogate may compel account.]** Under section 2603 of the Code of Civil Procedure, the surrogate may require a guardian to account and pay over in proceedings taken for his removal. (Phillips v. Liebmann, 10 App. Div. 128 [1896].)

—— **When the appointment will be reversed.]** Where the surrogate errs in neglecting to make proper inquiries upon an application to appoint a guardian or in omitting to direct proper notices to be given to such of the relatives as, in the exercise of a sound discretion, he ought to have notified, his decision will be reversed on appeal. (White v. Pomeroy, 7 Barb. 640 [Gen. T. 1850]; Holley v. Chamberlain, 1 Redf. 333–336 [1860].)

—— **Jurisdiction of the Supreme Court over minors.]** The jurisdiction of the Supreme Court over the persons and estates of infants, without regard to their age, is not limited by section 2827 of the Code, conferring concurrent jurisdiction on the Surrogate's Court, nor by Rule 52 of the General Rules of Practice designating the person who may present a petition for the appointment of a general guardian of an infant. (Matter of White, 40 App. Div. 165 [1899].)

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—— **When appointment may be revoked.]** Where the Supreme Court, upon the application of an infant over the age of fourteen years, has appointed the father of the infant guardian of his person and estate, it has power upon application of a corporation, a former temporary guardian of the person and estate of the infant, and upon notice to the infant and to the father, to revoke the appointment of the father as guardian and to appoint the corporation, the former temporary guardian, in his place, notwithstanding the fact that the infant asserts that he will not consent to the appointment of any person other than his father as guardian. (Matter of White, 40 App. Div. 165 [1899].)

—— **Powers of Supreme Court — proceeding by petition.]** Proceedings for the removal of a guardian may be commenced by a petition. The Supreme Court has power to remove a testamentary guardian. (Matter of King, 42 Hun, 607 [1886].)

—— **Removal of guardian.]** An action cannot be brought in the Supreme Court to remove a guardian appointed by a surrogate. (Dutton v. Dutton, 8 How. Prac. 99 [Sp. T. 1852].)

—— **Right to employ counsel.]** The widowed mother of an infant who owns real estate is entitled to the possession of such real estate as general

guardian with the rights, etc., of a guardian in socage, and has the right to employ counsel and to make a contract for his compensation. (Matter of Hynes, 105 N. Y. 560 [1887]). Liability of the guardian and of an attorney to pay counsel under such circumstances. (*Ib.*)

—— **Liability of sureties on a bond of a general guardian.]** Where a general guardian became insolvent, removed to another State and died there, no representative of his estate being appointed, and a mortgage given by him to indemnify his bondsmen was foreclosed and the proceeds realized were paid into a trust company to the joint account of the guardian and the bondsmen, after which the trust company became insolvent and the fund was lost, held, that the moneys received by the guardian as such not having been so deposited, the sureties on his bond were not exonerated from liability; and that the court, in an action against them on the bond, could determine the liability of the guardian and enforce the obligation of the sureties on the bond. (Otto v. Van Riper, 31 App. Div. 278 [1898].)

—— **When and in whose name suit should be brought against the sureties upon a general guardian's bond.]** Action against sureties upon a general guardian's bond. Question as to whether it should be brought in the name of infant or of the guardian. When action will lie against the sureties on a bond before an accounting has been had by the guardian. (Perkins v. Stimmel, 42 Hun, 520 [1886].)

—— **Surrogate's decree conclusive against a guardian's sureties.]** The sureties of a general guardian are, in the absence of fraud, concluded by the decree of the Surrogate's Court, entered upon the accounting of the executrix of the guardian, as to the amount due from his estate to the ward. (Martin v. Hann, 32 App. Div. 602 [1898].)

—— **Liability of sureties where a guardian has misappropriated funds.]** Where the obligation as administrator to pay and the right and duty to receive as guardian are united in the same person, he becomes chargeable in the latter capacity and his sureties are liable if, prior to his appointment as guardian, he has misappropriated and converted to his own use the moneys received by him as administrator to which his ward was entitled. (Matter of Noll, 10 App. Div. 356 [1896].)

—— **Sureties liable for costs awarded against a guardian by the surrogate.]** The costs awarded against a guardian on a decree of the surrogate removing him are an inherent part of the decree, and the sureties of the guardian are as much liable for their payment as for that of any other money which he is adjudged to pay. (Phillips v. Liebmann, 10 App. Div. 128 [1896].)

—— **Allowance to guardian for necessaries furnished by him before his appointment.]** Allowances may be made to a guardian for necessaries furnished by him to the infant before the issue of letters of guardianship. (Matter of Miller, 34 Hun, 267 [1884].)

—— **Guardian to apply only income to his ward's support.]** A guardian should not apply more than the income of the fund held for his ward to the latter's support, although there are exceptions to this rule. (Matter of Wandell, 32 Hun, 545 [1884].)

—— **Purchase by a guardian of his ward's lands — bad.]** A purchase by a special guardian of the ward's land is presumptively fraudulent. (People

v. The Globe Mutual Life Ins. Co., 33 Hun, 393 [1884]; Code Civil Procedure, § 1679.)

—— **Purchase of a ward's property by a guardian at a foreclosure sale.]** The common-law rule prohibiting the purchase by a guardian of his ward's property at a foreclosure sale had before 1877 was enforcible only in equity, and did not support an action of ejectment by the ward. (Dugan v. Denyse, 13 App. Div. 214 [1897].)

—— He has no authority to carry on business in the name of his ward. (Warren v. Bank of Rochester, 157 N. Y. 259 [1898].)

—— **Real estate purchased by a guardian under an order of the surrogate.]** Real estate purchased by the guardian of an infant under an order of the Surrogate's Court granted upon petition will, upon the death of the infant before majority, descend as personal and not as real property. (Matter of Bolton, 20 Misc. Rep. 532 [1897].)

—— The guardian of an infant has no inherent power as such to invest the personal property of the infant in real estate. (*Ib.*)

—— **A surrogate cannot authorize such purchase.]** The Surrogate's Court is without jurisdiction to authorize a guardian to purchase real estate for an infant with the infant's personal property. (*Ib.*)

—— **Election by a sole legatee to accept the land instead of the personal property.]** When the guardian of an infant has purchased real estate under an order granted upon petition by the Surrogate's Court, and the infant has died leaving a will bequeathing all her property and estate to her husband, the husband, as sole legatee, may elect to accept the land instead of requiring the guardian to account for the funds used in its purchase; and if he so elects a decree should be made directing the guardian to convey the property to him. (*Ib.*)

—— Where a widow in good faith purchases property which has been owned by her husband on its sale on foreclosure, though she is at the time a guardian in socage of his children, the sale is not void, but the title vests in her subject to being impressed with a trust in favor of the children, enforcible only upon the performance of the conditions which equity should impose. (O'Brien v. General Synod of Reformed Church, 10 App. Div. 605 [1896]. See, also, Greagan v. Buchanan, 15 Misc. Rep. 580 [1895].)

—— **General guardian — he may collect and sue for his ward's share of rent collected from premises owned in part by his ward.]** A general guardian of an infant may maintain an action to recover one-half of the rent of certain premises owned by the infant and the defendant as tenants in common, the entire rents of which had been collected and received by the defendant. (Coakley v. Mahar, 36 Hun, 157 [1885].)

—— **Right of infant to be brought up in religious faith of father.]** Letters of guardianship revoked in order that ward might be brought up in the religious faith of its deceased father. (Matter of McConnon, 60 Misc. Rep. 22; Matter of Crickard, 52 id. 63.)

—— **Right of mother.]** Since the enactment of the Domestic Relations Law it is obligatory upon the surrogate to give the mother notice of application for the appointment of a guardian for infant child. (Matter of Drowne, 56 Misc. Rep. 417.)

—— **Father of infant preferred.**] Surrogate will appoint father guardian unless he is shown to be unfit. (Matter of Tully Infants, 54 Misc. Rep. 184.) Provision in will of mother appointing testamentary guardian for child whose father is living, held ineffectual during lifetime of father. (Matter of Walker, 54 Misc. Rep. 177.)

—— **Rights of mother of infant.**] Husband's attempt by will to dispose of guardianship of his minor children, to the exclusion of mother, held void. (Matter of Kellogg, 110 App. Div. 472.)

—— **Accounting.**] Although no order was previously obtained, upon judicial settlement of guardian's accounts allowance may be made on account of advancements for support and maintenance of ward. (Matter of Putney, 61 Misc. Rep. 1.)

—— Guardian who advances money to protect ward's real estate from foreclosure allowed interest on sums advanced, but charged with interest on rents he had collected in his own name. (McCormick v. Shannon, 127 App. Div. 745.)

—— **Compensation.**] Claim of guardian for moneys paid to attorney for legal services in prosecuting claim in favor of ward before his appointment, disallowed. (Matter of Tyndall, 48 Misc. Rep. 39.)

—— **Powers of guardian to impose restrictions upon ward's property.**] Neither an executor (unless so authorized by the will) nor a general guardian has power by an independent contract to impose restrictions upon an infant's property and impair his estate by a mere covenant against use for the benefit of a stranger. (Curry v. Keil, 19 App. Div. 375 [1897].)

—— **Negligence — what is not culpable negligence in a general guardian.**] The failure of the general guardian of an infant legatee to institute proceedings to compel the payment of the legacy, where the estate is sufficient and the executor is known or believed to be solvent, is not of itself such culpable neglect as will prevent a recovery on behalf of such infant in an action brought to compel the residuary legatee to refund moneys prematurely paid to him. (Buffalo Loan, Trust, etc., Co. v. Leonard, 154 N. Y. 141 [1897].)

PAYMENT — Of money to general guardian.] See Rule 59.

RULE 53.

Court to Ascertain the Age of Infant and Amount of Property, etc.

Upon presenting the petition, the court shall, by inspection or otherwise, ascertain the age of the infant, and if of the age of fourteen years or upward, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount of value of the rents and profits of the real

estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian.

Rule 64 of 1858. Rule 65 of 1871. Rule 65 of 1874. Rule 56 of 1877. Rule 53 of 1880. Rule 53 of 1884. Rule 53 of 1888. Rule 53 of 1896.
See notes under Rule 52.

RULE 54.

Bond of a General Guardian.

The security to be given by the general guardian of an infant shall be a bond in the penalty of double the amount of the personal estate of his ward and of a gross amount or value of the rents or profits of the real estate during his minority. The bond shall be executed by the guardian, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond over and above all debts. If, however, the total amount of the personal estate of an infant and of the gross amount or value of the rents or profits of the real estate during his minority shall exceed twenty-five hundred dollars, then the bond must be the bond of a surety company authorized to do business in this State, or the general guardian may give a bond secured by a mortgage on improved and unencumbered real property of the value of the penalty of the bond.

The court in its discretion may vary the security where from special circumstances it may be found for the interest of the infant, and may direct the principal of the estate and any part thereof to be invested in the stocks of the State of New York or of the United States, or deposited with any trust company which shall have been designated as a depository for such moneys, or invested in bond and mortgage on unencumbered and improved property of at least double the value of the amount invested, to be shown to the satisfaction of the court, for the benefit of the infants, and that the interest or income thereof only be received by the guardian.

Rule 65 of 1858, amended. Rule 66 of 1871, amended. Rule 66 of 1874, amended. Rule 57 of 1877. Rule 54 of 1880. Rule 54 of 1884. Rule 54 of 1888, amended. Rule 54 of 1896. Rule 54, amended, 1910.
See notes under Rules 49 and 52.

CODE OF CIVIL PROCEDURE.

§ 744. Comptroller to prescribe rules and regulations relative to the care and disposition of moneys paid into court which shall be binding in the absence of special directions by the court into which the money was paid.

§ 745. Money paid into court (unless it be otherwise directed) to be paid to the county treasurer and securities taken in his name.

§ 746. Money paid into court — where and how deposited or invested.

§ 747. Moneys paid into court — each court may make special directions as to the disposition and investment thereof.

§ 749. Power of certain officers to bring actions relating to money held in a representative character.

§§ 810–816. General regulations respecting bonds and undertakings.

NEW YORK LIFE INSURANCE AND TRUST COMPANY — Section 3 of chapter 75 of the Laws of 1830 authorizes the said company to be appointed guardian of any infant, the annual income of whose estate exceeds $100.

UNITED STATES TRUST COMPANY — Section 3 of chapter 204, Laws of 1853, confers a similar authority upon this company.

TRUST COMPANIES — Appointment of, as guardian.] (See section 157 of chapter 689 of the Laws of 1892.)

GENERAL GUARDIAN — Appointment of.] (See notes under Rule 52.)

—— **Liability of sureties.]** Held to be no defense to action against sureties on bond of guardian for money lost through improper investments that when bond was given guardian falsely represented to defendants that bonds in which money was invested was good. (Rouse v. Whitney, 53 Misc. Rep. 56.)

—— Discharge of surety on bond of guardian no longer rests in the discretion of the court, but he is entitled to it as a matter of right. (Matter of Am. Surety Co., 61 Misc. Rep. 542.)

—— Powers of county treasurer same as other trustees. (Tompkins Co. v. Ingersoll, 81 App. Div. 344.)

RULE 55.

Petition for Sale of Real Estate of Infants, Lunatics, etc.— What to State — Previous Application.

The petition in proceedings to sell, mortgage or lease real estate belonging to an infant or lunatic, idiot or habitual drunkard, shall state, besides the particular grounds for a sale, mortgage or lease of the property, and the other matters required by the Code, the age and residence of the infant, lunatic, idiot or habitual drunkard, and the name and residence of the person proposed as a special guardian or committee, the relationship, if any, which he bears to the infant, lunatic, idiot or habitual

drunkard, and the security proposed to be given; and also whether any previous application has been made, and, if so, the time thereof, and what disposition was made of the same.

Rule 56 of 1858. Rule 67 of 1871, amended. Rule 67 of 1874. Rule 58 of 1877, amended. Rule 55 of 1884. Rule 55 of 1888. Rule 55 of 1896.

CODE OF CIVIL PROCEDURE.

§ 340. Jurisdiction of County Court over the person and estates of incompetents.

§§ 2345–2364. Proceedings for the disposition of the real property of an infant, lunatic, idiot or habitual drunkard.

SALE — Power of the court to direct.] The power of the court to order the sale of real estate belonging to an infant is derived entirely from the statute. (Horton v. McCoy, 47 N. Y. 21–26 [1871]; Losey v. Stanley, 147 id. 560 [1895]; Onderdonk v. Mott, 34 Barb. 106 [Gen. T. 1861]; Baker v. Lorillard, 4 N. Y. 257 [1850]; Rogers v. Dill, 6 Hill, 415 [1844]; Muller v. Struppman, 6 Abb. N. C. 343 [Sp. T. 1878].)

—— A mortgage given to pay the debt of another — the court is without jurisdiction to order it.] Where the petition and proofs show, without dispute, that the sole purpose of the proceeding is to mortgage the property of an infant to pay the debt of another, and there is no proof or claim that his property is not sufficient to pay all of his own debts and for his necessary education, the court does not acquire jurisdiction. (Warren v. Union Bank of Rochester, 157 N. Y. 529, revg. 28 App. Div. 7 [1898].)

—— Power of the Legislature to order a sale of infant's land.] It is within the power of the Legislature by special act to authorize a sale of an infant's lands, including the future contingent interests of those not in being. (Ebling v. Dreyer, 149 N. Y. 460 [1896].)

—— Power of the court over the proceedings — continues during minority.] On the sale of an infant's interest in real property, the court has control of the proceedings until the infant arrives at maturity and the money has been paid over to him, and can correct any irregularities and mistakes so as to protect a party likely, innocently, to suffer thereby. (Applied to case where the interest of the infant was one-third and the sale was of a one-half interest in the land.) (Matter of Price, 67 N. Y. 231 [1877].)

—— Powers of.] A guardian is not permitted to invest personal property of an infant in real estate without an order of the Supreme Court. (Manahan v. Holmes, 58 Misc. Rep. 86.)

—— A general guardian cannot bind the ward's person or property unless expressly authorized by statute. (Aborn v. Janis, 62 Misc. Rep. 95.)

—— Sale contrary to the statute — void.] A sale made contrary to the provisions of the statute is utterly void and passes no title to the purchaser. (Rogers v. Dill, 6 Hill, 415; Matter of Turner, 10 Barb. 552 [Sp. T. 1851].)

—— Noncompliance with the rule — does not invalidate the sale.] The rule of the Court of Chancery (Rule 158) requiring an infant to join when he is

over fourteen years of age, was a mere regulation of practice, which the court had power to waive, and did not affect the jurisdiction, nor did its violation invalidate the sale. (Cole v. Gourlay, 79 N. Y. 527 [1880]. See, however, Code Civ. Proc., § 2349.)

—— **Possession in fact or law — not necessary to authorize.]** Under the statute providing for the sale of the interest of an infant in real estate, a sale can be ordered in those cases in which the infant is not in the actual possession of the land, nor entitled to the immediate possession thereof. (Jenkins v. Fahey, 73 N. Y. 355 [1878].)

—— **Of equitable estates.]** Courts of equity have inherent jurisdiction, independent of the statute, to order the sale of equitable estates of infants. (Wood v. Mather, 38 Barb. 475 [Gen. T. 1862].)

—— **Expectant estates and estates in remainder.]** Can be sold thereunder. (Jenkins v. Fahey, 73 N. Y. 355, reversing 11 Hun, 351 [1877]; Matter of Haight, 14 id. 176 [1878].)

—— **Contingent interest of an infant cannot be sold under the statute.]** The contingent interest of an infant under a devise conditioned upon the remarriage of her mother, to whom the primary estate is devised, is not an estate which can be sold under the statute. (Matter of Dodge, 40 Hun, 443 [1886].)

—— **Estate of infant trustees.]** Proceedings for transferring the title of infant trustees under the Revised Statutes (article concerning the sale of infants' estates), are not affected by the one-hundred and seventy-sixth section of the article. That section applies only to the sale of infants' estates held in their own right. (Wood v. Mather, 38 Barb. 473 [Gen. T. 1862].)

APPLICATION — By whom made.] The application must be made by the petition of the general guardian or the guardian of the property of the infant; or by the committee of the property of the lunatic or other incompetent person, or by any relative or other person in behalf of either. Where the application is in behalf of an infant of the age of fourteen years or upwards, the infant must join therein. Where the application is made to the Supreme Court the petition must be presented at a term held within the judicial district in which the property or a part thereof is situated. (Code Civ. Proc., § 2349.)

—— **Corroborating affidavits and petition by general guardian — may be dispensed with.]** The court has power to dispense with the provision of the rule requiring corroborating affidavits and with that requiring the petition to be by the general guardian of the infant, or to show that he has none. (Cole v. Gourlay, 79 N. Y. 527 [1880].)

—— **Infant need not join in petition.]** Under the provisions of the Revised Statutes, in relation to the sale of real estate of infants (2 R. S. 194, § 170, *et seq.*), it is not essential that the infant should join in the petition for such sale; it may be made by the next friend or guardian alone. (Cole v. Gourlay, 79 N. Y. [1880]. See, however, Code Civ. Pro., § 2349.)

—— **Form of petition.]** The form of the application is not of importance, if the necessary facts are stated. A petition entitled "The petition of, etc., infants, by their next friend," is sufficient to give the court jurisdiction. (O'Reilly v. King, 2 Rob. 587 [Gen. T. 1864]; S. C., 28 How. Prac. 408.)

—— A petition in proceedings instituted for the sale of an infant's real estate, reciting that it was the petition of an infant under fourteen years of age, by his general guardian, and executed by the latter on the infant's behalf and verified, although throughout the petition the infant is described as the petitioner, is the petition of the guardian, and is sufficient in form. (Matter of Hopkins, 33 App. Div. 615 [1898].)

—— **When irregular.]** Such petition is, however, defective where it fails to state the facts and particulars concerning the real and personal property of the infant, his income, and the debts against his estate, as required by Code of Civil Procedure (§ 2350), it not appearing that the sale was necessary to avoid an action of partition; and a purchaser is justified in refusing to take a title founded thereon. (*Ib.*)

—— **It should be addressed to the "Supreme Court of the State of New York."]** (Matter of Bookhout, 21 Barb. 348 [Sp. T. 1856].)

—— **Where made.]** The application must be made at a Special Term, and not to a justice at chambers. (Matter of Bookhout, 21 Barb. 348 [Sp. T. 1856].)

BOND — Of guardian to sell infant's real estate — when it should be executed — it takes effect from the time of its delivery.] (Center v. Finch, 22 Hun, 146 [1880].)

SALE TO PAY DEBTS — Special guardian cannot dispute such debts.] Proceedings to mortgage an infant's real estate for payment of his debts — the special guardian cannot dispute the validity of debts he is directed to pay — when he is not protected by an order of confirmation. (Matter of Lampman, 22 Hun, 239 [1880].)

ORDER — Form of, in proceedings to pay debts.] In proceedings to mortgage an infant's real estate for the payment of debts, the order directing the mortgage, and the report of the referee, should specify the debts to be paid. (Matter of Lampman, 22 Hun, 239 [1880].)

—— **Deposit without delivering to the depositary a copy order directing it.]** In proceedings to sell real estate in which an infant had an interest, her special guardian being directed by order of the court to deposit the amount of her share with the defendant, "to await the further order of said court," made the deposit, without serving the order of the court, in his name as special guardian for the infant. Held, that this did not constitute notice to the defendant of the order, and the amount having been paid to the special guardian or on his order, could not be recovered from defendant by the infant on becoming of age. (Walker v. State Trust Co., 24 Misc. Rep. 498 [1898].)

DEED — May be executed by a special guardian in his name as special guardian.] An order in the Court of Chancery, in proceedings for the sale of certain infants' real estate, adjudged that the special guardian, who signed the petition, should execute a sufficient conveyance of the interests of the infants; a deed was executed by him in his own name as special guardian, the names of the infants appearing in the deed. Held, that the deed was in proper form; that it was not necessary to have it executed in the names of the infants. (Cole v. Gourlay, 79 N. Y. 527 [1880].)

COUNTY COURT — Always open, for proceedings for sale.] The County Court need not exercise its powers in regard to the sale of an infant's estate

at a stated term, but is always open for that purpose, except as otherwise provided by statute. (Brown v. Snell, 57 N. Y. 286 [1874]. See Code Civ. Proc., § 365.)

LEASE — Powers of a Court of Chancery to lease an infant's real estate.] The Court of Chancery, under its powers to lease the lands of infants, had jurisdiction in an action by trustees of real property in which infant defendants were entitled to a conditional remainder, to authorize the execution of leases by the trustees for a term of years, with covenants for renewals, and a judgment to that effect will bind the infants upon their subsequently acquiring an estate in the lands by virtue of a power of appointment under a will executed pursuant to the deed under which the trustees were appointed. (Gomez v. Gomez, 147 N. Y. 195, affg. 81 Hun, 566 [1895].)

—— Allowance to a guardian for expenses — suing as a poor person.] Where a guardian *ad litem* of an infant appointed upon the petition of the infant's father, after obtaining an order of the court permitting him to sue as a poor person, commences the action, but before trial, upon the stipulation of the attorneys, such order is vacated by a subsequent order not filed until after judgment is rendered, the latter order should be set aside and the proceedings be remitted to the Special Term to determine what allowance should be made to the guardian for expenses, it being evident that the plaintiff's attorney was seeking to secure for himself a greater compensation than is allowed by the law under which he was appointed. (Dunlay v. American Telephone & Telegraph Company, 4 App. Div. 432 [1896].)

MORTGAGING INFANTS' REAL ESTATE — Powers of the court relating thereto, etc.] Under section 2348 of the Code of Civil Procedure, the court has power to authorize the mortgaging of real estate of infants for the purpose of discharging an annuity charged thereon, and the mortgage covers whatever interests the infants have, whether an estate in possession or a vested future estate. (Craver v. Jermain, 17 Misc. Rep. 244 [1896].)

—— Use and income of property given to executors in trust until infants become of age — the remainder vests and may be mortgaged.] The fact that the use and income of property is given in trust to executors until the infants attain majority, when the land is devised to them, does not prevent the vesting of the remainder independent of the trust, and the same may be mortgaged by authority of the court, though such vested interests may possibly be defeated by the happening of a future event. (*Ib.*)

—— When a mortgage, including the interests of infants, need not state their proportionate liability.] Where an order directs the guardian of infants to unite with the adults interested in giving a mortgage on different pieces of property, and the mortgage refers to the proceedings by which it was authorized, they are to be construed with it, and where they show the proportionate liability of the infants' estates the mortgage itself need not specify the limitation of each. (*Ib.*)

—— Mere irregularities in proceeding to mortgage are not ground for setting the mortgage aside.] A brewery business belonging to an infant was carried on for a time, solely in his interest, by his general guardian who, as such, gave his own notes to a bank to meet an indebtedness incurred in the business, and procured an order of the Supreme Court to mortgage the infant's

real estate, in the proceedings for which the general attorney of the bank was appointed special guardian and made an oral agreement, afterward carried out, to mortgage the property to a third person, by whom the mortgage was afterward assigned to the bank. In an action brought by the infant to have the mortgage set aside.

Held, that the attorney not having represented the bank in the proceedings, his appointment as guardian, and his making an oral contract, were irregularities merely, and that the transaction being fair, and the court having had jurisdiction under Code of Civil Procedure, sections 2348–2364, the proceedings could not be attacked collaterally. (Warren v. Union Bk., 28 App. Div. 7 [1898].)

EXCHANGING AND MORTGAGING INFANTS' PROPERTY — Powers of County Court relating thereto.] Under section 2348 of the Code of Civil Procedure, providing that the real estate of an infant "may be sold, conveyed, mortgaged, released, or leased" in the manner prescribed, the County Court has no power to grant leave to make an exchange of lands in which an infant is interested, nor to mortgage the land acquired in exchange therefor for the amount of the difference in value. (Moran v. James, 21 App. Div. 183 [1897].)

RULE 56.

Referee's Report — Proof of Value.

The referee appointed on such petition must report as to whether a sale, mortgage or lease of the premises (or any and what portion thereof), would be beneficial to the infant, lunatic, idiot or habitual drunkard, and the particular reason therefor, and whether the infant, lunatic, idiot or habitual drunkard is in absolute need of having some and what portion of the proceeds of such sale, mortgage or lease, for a purpose provided in section 2348 of the Code, in addition to what he might earn by his own exertions; and such referee shall also ascertain and report the value of the property or interest to be disposed of, specifically, as to each separate lot or parcel, and whether there is any person entitled to dower or a life estate, or estate for years, in the premises, and the terms and conditions on which it should be sold.

And the referee's report shall give such further facts as are necessary or proper on the application.

The facts in relation to the value of the property or interest to be disposed of required to be ascertained and reported upon by the referee must be proven on such reference by evidence of at least two disinterested persons, in addition to that of the petitioner, and the report shall not refer to the petition or any other papers for a statement of fact.

Rule 67 of 1858. Rule 68 of 1871, amended. Rule 68 of 1874, amended. Rule 9 of 1877, amended. Rule 56 of 1880. Rule 56 of 1884. Rule 56 of 1888. Rule 56 of 1896, amended.

See notes under Rule 55.

REFERENCE — When unnecessary.] The court may proceed summarily without a reference, if the facts are made to appear so as to show a clear case, where the disposal of the estate is necessary and proper for any of the purposes indicated by the statute. (Matter of McIlvaine, 15 Abb. 91 [Gen. T. 1862].)

RULE 57.

Bond of Special Guardian.

The security required on the sale of the real estate of an infant shall be a bond of the guardian, with two sufficient sureties in the sum of double the value of the premises including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond over and above all debts, which bond shall be duly acknowledged and accompanied with affidavits of justification made by the sureties. In case, however, the value of the premises, including the interest on such value during the minority of the infant, shall exceed the sum of $500, the court must require the guardian to give a bond of a surety company authorized to do business in this State or a bond secured by a mortgage on improved and unencumbered real property of the value of the penalty of the bond.

Rule 68 of 1858. Rule 69 of 1871. Rule 69 of 1874, amended. Rule 60 of 1877, amended. Rule 57 of 1880. Rule 57 of 1884. Rule 57 of 1888. Rule 57 of 1896. Rule 57 as amended, 1910.

See notes under Rule 55.

CODE OF CIVIL PROCEDURE.

§ 474. Guardian *ad litem* not to receive property until security is given — except when.

§ 475. Form and amount of security to be given by guardian *ad litem*.

§§ 810–816. General regulations respecting bonds and undertakings.

SURETIES — Justification of.] Where real estate was sold for the benefit of five children, and the guardian gave a bond to each, with the same sureties, held, that the sureties should justify in respect to their ability as to the aggregate penalties of the several bonds. (Anonymous, 4 How. Prac. 414 [Sp. T. 1850].)

—— **Unauthorized act of a guardian for which his sureties are not liable.]** In an action against a surety on the bond of a special guardian, given in proceedings for the sale of infants' real estate, brought by one of the former infants, it appeared that the proceeding had been instituted by the infants and their general guardian to obtain a sale of the lands in order to pay off incumbrances thereon, which incumbrances included a judgment in favor of the present defendant; that the proceeding was regularly conducted by a reference, referee's report and order of the court directing the special guardian to contract for a sale, that the guardian thereupon reported a contract of sale thereof for a certain price; that an order was granted confirming his report and ordering him to convey the infants' interest; that he accordingly made a conveyance, received the money therefor and applied a portion of it in payment of the judgment.

No question as to the propriety of such payment was made for more than twenty years thereafter, but after the death of the guardian and the settlement of his estate, the present action was brought against the defendant as one of the sureties on the guardian's bond to recover the infants' interest in the money so paid upon the defendant's judgment, on the ground that such payment by the guardian was a misappropriation and conversion of the fund, for the reason that an order of the court was not previously obtained for the payment, under the rule of court (Rule 69 of 1858; Rule 58 of 1888), and for the reason that no such order could have been made as the judgment was void.

Held, that whether the judgment was void or voidable was not material, as it was conceded that the claim on which it was based was a valid one against the infants' estate, and the court could have ordered the claim paid if no judgment had been entered thereon.

That, although the money was paid without an order and in violation of a rule of court, the estate of the infants had had the benefit of it, as they were the residuary legatees of the estate. (Long v. Long, 66 Hun, 595 [1892].)

—— **Upon a guardian's bond, not discharged by a judgment fraudulently obtained.]** Where a guardian, upon the coming of age of his ward, procured a settlement with him, and an extension of time of payment, by means of fraudulent representations, and the ward, upon discovery of the fraud, repudiated the transaction, brought an action to annul it and to set aside the surrogate's decree based thereon, discharging the guardian and recovered a judgment granting the relief sought,

Held, that the liability of the sureties upon the guardian's bond was not affected by the settlement, as the effect of the judgment was to make the whole transaction void *ab initio*, and so there was no binding or valid extension of time of payment, and that said judgment was binding upon the sureties in an action upon the bond. (Douglass v. Ferris, 138 N. Y. 192 [1893].)

—— **Laches.]** Held, that plaintiff was not chargeable with any omission of duty in not notifying the sureties; that if there was any duty to use active diligence, it was imposed upon the sureties themselves, rather than upon the ward, and the fact that the fraud was committed and repudiated imposed no greater duty of active diligence upon the plaintiff than would have otherwise existed against the sureties. (*Ib.*)

RULE 58.

When Proceeds of Sale Must be Brought into Court — Costs.

If the proceeds of the sale exceed $500, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court. If the infant's interest in the property does not exceed $1,000, the whole costs, including disbursements, shall not exceed twenty-five dollars, and referee's fees not exceeding ten dollars. Where several infants are interested in the same premises as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

Rule 69 of 1858, amended. Rule 70 of 1871. Rule 70 of 1874, amended. Rule 61 of 1877. Rule 58 of 1880. Rule 58 of 1854. Rule 58 of 1888. Rule 58 of 1896.

CODE OF CIVIL PROCEDURE.

§§ 743–754. Payment of money into court — care and disposition thereof.

COSTS — When allowed in excess of twenty-five dollars.] If several infants are included in the same application, or if several parcels are sold at different times, the solicitor for the petitioners is entitled to an allowance for the extra expense, notwithstanding the limitation by the rule to twenty-five dollars. (Matter of Morrell, 4 Paige, 44 [1833].)

—— In proceedings to compel a special guardian appointed to sell the real estate of an infant to pay over the proceeds. (Matter of Spelman v. Terry, 74 N. Y. 448 [1878].)

INVESTMENT — In land beyond the jurisdiction of the court — order directing it is void.] Where land has been sold under an order of the County Court, a subsequent order of the same court, directing the special guardian to invest the proceeds in lands outside the county over which its jurisdiction extends, the infant and special guardian being at the time residents of the county where such land is located, is a nullity. (Stiles v. Stiles, 1 Lans. 90 [Gen. T. 1869].)

RULE 59.

When Proceeds to be Paid to General Guardian; Petition Therefor.

No money arising from the sale of the real estate of an infant shall be paid over to his general guardian except so much thereof or of the interest or income from time to time as may be necessary for his support or maintenance unless such guardian shall give a bond in the penalty of double the amount to be paid to him with sufficient surety to be approved by the court. In case, however, such money shall exceed the sum of $500 the court must require the guardian to give a bond of a surety company authorized to do business in this State or a bond secured by a mortgage on improved and unencumbered real property of a value of the penalty of the bond.

No order shall be made for the payment of any such moneys to any person, except upon petition, accompanied by a certified copy of the order, in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the fund, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee to take proof and report thereon.

Rule 70 of 1858. Rule 71 of 1871. Rule 71 of 1874. Rule 62 of 1877. Rule 59 of 1880. Rule 59 of 1884. Rule 59 of 1888. Rule 59 of 1896. Rule 59 as amended, 1910.

See Rule 51.

CODE OF CIVIL PROCEDURE.

§§ 743–754. Payment of money into court and care and disposition thereof.

—— **Effect of order directing proceeds to be paid to guardian.]** Where the order does not specify the purposes for what the proceeds are to be devoted, it will be assumed that all such proceeds are absolutely necessary for the support of the infant. (Allen v. Kelly, 171 N. Y. 1 [1902].)

—— The requirements of the rule are not satisfied by the bond of a surety company. (Matter of Flynn, 58 Misc. Rep. 628.)

RULE 60.

Failure to Answer on Mortgage Foreclosure — Reference — What Proof Must be Made — Judgment.

If, in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, the plaintiff may have an order referring it to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrances of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference shall also direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent, on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

When no answer is put in by the defendant, within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial, as to all the defendants, may apply for judgment, at any Special Term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar.

The plaintiff, in such case, when he moves for judgment, must show, by affidavit or otherwise, whether any of the defendants who have not appeared are absentees; and, if so, he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made. And in all foreclosure cases the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mort-

gage, and the parties thereto, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, and at or after the time of filing of the complaint, as required by law.

Rule 71 of 1858. Rule 72 of 1871. Rule 72 of 1874, amended. Rule 63 of 1877, amended. Rule 60 of 1880. Rule 60 of 1884. Rule 60 of 1888. Rule 60 of 1896.

CODE OF CIVIL PROCEDURE.

§ 340. Action for the foreclosure of a mortgage — when it may be brought in a County Court.
§ 447. Who are proper parties defendant.
§ 473. Guardian for absent infant defendants — how appointed.
§ 982. The action must be tried in the county in which the subject of the action, or some part thereof, is situated.
§ 1242. Sale made — where — by whom — effect of the conveyance.
§ 2443. Security may be required upon a sale by a referee.
§ 1244. The conveyance to state in the granting clause whose right, etc., is sold.
§§ 1626–1637. Provisions relating to foreclosure by action.
§ 2798. Surplus in foreclosure, when to be paid to surrogate.
§ 3297. Fees of the referee to sell.
§ 3307. Fees where the sheriff makes the sale.

FORECLOSURE — Parties — who are proper to a foreclosure suit.] In actions of foreclosure only subsequent lienors should be made defendants. (Bram v. Bram, 34 Hun, 487 [1885].)

—— **When a bondholder may bring it.]** When an action to foreclose a mortgage may be brought by a bondholder, on the refusal of the trustee to bring it. The complaint must allege a failure to comply with some obligation for a breach of which the mortgage authorizes such an action to be brought. (Davies v. New York Concert Company, 41 Hun, 492 [1886].)

—— A failure by the trustee to foreclose for a long time after a default does not give a bondholder the right to bring an action of foreclosure on the ground of abandonment or neglect of the trust. (Beebe v. Richmond Light, Heat & Power Co., 13 Misc. Rep. 737 [1895].)

—— **Wife not personally served with the summons in a mortgage foreclosure — judgment not vacated.]** A motion by a wife to set aside a judgment of foreclosure on the ground that the summons had not been personally served upon her as stated in the judgment-roll was held to be properly denied in the discretion of the court, her interest being merely inchoate. (Smith v. Askin, 20 Wkly. Dig. 394 [Supr. Ct. 1885]; *contra*, Burton v. Sherman, Id. 419 [Sup. Ct. 1884]; S. C., 98 N. Y. 629; Nagle v. Taggart, 4 Abb. N. C. 144 [Sp. T. 1877]; Lathrop v. Heacock, 4 Lans. 2 [Gen. T. 1871]; White v. Coulter, 1 Hun, 366 [1874]; Foote v. Lathrop, 53 Barb. 183 [Gen. T. 1869];

S. C., 41 N. Y. 358; Code Civ. Proc., § 450; Watson v. Church, 3 Hun, 80 [1874]; Feitner v. Lewis, 119 N. Y. 131 [1890]; Feitner v. Hoeger, 121 id. 660.)

—— **Person not made a party in his official capacity.]** Where a second mortgagee holds the mortgage as trustee, and is not made a party in his official capacity to an action brought to foreclose the prior mortgage, if it does not appear on the face of the complaint, or by answer, or by his appearance in the capacity of trustee, that the trust which he represents is intended and understood to be affected by the suit, the second mortgage remains a lien upon the premises after their sale under the foreclosure of the prior mortgage. (McGuckin v. Milbank, 83 Hun, 473 [1895].)

—— **Mortgage foreclosure — when it binds a general assignee made a party in his individual capacity.]** Foreclosure of a mortgage — when a general assignee is bound by the judgment, although he is made a party individually and not as assignee. (Wagner v. Hodge, 34 Hun, 524 [1885].)

—— **All having a right to redeem made parties.]** All persons entitled to redeem from a mortgage must be made parties to an action. (Russ v. Stratton, 11 Misc. Rep. 565 [N. Y. Supr. Ct. Gen. T. 1895].)

—— **Any person liable for the debt.]** Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared or has been personally served with the summons, the final judgment may award payment by him of the resldue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein.

—— **The People.]** The People of the State of New York may be made a party defendant to an action for the foreclosure of a mortgage on real property, where the people of the State of New York have a lien on the said real property subsequent to the lien of the mortgage sought to be foreclosed in said action in the same manner as a private person. In such a case the summons must be served upon the Attorney-General, who must appear in behalf of the people. (Code Civil Procedure, § 1627.)

—— **When a prior mortgagee is a proper party.]** Where the owner of mortgaged premises sells the same and takes from the vendee a mortgage to secure the payment by the vendee of the prior mortgage, the prior mortgagee is a necessary party defendant to an action brought to foreclose the second mortgage. (Wait v. Getman, 32 App. Div. 168 [1898].)

—— **Mortgagor a necessary party, although a receiver has been appointed.]** The mortgagor is a necessary party to an action to foreclose the mortgage, although a receiver of his property was appointed prior to the commencement of the action and was made a party thereto. (Brandow v. Vroman, 29 App. Div. 597 [1898].)

—— **A prior assignor is a proper party.]** A prior assignor of a mortgage is a proper but not a necessary party to its foreclosure. (Merrill v. Bischoff, 3 App. Div. 361 [1896].)

—— **Paramount claimants made parties.]** It seems, that while a prior incumbrancer is not a necessary or proper party in an action to foreclose a

mortgage, yet if made a party the court has jurisdiction, and may grant the relief demanded in the complaint in case he makes default, and if he does not desire to have his rights adjudicated he should appear and by answer or demurrer raise the question that he is improperly made a party. (Jacobie v. Mickle, 144 N. Y. 237 [1894].)

—— Where in an action brought to foreclose a mortgage, a person whose title to the mortgaged premises is superior and prior to that of the mortgagor is made a defendant, and it is alleged in the complaint that he has some claim or interest in the mortgaged premises, which, if any, accrued subsequently to the execution of the mortgage, ordinarily such person's rights will not be affected by the foreclosure judgment, nor will he be estopped thereby from afterward asserting his title to the premises in question, but it is otherwise if the defendant in the foreclosure action so made a party sets up by answer his prior right or claim to the premises and, stating facts in regard to his interest therein, asks the court to determine as to his title thereto.

The judgment entered in such an action fixing the rights of such defendant estops his heirs and privies from thereafter asserting any title to the premises other than that determined by such judgment. (Fletcher v. Barber, 82 Hun, 405 [1894].)

—— **Dower.]** A person claiming dower by title paramount to a mortgage upon the real estate cannot be brought into court in an action to foreclose the mortgage, and compelled to test the validity of her right to dower. (Nelson v. Brown, 144 N. Y. 384 [1895].)

—— **Title of infant defendant not cut off in foreclosure.]** The rule that the order of reference to compute amount due must direct the referee to take proof of the facts, it is mandatory, and where this has not been complied with, a purchaser at the sale need not take title, as it is not marketable, the rights of infants not having been cut off. (Smith v. Warringer, 41 Misc. Rep. 94.)

—— **Who are proper parties.]** Conditional vendees of personal property situated on mortgaged premises are not proper parties in foreclosure. (Condit v. Goodman, 44 Misc. Rep. 312. See, also, Borden v. Longacre Sq. B. Co., 92 App. Div. 325.)

—— **Action on bond for a deficiency on foreclosure in another State.]** Where an action is begun in this State on a bond for a deficiency on the foreclosure of a mortgage on land in another State, the right of recovery is regulated by the law of such other State. (Stumpf v. Hallahan, 101 App. Div. 383. See Prior Liens, *post*.)

PUBLIC POLICY — Mortgage given to indemnify bail.] The execution of a bond and mortgage to indemnify bail in a criminal case is not contrary to the public policy of the State of New York and such bond and mortgage are valid. (Moloney v. Nelson, 158 N. Y. 351 [1899].)

—— **Mortgage taken by a life insurance company on property not worth fifty per cent. more than the loan.]** The objection that a life insurance company has taken a bond and mortgage in violation of sections 13 and 16 of chapter 690 of the Laws of 1892, providing that the mortgages taken by such companies shall be on "improved, unincumbered real property in this State, worth 50 per cent. more than the amount loaned thereon," is not available

to the mortgagor in an action to foreclose the mortgage, but to the State alone. (Washington Life Insurance Company v. Clason, 16 App. Div. 434 [1897].)

—— **Purchase by the mortgagee of the equity of redemption.]** No relation exists between the mortgagor and the mortgagee which, in the absence of fraud or gross inadequacy in the price, prevents the mortgagee from purchasing the equity of redemption or title of the mortgagor. (Martin v. New Rochelle Water Company, 11 App. Div. 177 [1896].)

APPEARANCE — After judgment.] A defendant appearing in an action for foreclosure after the entry of judgment is entitled to notice of all the subsequent proceedings. (Martine v. Lowenstein, 6 Hun, 225 [1875].)

—— **When a party appearing is not entitled to notice of a hearing before the referee.]** Where, in an action brought for the foreclosure of a mortgage upon real property, a defendant who has appeared but has not answered receives notice of a motion for judgment, but does not appear at the time specified therein, and without further notice to him the court appoints a referee to compute the amount due upon the mortgage, who makes his report, and upon the filing of such report the court grants a judgment of foreclosure, such defendant is not entitled to have the judgment opened on the ground that he did not receive notice of the hearing before the referee. (Eyring v. Hercules Land Company, 9 App. Div. 306 [1896].)

—— **After appearance — notice of computation of amount due.]** Where the defendant appears, but fails to answer, and the plaintiff gives due notice of an application to the court for the relief demanded in the complaint, or judgment, the court may, instead of itself computing the amount due, refer it to the clerk, or to some other suitable person, to make such computation. Such reference is not such a new or independent proceeding as to require new notice to the defendant. Nor need it be executed in the county in which the action is triable. (Kelly v. Searing, 4 Abh. 345 [Sp. T. 1857].)

STATUTE OF LIMITATIONS — It does not run in favor of an absent mortgagor.] Under section 401 of the Code of Civil Procedure, the period during which a mortgagor of real property is absent from the State, is not a part of the time limited for the commencement of an action to foreclose the mortgage; the fact that such an action may be instituted by service of the summons by publication does not limit the effect of that section. (Simonson v. Nafis, 36 App. Div. 473 [1899].)

REFERENCE — Form of order of reference to examine, etc.] In a foreclosure action an order of reference is in due form where it directs the referee to examine the plaintiff as to the truth of the allegations of the complaint when the complaint averred that no payment had been made, and the plaintiff was examined and so testified before the referee. (Hatfield v. Malcolm, 71 Hun, 51 [1893].)

—— **Not granted where some of the defendants are not served.]** The action cannot be referred while any defendants, against whom the plaintiff seeks a judgment for a deficiency, have not been served with a summons, or have been served only with a notice that no personal claim is made against them,

and have not appeared. (Goodyear v. Brooks, 4 Rob. 682 [Gen. T. 1866]; S. C., 2 Abb. [N. S.] 296.)

—— **Nor upon a failure to appear on the trial, where an answer has been interposed.]** Where a defendant, who has failed to appear on the trial, has interposed an answer raising a material issue, the plaintiff cannot take a reference to compute the amount due. (Exchange Fire Ins. Co. v. Early, 4 Abb. N. C. 78 [Sp. T. 1878].)

—— **Practice where some defendants answer and some do not.]** In an action in which some of the defendants answered and some did not, the issues raised by the answers were referred and decided against the defendants, but the amount due was not computed. The plaintiff then applied, on notice, for the relief demanded in the complaint, and no opposition being made, took an order of reference to compute the amount due, and after obtaining the report on notice, brought the cause to a hearing, and took judgment of foreclosure and sale. Held, that his practice was regular. (Hill v. McReynolds, 30 Barb. 488 [Gen. T. 1859].)

—— **Including inquiry as to amount due and the trial of issues — when irregular.]** As against a nonanswering defendant in foreclosure, it is irregular to combine in one reference the inquiry as to the amount due, with the trial of issues between the plaintiff and other defendants, and to enter judgment upon the report without applying to the court for judgment against the nonanswering defendant. (Cram v. Bradford, 4 Abb. 193 [Gen. T. 1857].)

—— **To compute amount due — affidavits on motion for.]** On a motion for a reference to compute the amount due, the affidavit should show a failure to answer, as provided by the rule, and, also, whether the moneys secured by the mortgage have all become due and payable, and whether any of the defendants are absentees or infants. (Anonymous, 3 How. Prac. 158 [Sp. T. 1847].)

—— **How affected by the amount demanded in the complaint.]** The fact that a trustee for bondholders states in his complaint that the amount of bonds secured by a railroad mortgage is less than it is in fact, does not prevent the referee from reporting the correct amount. (Peck v. N. Y. & N. J. R. Co., 85 N. Y. 246 [1881].) In such a case the referee may properly pass upon the validity of bonds claimed to be secured by a mortgage. (Bockes v. Hathorn, 20 Hun, 503 [1880].)

—— **Duties of the referee — amount due.]** The referee may be required to compute the amount due upon any other mortgage set up in the answer, and also to ascertain whether there are any prior liens by mortgage upon such premises. (Chamberlain v. Dempsey, 36 N. Y. 144 [1867]; S. C., 1 Trans. App. 257, reversing S. C., 9 Bosw. 540, 15 Abb. 1.)

—— **Sale — additional compensation to the referee.]** A referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclosure a mortgage, exceed fifty dollars unless the propery sold for $10,000 or upwards, in which event the referee may receive such additional compensation as to the court may seem proper, or in any other cause $500. (§ 3297, Code of Civil Procedure.)

—— Such a referee is entitled, however, to be allowed his disbursements to whatever extent they were properly incurred. (Caryl v. Stafford, 69 Hun, 318 [1893].)

—— **Allowing set-off — accounting.]** Where a debt secured by a bond and mortgage has become due, and the only persons interested in the estate of the deceased mortgagor, excepting the creditors thereof, are the children of the mortgagor and their descendants, the plaintiff in an action brought to foreclose such mortgage, if in any way indebted to the testator at the time of his death, must allow the amount of such debt to be deducted from the amount due upon the bond and mortgage.

In such foreclosure action, where no accounting has been had between the parties, it is proper that an accounting between the mortgagee and his *cestui que trust* should be ordered. (Ingalsbee v. Murphy, 84 Hun, 181 [1895].)

—— **Extent of examination by.]** When a decree has been made upon pleadings and proofs, appointing a referee to compute the amount due, to examine the plaintiff as to payments, and to take proof of the allegations of the bill as against an absent defendant, and directing a sale of the premises on the confirmation of the report, the parties who have appeared and answered are concluded by such decree as to the issues in the pleadings, and the referee has no right to examine the plaintiff as to any facts, except those relating to payments on the mortgage, nor to examine the absent defendant in behalf of his codefendants, as to a defense of fraud set up in the answer. (McCrackan v. Valentine's Exrs., 9 N. Y. 42 [1853].)

—— **Proceedings on the reference.]** The referee is to perform his duty as though he were an examiner, and the plaintiff must adduce legal proof of every material fact alleged in the complaint; secondary evidence will not answer. (Wolcott v. Weaver, 3 How. Prac. 159 [Sp. T. 1847].)

—— **Affidavit cannot be received as proof.]** An affidavit made before a commissioner of deeds cannot be received as evidence of the amount due. (Security Fire Ins. Co. v. Martin, 16 Abb. Pr. 479 [Sp. T. 1863].)

—— **The proper practice as to proving the bond and mortgage on, discussed by counsel.]** (Knickerbocker Life Ins. Co. v. Hill, 16 Abb. Pr. [N. S.] 321 [Gen. T. 1875].)

—— **Recital of bond in mortgage.]** The recital of the bond in the mortgage is evidence of its execution. (Cooper v. Newland, 17 Abb. 342 [Gen. T. 1863].)

—— **The referee need not find the several items.]** It is not necessary for the court to find the several items constituting the amount due in a foreclosure suit. They are covered by the general finding. (Sidenberg v. Ely, 90 N. Y. 257 [1882].)

—— **Nomination of the referee.]** The nomination by one party of a referee in a mortgage case is not an irregularity. (White v. Coulter, 3 N. Y. Sup. Ct. [T. & C.] 608 [1874].)

—— **When there are absent defendants, form of order.]** When there are absent defendants, the order of reference should direct the referee to take proof of the facts and circumstances set forth in the complaint, and to report the proofs and examinations had before him. (Wolcott v. Weaver, 3 How. Prac. 159 [Sp. T. 1847].)

REPORT — Should show facts and an abstract of the documents.] The report of the referee should show the facts upon which his conclusions are based (Wolcott v. Weaver, 3 How. Prac. 159 [Sp. T. 1847]), and be accompanied with an abstract of the documentary evidence produced before him. (Security Fire Ins. Co. v. Martin, 15 Abb. 479 [Sp. T. 1863].)

—— Where the mortgagee has been compelled, in order to preserve his security, to pay rent.] (Robinson v. Ryan, 25 N. Y. 320 [1862]; Catlin v. Grissler, 57 id. 374 [1874].) **Or to pay taxes.]** The amount so paid may be added to the mortgage, but not the expense of insurance, unless by the express agreement of the mortgagor or the owner of the estate. (Faure v. Winans, Hopk. Ch. 283 [1824].)

—— Confirmation of the report.] The report must be confirmed by the court at Special Term. (Swarthout v. Curtis, 4 N. Y. 415 [1850]; S. C., 5 How. Prac. 198.)

—— Effect of the confirmation of the report.] The referee's report of the amount due, when confirmed, becomes the act of the court. (McGowan v. Newman, 4 Abb. N. C. 80 [Sp. T. Supr. Ct. 1878].)

—— Court confirming, how composed.] But the court rendering final judgment need not be composed of the same judges who rendered the preliminary judgment and ordered the reference. (Chamberlain v. Dempsey, 36 N. Y. 144 [1867], reversing S. C., 9 Bosw. 540, 15 Abb. 1.)

—— Report, impeachment of, as to terms of sale by affidavit.] To sustain a report of sale as against exceptions filed to it, it cannot be shown by affidavit that the terms of sale were different from those reported. (Koch v. Purcell, 13 J. & S. 162 [1879].)

—— What is a sufficient direction for the entry of a judgment.] The statement, at the conclusion of a referee's report on foreclosure, that the plaintiff "is entitled" to judgment as specified in the report, is a sufficient direction for the entry of judgment to entitle the plaintiff to judgment accordingly. (Albany County Savings Bank v. McCarty, 71 Hun, 228 [1893].)

ESTOPPEL — Assignor estopped from alleging payment of the mortgage.] A mortgagee who, upon assigning the mortgage, expressly covenanted that a certain sum, the payment of which he guaranteed, was due upon the mortgage, is estopped both by his express covenant and by the covenant implied from the assignment itself, from asserting that the mortgage debt had been repaid to him prior to the assignment, as a defense to an action brought by his assignee for the foreclosure of the mortgage, to which action he is a party defendant, and in which the assignee has obtained a judgment of foreclosure by default against all the defendants, with the exception of the mortgagee. (Gans v. McGowan, 41 App. Div. 461 [1899].)

TRIAL — Unless reference is ordered, the trial is to be in the same county as the property.] Unless a reference is made in an action of foreclosure it can only be tried at a Special Term in the county where the premises are situated. (Gould v. Bennett, 59 N. Y. 124 [1874].)

JUDGMENT — Variance between it and the referee's report — remedy.] Where, in an action to foreclose a mortgage, the referee's report states the amount due at the time of the commencement of the action and that due at

the date of his report, before which latter date and after the time of the commencement of the action a payment of principal fell due under the provisions of the mortgage, and the judgment sets forth the latter amount as due, the remedy of the defendant is by motion to correct the judgment and conform the same to the report, and not by an appeal therefrom. (Walbridge v. James, 4 Hun, 793 [1875].)

—— **Judgment of sale — not interlocutory.]** A judgment in an action to foreclose the equity of redemption in mortgaged premises, directing the sale of the premises for the satisfaction of the debt, and that the defendant pay any deficiency appearing after such sale, is final, and not interlocutory merely. It leaves nothing further to be adjudicated or reviewed by the court. (Morris v. Morange, 38 N. Y. 172 [1868]; Bolles v. Duff, 43 id. 469 [1871]; Waker v. Link, 134 id. 122 [1892].)

—— **Judgment of foreclosure is final only for the purposes of review.]** A judgment of foreclosure, while final for all purposes of review, is in other respects interlocutory, and parties to the action having liens upon the property may sell it upon execution, notwithstanding the judgment prior to the foreclosure sale. (Nutt v. Cuming, 155 N. Y. 309 1898].)

—— **Liability upon the bond.]** Liability of the mortgagor where he sells the land for a full consideration and conveys the same not subject to the mortgage and rights of the mortgagee who purchases at a sale under the foreclosure of the mortgage. (Wadsworth v. Lyon, 93 N. Y. 201 [1883].)

—— **Effect of a judgment of foreclosure.]** When a judgment is conclusive as against all of the defendants in the action. (Roarty v. McDermott, 146 N. Y. 296 [1895].)

—— **Effect of the foreclosure on the mortgage.]** A judgment of foreclosure of a mortgage does not so far merge the mortgage in the judgment as to blot out the record of the mortgage or relieve anyone looking at the judgment, and the deed given on the sale pursuant thereto, from the effect of that record as showing what the mortgage contains. (Bernstein v. Nealis, 144 N. Y. 347 [1895].)

—— **When interest of parties becomes barred.]** The interests of parties to the action becomes barred and foreclosed, not upon the entry of the judgment, but upon the sale and conveyance of the land. (Nutt v. Cuming, 155 N. Y. 309 [1898].)

—— **The judgment does not affect a party claiming under a paramount title.]** A judgment entered in an action for the foreclosure of a mortgage, does not affect the right or title of a party defendant, alleged in the complaint to have some interest in, or lien upon, the mortgaged premises which is subordinate to the lien of the mortgage, where it appears that such defendant entered into possession of the premises prior to the execution of the mortgage, pursuant to a contract to purchase the mortgaged premises, and that he has fulfilled the contract upon his part and has paid the purchase price in full, and has since remained in the open, visible possession and occupation of the premises. It is immaterial whether such defendant appears and answers in the foreclosure action or makes default. (Stillwell v. Hart, 40 App. Div. 112 [1899].)

—— **[Judgment in foreclosure does not prevent the defeat of the mortgage under the Statute of Limitations.]** A judgment of foreclosure and sale in a mortgage foreclosure suit brought under the Revised Statutes (2 R. S. 191, § 151) is not a merger of the debt; it is simply a means of enforcing the lien of the mortgage which remains until the debt is paid or discharged; the lien, therefore, is, notwithstanding the decree, subject to be defeated by the presumption of payment founded on lapse of time, the same as if no decree had been rendered. (Bernard v. Onderdonk, 98 N. Y. 158 [1885].)

—— **A judgment of foreclosure cannot settle priorities and equities of subsequent incumbrances.]** In an action to foreclose a second mortgage upon certain lots in the city of New York, the first mortgagee was made a party, priorities and equities of the subsequent incumbrances; that the whole proceeds of the sale. Other persons who held subsequent mortgages covering, in whole or in part, said lots, which took effect at different dates, were made parties to the action. The decree of sale provided for a sale of the lots in separate parcels in the inverse order of the giving of the mortgages. A surplus having arisen on the sale of all the lots, the court below directed a distribution, according to the priorities as liens of the various subsequent mortgages. Held, no error; that the decree did not and could not settle the priorities and equities of the subsequent incumbrances; that the whole proceeds of sale formed a common fund, to be applied first to the payment of the first and second mortgages, the surplus to the payment of the subsequent liens in the order of their priority, subject to the limitation that no greater amount should be paid in discharge of a lien on any lot than was realized for the lot at the sale; that, therefore, the surplus could not be regarded as constituting a specific fund, subject to the specific liens upon the last lot sold, but as a common fund distributable to all the lienors in the order of the date when their mortgages became liens. (Burchell v. Osborne, 119 N. Y. 486 [1890].)

—— **When such a judgment is res adjudicata against a mortgage.]** A notice of *lis pendens* was filed in an action commenced against the owner of certain real estate to obtain an adjudication that such premises were subject to certain restrictive easements; subsequently, and during the pendency of such action, the owner of such premises mortgaged the same. The plaintiff was finally successful in the action, and a judgment in his favor, and for costs, was docketed after the recording of such mortgage. Held, that what ever the judgment in such action determined *in rem* touching such property was *res adjudicata* against such mortgagee; but that such mortgage was a lien on such real estate prior to the judgment for costs recovered in such action. (Crocker v. Lewis, 79 Hun, 400 [1894].)

—— **Scope of judgment.]** The judgment in a foreclosure action is not determined by the facts as they existed at the commencement of the action, but by the facts as they exist at the close of the litigation. (Sherman v. Foster, 158 N. Y. 587 [1899].)

—— **Foreclosure of mortgage not due at the commencement of the action.]** A mortgage not due at the commencement of an action to foreclose another mortgage upon the same property may be included in the decree of foreclosure

provided it became due before judgment and was still unpaid and was covered by the complaint and the evidence. (*Ib.*)

—— **What questions may not be raised collaterally.**] The question as to the validity or regularity of a provision in a judgment of foreclosure, not raised by a party to the suit by answer, appeal or motion, may not be raised collaterally where the court rendering the judgment had general jurisdiction of the parties and the subject-matter of the action. (Matter of Estate of Stilwell, 139 N. Y. 337 [1893].)

—— **An order for a special clause to be inserted therein cannot be granted before judgment.**] A Special Term cannot, in advance of a decision and the entry of judgment in an action, by an order granted on a special motion, require the court to which the action is to be submitted for judgment, to enter particular provisions in that judgment. (East River Savings Institution v. Bucki, 77 Hun, 329 [1894].)

—— **Judgment where restrictive covenants were entered into subsequent to the execution of the mortgage.**] An owner of real property, who after giving a mortgage upon it enters into an agreement subjecting the property to certain restrictions, is entitled, upon stipulating to bid the amount of the mortgage debt with the costs and expenses of the foreclosure, to have inserted in the judgment foreclosing the mortgage a provision that the premises shall be sold subject to the restrictions, notwithstanding the objection of the holder of the record title, who had purchased subject to such restrictions. (Rhoades v. Card, 16 App. Div. 261 [1897].)

—— **When a judgment and default will be set aside.**] A judgment *in rem*, at least before it is finally executed, is not so conclusive upon the court as to prevent it from opening a default and vacating and setting aside the judgment for the hearing of a new party and the determination of a new claim. (Matter of City of Rochester, 136 N. Y. 83 [1892].)

—— **Motion for judgment under this rule — when proper.**] A motion for judgment cannot be made under this rule when the answer raises an issue against the plaintiff, although the issue so raised may not be a sufficient one, and although the answer may not deny any material fact in the complaint. The intention of the rule was to prevent defendants delaying a plaintiff by interposing controversies between themselves. (Stuyvesant v. Browning, 1 Jones & S. 203 [Gen. T. 1871].)

—— **What direction of judgment is not a decision.**] The following indorsement on the back of the complaint in an action for the foreclosure of a mortgage: "Judgment of foreclosure and sale with deficiency judgment. W. D. D., J. S. C.," does not constitute a decision within section 1022 of the Code of Civil Procedure, and affords no basis for the entry of a judgment. (Osborne v. Heyward, 40 App. Div. 78 [1899].)

—— **Sale of lands not described in the complaint.**] A purchaser at a foreclosure sale under a judgment does not acquire title to lands not described in the complaint, but included in the judgment by mistake of the plaintiff's attorney. (Clapp v. McCabe, 155 N. Y. 525 [1898].)

—— **Remedy.**] The defendant in the foreclosure action is not obliged to move to correct the judgment, but may resist or attack it in any form that he may elect. (*Ib.*)

—— **Right of redemption given in a decree.]** A provision in a decree directing a judicial sale, authorizing the subsequent grantee and mortgagee to redeem within the period provided by statute for the redemption of lands sold on execution is error. The right to redeem lands from sale exists only when given by statute, and while the lien created by the filing and entry of a collector's bond is a general one, with no greater effect as against prior unrecorded conveyances than a judgment, it is not a judgment lien, or enforcible by sale under execution, and the provision of the Code of Civil Procedure authorizing redemption from sales under execution (§ 1446) does not apply. (Crisfield v. Murdock, 127 N. Y. 315 [1891].)

—— **Relief available to defendant in an action to set aside a mortgage and to restrain foreclosure.]** The defendants in an action brought to set aside a mortgage as invalid and for an injunction restraining the foreclosure thereof may, under proper allegations in their answer, if successful in maintaining the validity of the mortgage and the right to enforce it, obtain all the relief that they could obtain in a new action instituted by them for the foreclosure of such mortgage. (Earle v. Robinson, 84 Hun, 577 [1895].)

—— **Death of the owner of the equity of redemption after interlocutory judgment.]** The death of the owner of the equity of redemption, against whom no judgment for deficiency is demanded, after the entry of an interlocutory judgment, does not cause the action to abate, and no motion to revive is necessary. (Wasson v. Hoff, 27 Misc. Rep. 55 [1899].)

JUDGMENT VACATED — Judgment and sale on foreclosure set aside to enable service to be made on an infant.] Irregularities in the substituted service of a summons upon an infant in an action of foreclosure. Right of the plaintiff to have the judgment and sale set aside in order to enable him to again serve the infant. A purchaser need not be made a party to the action. (Wood v. Kroll, 43 Hun, 328 [1887].)

—— **Circumstances under which a judgment of foreclosure and sale will not be set aside.]** The judgment in an action to forcelose a mortgage executed hy a telegraph company to secure its bonds, recited the amount due upon the bonds as it appeared by affidavit, ordered the referee appointed to sell to ascertain and report the amount due "on such bonds as may be ascertained and reported by such referee to be secured by said mortgage," with the names of the persons holding them and by what title, and to sell unless previous to the sale "the amount herein found as actually due and payable" shall be paid. The referee did not, prior to the sale, report the amount due; his report of sale was confirmed. On motion by a bondholder to set aside the sale upon the ground that the failure to make such report rendered the sale illegal,

Held, that the court below was competent to interpret its own judgment, and its confirmation of the sale showed its understanding to be that the reference as to amount of bonds was to be executed after sale; that, inasmuch as it appeared that the entire proceeds of the foreclosure would be exhausted in paying claims paramount to the bonds, the omission to execute the reference before sale, conceding it was required by the judgment, was at most a harmless irregularity, and that the court below had power, in its

discretion, to refuse to set aside the sale on that account. (F. L. & T. Co. v. B. & M. T. Co., 119 N. Y. 15 [1890].)

PREMISES OUT OF THE STATE — Mortgage foreclosure — manner of — election to have the whole amount become due.] Power of parties to a mortgage to provide for the manner in which the mortgaged premises shall be sold — as to property in this State, and as to property in other States. This court cannot direct the sale of property in another State. Construction of a provision giving to the mortgagee the right to elect that the principal should become due on default of the mortgagor. (Farmers' Loan & Trust Co. v. The Bankers & Merchants' Telegraph Company, 44 Hun, 400 [1887].)

—— Action for the strict foreclosure of a mortgage upon lands situated in another State — when the courts of this State have jurisdiction over it.] This action was brought to procure a strict foreclosure of a mortgage upon lands in Cook county, Illinois, given by the defendant, Juliet R. Lockwood, to secure the payment of a sum of money due to the plaintiff from the defendant, John L. Lockwood, her husband. The referee dismissed the complaint upon the ground that the court had no jurisdiction over the action because the land was situated in the State of Illinois. Held, error; that as the parties were within the jurisdiction of the court when its process was served upon them and had appeared and served answers contesting the right of the plaintiff to maintain the action, the court acquired jurisdiction to entertain the action and to grant the relief sought. (House v. Lockwood, 40 Hun, 532 [1886].)

—— Land in another State — to be sold and conveyance to be executed by the mortgagor.] In an action to foreclose a mortgage where part of the lands covered by the mortgage are in another State the court has power to decree a sale of the whole, and may require the mortgagor to execute a conveyance to the purchaser. (Union Trust Co. v. Olmsted, 102 N. Y. 729 [1886].)

—— Amendment of judgment, requiring the mortgagor to execute a conveyance.] Where a provision for a conveyance is omitted from the judgment, the court has power, after a sale, to amend the judgment by inserting therein such a provision. (*Ib.*)

—— Action on bond in this State.] Where an action is begun in this State on a bond for a deficiency arising on foreclosure of a mortgage on land in another State the law of the other State governs the right to recover. (Stumpf v. Hallahan, 101 App. Div. 383.)

PRIOR LIENS — Effect of a foreclosure on prior liens — right of subrogation.] Action to foreclose a mortgage. The validity of liens prior to the mortgage cannot be contested. Right of the mortgagee to be subrogated to the place of a prior mortgagee whose mortgage has been paid. Power of the court over the relief to be granted. Emigrant Industrial Savings Bank v. Clute, 33 Hun, 82 [Gen. T. 1884]. (See Burchell v. Osborne, 119 N. Y. 486 [1890].)

—— Effect of a foreclosure on a prior dower right.] Action for foreclosure — effect of a judgment therein upon a defendant claiming a dower right prior

to the lien of the mortgage — proper practice in such a case. (Lanier v. Smith, 37 Hun, 529 [1885].)

—— **Priority of judgments on land conveyed in fraud of creditors — dower.]** Judgment-creditors of a grantor of real estate, who has conveyed the same in fraud of his creditors, have, by virtue of their judgments, liens upon the premises so conveyed, which are entitled to priority in the order of time in which their respective judgments are docketed, and are not affected by the order in which suits to set aside such fraudulent transfer are instituted. Where a conveyance by a husband is set aside on the ground that it was fraudulent as to his creditors, the dower interest of his wife, which was cut off by her uniting in the fraudulent deed with him, is restored to her, and after the death of her husband she may recover her dower in the premises. (Wilkinson v. Paddock, 57 Hun, 191 [1890].)

—— **Purchase-money mortgage presumed to be a first lien.]** In the absence of any proof on the subject, the law will imply that a purchase-money mortgage is a first lien upon the premises; it is competent, however, for the parties to make a different agreement upon the subject, which agreement is binding on an assignee of the purchase-money mortgage. (Dodge v. Manning, 19 App. Div. 29 [1897].)

—— **Voluntary future advances only, postponed to subsequent lien.]** The rule that the lien of a mortgage to secure voluntary future advances will be postponed in favor of the holder of a subsequent mortgage, as to such advances as are made after knowledge on the part of the prior mortgagee of the existence of a subsequent mortgage, if it controls in this State, as to which *quære*, only applies where it appears, as matter of law, from the inspection of the instrument, that the advances are purely and plainly optional, so that the prior mortgagee may decline to make the advances at his pleasure without risk of damage or loss; it does not apply where an obligation to advance exists, and the right to decline depends upon facts *de hors* the instrument. (Hyman v. Hauff, 138 N. Y. 48 [1893].)

—— **Parties — prior lienors.]** The only proper parties to a bill of foreclosure, so far as mere legal rights are concerned, are the mortgagor and mortgagee, and those who have acquired rights under them subsequent to the mortgage. (Emigrant Industrial Savings Bank v. Goldman, 75 N. Y. 127, 131 [1878].)

SUBROGATION — When proper.] Where a party holds a second mortgage and his equity of redemption has been cut off by the foreclosure of the first, he may sometimes have the right of subrogation, or even be entitled to an assignment, but it will depend on circumstances showing its equity, and he will not be entitled to a stay of the sale by injunction, without clearly showing that the payment of the first, or its foreclosure or sale will work him injustice. (Bloomingdale v. Barnard, 7 Hun, 460 [1876]. See, however, Dings v. Parshall, 7 Hun, 522 [1876]; Twombly v. Cassidy, 82 N. Y. 155 [1880].)

—— **Who is a stranger and volunteer.]** He is one who in no event can become liable for the debt. (Blydenburgh v. Seabury, 104 App. Div. 141.)

—— **Purchaser of mortgaged premises is not entitled to subrogation to the extent of moneys paid on the mortgages.]** A person who takes title to prem-

ises subject to two mortgages, but does not assume payment of such mortgages, is not entitled upon the foreclosure of the second mortgage to be repaid out of the proceeds of sale a sum paid by him on the first mortgage and to share proportionately with the second mortgagee for an amount paid by him upon the second mortgage. (Schreyer v. Saunders, 39 App. Div. 8 [1899].)

—— **Advancing money to discharge lien.**] Where, at the request of one who is interested in mortgaged premises, a party advances money to pay the mortgage with the understanding that the premises are to be chargeable with its repayment, the party so advancing the money is entitled to be subrogated and enforce the mortgage so paid. (Gans v. Thieme, 93 N. Y. 225 [1883].)

—— **Effect of quit claim deed given by holder of mortgage.**] A quit claim deed executed and delivered by one owning a mortgage is an effectual bar to a subsequent action by such grantor to foreclose the mortgage. (McKell v. Tracy, 100 App. Div. 80.)

JUNIOR MORTGAGEE — Redemption — a tender by, does not discharge the lien of a prior incumbrancer.] (Frost v. Yonkers Savings Bank, 16 Alb. Law J. 333 [Ct. of Appeals, 1877]; S. C., 8 Hun, 26 [1876].)

—— **Redemption by a junior mortgagee not made a party.**] A purchaser at a foreclosure sale occupies, as a junior mortgagee who was not made a party to the action — although his mortgage was on record, the position of a mortgagee in possession, from whom the junior mortgagee is entitled to redeem.

—— The purchaser should not, however, be compelled to submit to a sale, but should be permitted to retain possession on paying the junior mortgagee the amount due him. (Naylor v. Colville, 20 App. Div. 581 [1897].)

—— **Right of dowress to redeem.**] The wife of a mortgagor having an inchoate right of dower in real estate formerly owned by her husband, of which a mortgagee is in possession, has the right, even during the life of her husband, to redeem such premises by paying the mortgage debt. (Campbell v. Ellwanger, 81 Hun, 259 [1894].)

—— **Junior incumbrancer not made a party to the action.**] The rule that a foreclosure is of no avail as against a junior incumbrancer who is not made a party, applied. (Reynolds v. Park, 53 N. Y. 36 [1873].)

—— **Leasehold interest — foreclosure of mortgage on.**] Foreclosure of a mortgage on a leasehold estate — effect of a sale upon a subsequent lease when the lessor is not made a party. (Pardee v. Stewart, 37 Hun, 259 [1885].)

—— **Right of a junior mortgagee to take an assignment.** As a rule an order made in an action brought to foreclose a mortgage granting the motion of a subsequent mortgagee for leave to pay off the mortgage in the suit and compel the assignment thereof to him, is just and proper. (De Forest v. Peck, 84 Hun, 299 [1895].)

RENTS AND PROFITS — Power to appoint a receiver of rents and profits.] The power to appoint a receiver of the rents and profits of mortgaged premises accruing pending a foreclosure was inherent in a Court of Chancery before the adoption of the Code of Procedure; it was continued by that Code and is not abrogated by section 713 of the Code of Civil Procedure, defining cases in which receivers may be appointed. (Hollenbeck v. Donnell, 94 N. Y. 342 [1884].)

—— **Receiver of rents and profits — when proper.]** When a receiver of rents and profits will be appointed in an action to foreclose a contract for the sale of land. (Smith v. Kelley, 31 Hun, 387 [1884].)

—— **When a receiver of the rents and profits will be appointed.]** In the absence of a clause in a mortgage pledging the rents and profits as security for the mortgage debt, the mortgagee can obtain the appointment of a receiver of such rents and profits only upon showing, with reasonable certainty, that the mortgage property is an inadequate security for the payment of the mortgage debt. (Ross v. Vernam, 6 App. Div. 246 [1896].)

—— **Relative rights of senior and junior mortgagees.]** Where the question as to the appointment of the receiver of the rents and profits arises between senior and junior mortgagees, the moving party must show a superior equity. (*Ib.*)

—— **Receiver appointed although principal sum is not due.]** A receiver of the rents and profits of mortgaged premises may, in a proper case, be appointed during the pendency of an action to foreclose the mortgage, although the principal sum was not due at the time the action was commenced, and only the interest can be collected therein. (Veerhoff v. Miller, 30 App. Div. 355 [1898].)

—— **Receiver appointed without notice where the summons was served by publication.]** Where the summons in a foreclosure action was served upon the owner of the equity of redemption by publication, the court has jurisdiction under section 714 of the Code of Civil Procedure to grant, without notice to such owner, an order appointing a receiver of the rents, issues and profits of the premises. (Fletcher v. Krupp, 35 App. Div. 586 [1898].)

—— **Proof authorizing the appointment.]** What proof considered in connection with a receiver's clause in the mortgage is sufficient to authorize the appointment of the receiver. (*Ib.*)

—— **A receiver's clause gives no absolute right to have a receiver appointed.]** The existence in a mortgage of a receiver's clause does not give the mortgagee, in an action brought by him for the foreclosure of the mortgage, an absolute right to the appointment of a receiver of the rents and profits of the mortgaged premises, but such clause is to be considered in connection with the other features of the case in determining the property of appointing a receiver. (Eidlitz v. Lancaster, 40 App. Div. 446 [1899].)

—— **Receiver in mortgage foreclosure — what rents are recoverable by him.]** After an action of foreclosure has been commenced the plaintiff may, if the security is in jeopardy, intercept, through the aid of a receiver, the rents or emblements, or both; but the receiver is not entitled to recover for rents collected or emblements removed prior to the date of his appointment. (Hamilton v. Austin, 36 Hun, 138 [1885].)

—— **Payment of rents, on a subsequent mortgage.]** Foreclosure — receiver of the rents and profits of the premises — disposal of the fund in payment of a subsequent mortgage, sufficient having been realized upon a sale of the premises to pay the mortgage for the enforcement of which the action was brought. (Keogh v. McManus, 34 Hun, 521 [1885].)

—— **Second receiver in foreclosure.]** In a proper case a receiver should be appointed upon the foreclosure of a paramount mortgage given by a corpora-

tion, although a receiver has previously been appointed of the property of such corporation in an action instituted for the foreclosure of a junior mortgage. (Holland Trust Co. v. Consolidated Gas & Electric Light Co., 85 Hun, 454 [1895].)

—— **Right of junior incumbrancer when a receiver is appointed on his application.]** (Ranney v. Peyser, 83 N. Y. 1 [1880.].)

—— **Mortgage upon — when retrospective discussed.]** (15 Alb. Law J. 294.)

—— **Receiver of — liability of the tenant to him.]** (Nealis v. Bussing, 10 N. Y. Wkly. Dig. 289 [N. Y. Com. Pl. Gen. T. 1880].)

—— **After-acquired property.]** When covered by a mortgage. (Platt v. N. Y. & Sea B. R. R., 9 App. Div. 87 [1896]; Rochester D. Co. v. Rasey, 142 N. Y. 570 [1894]; Beebe v. Richmond L. H. & P. Co., 13 Misc. Rep. 737 [1895]; Davidson v. Westchester Gas Co., 99 N. Y. 558, 569 [1885].)

CONDEMNATION PROCEEDINGS — Effect of, on a mortgage.] A mortgagee of premises in the city of New York, the title to which has been acquired by the city in condemnation proceedings before any default has taken place in the conditions of the mortgage, loses his lien upon the specific property and acquires in place thereof the right, as a person interested in the property, to have the value of his interest in the property ascertained and paid to him by the municipality.

Semble, that the right of action on the bond to which the mortgage is collateral is not affected by the condemnation proceedings. (Hill v. Wine, 35 App. Div. 520 [1898].)

SURROGATE — When surplus moneys are to be paid over to him.] (See Code of Civil Procedure, § 2798.)

—— **Surrogate's jurisdiction over surplus money is constitutional.]** The provisions of sections 2798 and 2799 of the Code of Civil Procedure, requiring surplus moneys arising on the sale in partition or foreclosure of lands belonging to the estate of a deceased person to be deposited in the Surrogate's Court from which letters testamentary or of administration on the estate had been issued, are constitutional. (Matter of Stilwell, 139 N. Y. 337 [1893].)

—— **When surplus should not be paid into the Surrogate's Court.]** Where real property of a decedent, which is subject to a valid imperative power of sale for the payment of her debts and funeral expenses, is sold upon a foreclosure, in the Supreme Court, of a mortgage upon the premises, any surplus moneys should be retained in the Supreme Court, instead of being paid into the Surrogate's Court, under section 2798 of the Code of Civil Procedure, as the Surrogate's Court cannot distribute the moneys, since, under such circumstances, proceedings could not be maintained under title 5 of chapter 18 of the Code of Civil Procedure to sell the real estate of the decedent to pay her debts. (Matter of Coutant, 24 Misc. Rep. 350 [1898].)

TITLE — When acquired.] Purchaser does not acquire title till the delivery of the deed. (Mitchell v. Bartlett, 51 N. Y. 447 [1873]; Ainslie v. Hicks, 13 App. Div. 388 [1897]; Harrigan v. Golden, 41 id. 423 [1899].) On foreclosure by advertisement, on the filing of the affidavits, etc. (Mowry v. Sanborn, 7 Hun, 380 [1876].)

—— **Defense of failure of title.]** One who purchases premises and assumes payment of a mortgage thereon, so long as he remains in peaceable possession

of the premises, cannot defend against the mortgage by setting up a defect of title. (Parkinson v. Sherman, 74 N. Y. 88 [1878].)

—— To what equitable relief he is entitled. (*Ib.*)

FOREIGN CORPORATION — Mortgage negotiated by.] The statutes of the State of New York regulating the mortgaging of corporate property do not apply to foreign corporations. (Ernst v. Rutherford & B. S. Gas Co., 38 App. Div. 388 [1899].)

TAXES — When foreclosure will not be decreed for non-payment thereof.] A court of equity will not entertain an action to foreclose a mortgage because of a technical default in the payment of taxes where it appears that the taxes were promptly paid by the mortgagor when her attention had been called to the default and before the action was commenced, and that the mortgagee was not injured by the default. (Ver Planck v. Godfrey, 42 App. Div. 16 [1899].)

DEED — Form of.] An order requiring the referee to convey by "a valid and sufficient deed," requires a deed sufficient in form and terms to make the title obtained by it as valid to the purchaser as it is in the power of the referee officially to make it. (Easton v. Piskersgill, 55 N. Y. 310 [1873].)

DEFICIENCY — Assumption clause in deed does not of itself create a liability for any deficiency.] The mere presence in a deed of a clause stating that the grantee assumes and agrees to pay an outstanding mortgage on the premises, does not establish a personal promise or obligation on the part of the grantee to pay the debt of a third party, in the absence of proof that the grantee actually accepted the deed with knowledge of the assumption clause, or at least under such circumstances that he was bound to know its purport and legal effect. (Blass v. Terry, 156 N. Y. 122 [1898].)

—— **Judgment for, must be decreed in the judgment for sale.]** When a judgment in foreclosure does not decree that a party shall be liable for any deficiency on the sale, an order granting such a judgment for deficiency upon the referee's report of sale is irregular, and will be set aside. (Day v. Johnson, 5 N. Y. Wkly. Dig. 237 [Sup. Ct. 1877].)

—— **Cannot be entered until after a sale.]** Where a judgment of foreclosure, and for any deficiency arising on a sale, has been entered, a judgment for deficiency cannot be entered without a sale, although the land has already been sold under a prior mortgage. (Siewert v. Hamel, 33 Hun, 44 [1884].)

—— **Resale — when it does not relieve one liable for a deficiency.]** When the fact that, owing to the failure of the first purchaser to complete his purchase, a resale is ordered, does not relieve one liable for any deficiency. (Goodwin v. Simonson, 74 N. Y. 133 [1878]. See, however, RESALE, under Rule 62.)

RULE 61.

Judgment for Sale — Form of — Surplus Money — Disposition of — Referee — Selection of.

In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far, at least, as the same can be ascertained from the mortgage,

shall be inserted. And, unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, as provided by sections 1626 and 1676 of the Code, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale, unless otherwise directed, he pay the expenses of the sale, as provided in section 1676 aforesaid, and that he pay to the plaintiff, or his attorney, the amount of his debt, interest and costs, or so much as the purchase money will pay of the same, and that he take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale, and that the purchaser at such sale be let into possession of the premises on production of the deed.

All surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale within five days after the same shall be received and be ascertainable, in the city of New York to the chamberlain of the said city and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court, and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of a sale shall be filed or confirmed, unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited or disposed of in pursuance of the judgment. The referee to be appointed in foreclosure cases to compute the amount due, or to sell mortgaged premises, shall be selected by the court, and the court shall not appoint as such referee a person nominated by the party to the action or his counsel.

Rule 72 of 1858. Rule 73 of 1871. Rule 73 of 1874, amended. Rule 64 of 1877, amended. Rule 61 of 1880. Rule 61 of 1884. Rule 61 of 1888. Rule 61 of 1896.

See notes under Rule 60.

CODE OF CIVIL PROCEDURE.

§§ 743–754: Care and disposition of money paid into court.
§ 1633. Disposition of surplus arising in a foreclosure action.

—— **Surplus moneys on foreclosure.]** Where surplus moneys, arising in an action to foreclose a mortgage, after the death of the mortgagor, are deposited with the county treasurer, all parties to the foreclosure action are entitled to notice of an application for an order transferring the surplus moneys to the Surrogate's Court. (Washington Life Ins. Co. v. Clark, 79 App. Div. 160; Matter of Stilliwell, 139 N. Y. 337.)

RULE 62.

Sale of Lands in the Counties of New York and Kings, and the City of Buffalo, under Judgment or Order.

Where lands in the county of New York or the county of Kings are sold under a decree, order or judgment of any court, they shall be sold at public auction, between eleven o'clock in the forenoon and three o'clock in the afternoon, unless otherwise specifically directed.

Notice of such sale must be given, and the sale must be had, as prescribed in section 1678 of the Code.

Such sales in the county of New York, unless otherwise specifically directed, shall take place at the Exchange Sales Rooms, now located at No. 111 Broadway in the city of New York.

The Appellate Division of the Supreme Court in the first department is authorized to change the place at which said sales shall be made, may make rules and regulations in relation thereto and may designate the auctioneers or persons who shall make the same.

Such sales in the city of Buffalo shall, on and after May 1, 1896, take place at the Real Estate Exchange Rooms, between the hours of nine and eleven in the forenoon, and two and three o'clock in the afternoon, unless the court ordering the sales shall otherwise direct. Such sales shall, however, be made subject to such regulations as the justices of the Supreme Court of the eighth district shall establish.

Rule 73 of 1858, amended. Rule 74 of 1871. Rule 74 of 1874, amended. Rule 65 of 1877, amended. Rule 62 of 1880. Rule 62 of 1884. Rule 62 of 1888, amended. Rule 62 of 1896, amended.

CODE OF CIVIL PROCEDURE.

§ 1242. Sales made— where — by whom — effect of conveyance.
§ 1243. Security — may be required upon a sale by a referee.
§ 1244. The conveyance to state in the granting clause whose right, etc., in the premises is sold.
§ 1384. Sale under execution — how conducted.
§ 1385. Penalty for injuring the notice of sale.
§ 1386. The validity of the sale is not affected by the sheriff's default.
§ 1387. Purchases at such sales, by certain officers, prohibited.
§ 1388. When an execution is to be enforced by the under sheriff.
§§ 1430–1478. Sale, redemption and conveyance of real property — rights and liabilities of persons interested.
§§ 1479–1485. Remedies for failure of title to real property sold, and to enforce contribution.
§ 1546. Sale in partition — when interlocutory judgment must direct it.
§ 1560. When a sale may be directed, after interlocutory judgment, on commissioners' report.
§ 1575. Security taken back on a sale in partition to be in the name of the county treasurer.
§ 1585. All securities in proceedings for partition to be taken in the name of the county treasurer.
§ 1622. Sale in action for dower.
§ 1626. Sale in action for foreclosure.
§ 1657. Sale in action for waste between cotenants.
§ 1676. On sale of real property in actions for foreclosure, dower and partition, officer selling to pay taxes, etc.
§ 1678. Sale, how conducted.
§ 1679. Purchases by certain officers prohibited.
§ 1823. Real property of decedent cannot be sold under execution against executor — exception.
§ 1845. Effect on creditor's proceedings of application in Surrogate's Court to sell real property.
§ 1874. Sale of interest in contract for purchase of land, in action by judgment-creditor.
§ 1947. Sale of partnership property.
§ 2232. When a person holding over after sale is removable by summary proceedings.
§§ 2348–2364. Sale of real property of infant, lunatic, etc.
§§ 2388–2395. Sale on foreclosure by advertisement.
§ 2404. Surplus money on sale by advertisement to be paid into Supreme Court.
§§ 2405–2408. Application for distribution of surplus.
§§ 2761–2786. Sale in proceedings to dispose of real property of decedent, for payment of debts.

§ 3297. Fees of referee to sell real property.
§ 3307. Fees of sheriff on the sale of real property.

PUBLICATION — Time of.] A statute providing that before completing and signing the report, the commissioners must publish, once in each week for two weeks successively, a notice of a time and place when and where the parties interested can be heard, held, to mean that there shall be two publications, one in one week and the other in the next week, and not that two weeks must elapse between the first publication and the day designated for the hearing. (Merritt v. Portchester, 8 Hun, 40 [1876].)

—— A notice of sale, under a judgment of foreclosure and sale, for the twenty-eighth of December, duly published on the ninth, twelfth, sixteenth, nineteenth, twenty-third and twenty-sixth of that month, is a publication "for three weeks immediately previous to the time of sale, at least twice in each week," within the meaning of this rule. (Chamberlain v. Dempsey, 13 Abb. 421 [Sp. T. 1862]; S. C., 22 How. Prac. 356.)

—— When sufficient.] A notice of sale of real property in the city of New York, under a decree of foreclosure, to take place May 20, 1881, was published in two newspapers on April twenty-seventh (Wednesday), and thirtieth (Saturday), May fourth (Wednesday), seventh (Saturday), eleventh (Wednesday), fourteenth (Saturday), and in one of them on May twentieth. It was objected that there was but one publication during the week "immediately preceding the sale." Held, that the notice was sufficient. (Valentine v. McCue, 26 Hun, 456 [1882].)

—— Week defined.] A week is a definite period of time, commencing on Sunday and ending on Saturday. (Steinle v. Bell, 12 Abb. Pr. [N. S.] 171.)

—— Notice of sale of real estate — need not be published in all the editions of the paper issued on the days of publication.] (Eversen v. Johnson, 22 Hun, 115 [1880].)

—— Notice of sale.] As to what notice of sale must be given under a decree of foreclosure. (Gallup v. Miller, 25 Hun, 298 [1881].)

—— The title of the cause should be briefly stated in the notice.] (Ray v. Oliver, 6 Paige, 480 [1837].)

—— Amendment of judgment — pending notice of sale.] The court has power to amend the judgment of foreclosure while the notice of sale is being published, and the sale will not be thereby rendered invalid. (Valentine v. McCue, 26 Hun, 456 [1882].)

—— What publication is a newspaper.] A publication issuing two editions daily, except Sunday, having a circulation in a city of 1,000, and elsewhere of more than 4,000, which, although containing matter of special value to attorneys, bankers, commission merchants and real estate dealers, yet devotes several columns to general advertising and to the publication of local and other news of general interest, and is printed in sheet form, as newspapers usually are, must be deemed a "newspaper" within the meaning of section 1434 of the Code of Cvil Procedure, prescribing the method for publishing notice of sales of land by a sheriff, notwithstanding the fact that the publication is not sold by newsboys nor at newsstands, but only by subscription and

upon application at the office of the publisher. (Williams v. Colwell, 14 App. Div. 26 [1897].)

SALE — Relative rights of purchasers.] Relative rights of purchasers at sales under executions. (Terrett v. Brooklyn Improvement Co., 87 N. Y. 92 [1881].)

—— What title is acquired by the purchaser.] A purchaser in good faith, on an execution sale, acquires no better title than the judgment-creditor would have obtained had he purchased. (Clute v. Emmerich, 99 N. Y. 342 [1885].)

—— Code of Civil Procedure, § 1440, not applicable, when.] Section 1440 of the Code of Civil Procedure providing for the repayment of the amount paid upon a sale under execution where the title is adjudged void in an action brought by the judgment-debtor, has no application to a case in which relief is sought against the fraudulent act of the grantee. (McIntyre v. Sanford, 89 N. Y. 634 [1882].)

—— Duty to collect purchase price at time of sale.] It is the duty of the sheriff in making a sale, to demand payment for property sold; if he is not paid, it is his duty to avoid the sale and resell or postpone the sale and give notice thereof. If he closes the sale and gives credit, or takes anything but money, he is personally liable for the purchase price. (Robinson v. Brennan, 90 N. Y. 208 [1882].)

—— Incumbrances — leasehold property.] On sale of leasehold property, taxes and arrears of rent should not be directed to be paid off as incumbrances. (Stuyvesant v. Browning, 33 N. Y. Supr. Ct. [1 J. & S.] 203 [Gen. T. 1871]; *contra*, see Catlin v. Grissler, 57 N. Y. 374 [1874].)

—— This rule applies to plaintiffs, mortgagees in possession. (Ten Eyck v. Craig, 2 Hun, 452 [1874].)

—— Error in notice of sale.] An erroneous statement in the notice of sale of matters not required by the statute to be stated, and which is calculated to mislead and to prevent bidding, will, it seems, render the sale void, but not if inserted by mistake and a correction be published with the notice before it can be presumed to influence persons desiring to bid. (Hubbell v. Sibley, 5 Lans. 51 [1871].)

— Who may object to the manner of conducting a sale.] A party not interested cannot object to the manner of conducting a judicial sale. (Shuler v. Maxwell, 38 Hun, 240 [1885].)

—— Judicial sale — when set aside.] A motion should not be granted to set aside a judgment sale simply for the reason that a higher price might be obtained upon a resale, unless it is apparent that there has been fraud or surprise upon the sale. (McEwan v. Butts, 48 St. Rep. 312 [Sup. Ct. 1892].)

—— Opening sale discretionary — not appealable.] An order opening a sale in a foreclosure and allowing a resale on the ground of inadequacy of price, etc., is a matter of favor resting in discretion, and is, therefore, not reviewable by the Court of Appeals. (Buffalo Savings Bank v. Newton, 23 N. Y. 160 [1861].)

—— Order setting aside sale and directing reference to ascertain equities of parties.] An order made in a foreclosure suit, after judgment and sale, setting aside the sale and ordering a reference to ascertain the equities of the

parties is not appealable to the Court of Appeals. (Dows v. Congdon, 28 N. Y. 122 [1863]; Hale v. Clauson, 60 id. 339 [1875].)

—— **When property should be sold as a whole.]** Upon the sale of mortgaged property, which consists of more than one lot, and upon which is a building which requires the use of all the land, the property should be sold as a whole. (Coudert v. De Logerot, 30 N. Y. Supp. 114 [Sup. Ct. 1894].)

—— **Position of an auctioneer at a judicial sale.]** An auctioneer at a judicial sale should not be interested in the sale as a party to the suit, unknown to the bidders, and the purchaser at such sale may on that ground avoid the sale without showing actual fraud or bad faith on the part of the auctioneer, although his interest be only that of a tenant by the curtesy. (Smith v. Harrigan, 27 Abb. N. C. 322 [Sup. Ct. 1891].)

—— **Disposition of the percentage paid on a sale where the purchaser defaults after assigning his bid.]** At a foreclosure sale where the highest bidder having paid the referee the ten per cent deposit, assigns his bid to another upon an agreement that such party will procure the balance of the purchase price, which he fails to do, and the property is resold for enough to satisfy the claim in full, and the first purchaser and the party to whom he assigned his bid severally assign their interests in the deposit to different persons, the assignee of the former is entitled to the deposit. (Flint v. George, 28 St. Rep. 629 [Sup. Ct. 1889].)

—— **Where remedy is by motion.]** Where a judgment erroneously provides that a sale shall be made by a receiver, the remedy is by motion to correct the judgment and not by appeal. (Cole v. Tyler, 65 N. Y. 73 [1875].)

—— **Terms of — purchaser bound by.]** (Hart v. Waudle, 50 N. Y. 381 [1871].)

INVERSE ORDER OF ALIENATION — Right to a sale in.] The right exists, where persons have liens upon separate lots covered by a mortgage, to require that the lots be sold in the inverse order of alienation. (Thomas v. Moravia Machine Company, 43 Hun, 487 [1877]; Van Slyke v. Van Loan, 26 id. 344 [1882].)

—— **Limitation of the rule.]** The equitable doctrine that, when premises subject to a mortgage are conveyed in parts at different times, the parcels are to be primarily charged with the payment of the mortgage debt in the inverse order of alienation, is subject to qualification when the equities of a subsequent grantee require it.

Where land is purchased subject to a mortgage covering it and other land, and an amount of the consideration agreed to be paid therefor, equal to the mortgage, is deducted from the purchase price because of the existence of the mortgage, the portion of the mortgaged premises so sold becomes primarily charged with the obligation of the mortgage. (Wood v. Harper, 9 App. Div. 229 [1896].)

—— **Primary liability of land conveyed subject to the mortgage.]** Where a portion of mortgaged premises is conveyed subject to the mortgage, the grantee covenanting to pay the mortgage, a subsequent grantee, not covenanting to pay the mortgage, whose deed refers to the conveyance assuming it, thereby has notice that, by an agreement between the parties in interest, the

land so conveyed is primarily liable for the payment of the mortgage, and he is not in a position to assert the rule that mortgaged premises should be sold in the inverse order of alienation. (Eyring v. Hercules Land Co., 9 App. Div. 306 [1896].)

—— **Successive mortgages.]** Parcels of land, held by successive alienees subject to a lien on the whole, when resorted to for the satisfaction of such general lien, must be sold in the inverse order of alienation, and the principle is equally applicable to the case of successive mortgages, as to that of successive conveyances of the fee, of parcels of the mortgaged premises. (Denton v. Ontario County Nat. Bank, 77 Hun, 83 [1894].)

—— **Of land out of the State.]** The rule that under a mortgage foreclosure sale the land must be sold in the inverse order of alienation holds good although part of the land is in another State. (Welling v. Ryerson, 94 N. Y. 98 [1883].)

—— **Rule one of equity only.]** The rule that mortgaged premises are to be sold in the inverse order of alienation is one of equity and yields to circumstances. (Bernhardt v. Lymburner, 85 N. Y. 172 [1881].)

—— **Where surety and principal own separate, undivided shares.]** Where the mortgagors severally own separate, undivided shares, and one is principal and the other is surety, the share of the principal should be sold first. (Erie County Savings Bank v. Roop, 80 N. Y. 591 [1880].)

—— **Sale valid although the pieces are sold in an improper order.]** A failure to sell the piece of land primarily liable for the debt does not render the sale void, and the purchaser at the sale acquires a valid title to the property purchased. (Jenks v. Quinn, 61 Hun, 427 [1891].)

NOTICE OF DEFECT — Purchaser — when chargeable with notice of existing conditions.] Where a mortgage is of a leasehold interest, and in the notice of sale under judgment of foreclosure the lease is referred to, a purchaser is chargeable with knowledge of the contents of the lease, and is supposed to have made his bid in view of its provisions. (Riggs v. Pursell, 66 N. Y. 193 [1876]; Kingsland v. Fuller, 157 id. 507 [1899].)

—— **Assignment — when notice thereof to the mortgagor is unnecessary.]** No notice to the mortgagor of an assignment of a bond and mortgage is necessary to protect the assignee thereof against a counterclaim in favor of the mortgagor against the mortgagee, arising subsequent to the assignment. (Central Trust Co. v. Weeks 15 App. Div. 598 [1897].)

—— **Misdescription of an agreement in notice of sale.]** A purchaser at a sale in foreclosure is entitled to rely upon a description of an agreement affecting the property referred to on the sale and in the notice of sale and is not obliged to examine the instrument thus misdescribed. (Kingsland v. Fuller, 31 App. Div. 313 [1898].)

—— **Irregularities appearing on the face of the proceedings.]** A purchaser at a sale in partition is chargeable with notice of an irregularity in the interlocutory judgment consisting in its failure to provide for the payment of an existing lien on the undivided share of one of the parties, where such irregularity appears upon the face of the proceedings. (Kelly v. Werner, 34 App. Div. 68 [1898].)

—— **Outstanding interests not referred to in judgment, but subject to which the sale is made, afford no ground for refusing to complete the purchase.]** Where a mortgage which does not cover certain interests in the mortgaged premises is foreclosed and a judgment is entered in the usual form without referring to such outstanding interests, but notice thereof is given on the sale which is made subject thereto, held, that the purchaser should be compelled to complete his purchase. (Cromwell v. Hull, 97 N. Y. 209 [1884].)

—— **Mortgagee purchasing with notice of an unrecorded deed.]** A mortgagee purchasing at a foreclosure sale and conveying the land to a *bona fide* purchaser with knowledge that the holder of an unrecorded deed was not a party to the foreclosure action, will be compelled to account to the latter. The effect of filing a *lis pendens* is avoided by proof of notice of the unrecorded deed. What evidence is required to charge a client with notice of facts known to his attorney. (Slattery v. Schwannecke, 44 Hun, 75 [1887].)

RESALE — Must readvertise for.] When the time for selling, pursuant to notice, has passed, and no valid sale has been made, or, if valid, the party elects to disregard it, the officer cannot sell again without an order of the court, unless he again advertises the sale, in which case no order is necessary. (Bicknell v. Byrnes, 23 How. Pr. 486 [Sp. T. 1862].)

—— In mortgage foreclosure, private resale of property not authorized. (Ely v. Matthews, 128 App. Div. 513.)

—— **Resale discretionary — conditions of.]** It is in the discretion of the court whether or not to set aside a sale, and whether or not, as a condition of the setting aside of the sale, the payment of the referee's and the auctioneer's fees will be required, where a defendant in a foreclosure action has procured a stay in order to fix the amount of an undertaking on appeal and a further stay on condition of paying the costs of advertising, providing for payment thereof on twenty-four hours' notice, and on notice has failed to make payment and thereafter procured an extension of time to complete his undertaking, which does not provide for a further stay, and before the justification was completed a sale has been made. (Stephens v. Humphreys, 46 St. Rep. 646 [Sup. St. 1892].)

—— **Not reviewable in the Court of Appeals.]** An order granting or refusing a resale of land is discretionary, and not reviewable in the Court of Appeals. (C. L. Ins. Co. v. Bowman, 90 N. Y. 654 [1882]; Peck v. N. Y. & N. J. R. Co., 85 id. 246 [1881]; Fisher v. Hersey, 8 N. Y. Wkly. Dig. 513 [Court of Appeals, October, 1879]; White v. Coulter, 3 N. Y. Sup. Ct. [T. & C.] R. 608 [1874].) But is reviewable at the General Term. (Rogers v. Ives, 23 Hun, 424 [1881].)

—— **When ordered.]** A resale of premises under a decree of foreclosure will be directed upon equitable terms when the first sale is made in such manner as to prevent fair competition, or where for any cause it would be inequitable to permit the sale to stand. (2 N. Y. Wkly. Dig. 547 [Sup. Ct. 1876].)

—— **Terms of such resale.]** When a purchaser fails to complete his purchase alleging objections to the title, the resale should be made upon the same terms as the first one; and if materially different, the deficiency cannot be collected from the purchaser on the first sale. (Riggs v. Pursell, 74 N. Y. 370 [1878].)

—— **Conditions imposed on granting a resale.**] The Appellate Division will not disturb the exercise by the Special Term of its discretion in refusing to order a resale under a foreclosure judgment except upon condition that the moving party should pay the costs and expenses of the sale and deliver an agreement directing him to bid at least a certain sum, and that the original sale should stand if upon the resale the party agreeing to bid such certain sum failed to do so, or having bought the same, failed to pay. (German-American Bank v. Dorthy, 39 App. Div. 166 [1899].)

—— **Resale ordered where a promised notice was not given.**] Where the property has been sold for the amount of the first mortgage, which was less than the assessed value, without notice except by advertisement to a junior mortgagee who had been promised that he should have notice before anything was done, a resale will be ordered at his request, plaintiff not objecting, on condition that the purchaser be reimbursed for expenses, and a bond given to bid more than the assessed value at the resale. (Kennedy v. Bridgman, 27 Misc. Rep. 585 [1899].)

—— **Sale under railroad mortgage not affected by the fraudulent default of the directors.**] When a sale under the foreclosure of a railroad mortgage cannot be attacked because the directors were actuated by corrupt motives in permitting a default to take place in the payment of the bonds. (Harpending v. Munson, 91 N. Y. 650 [1883].)

—— **Inadequacy of price, not a sufficient ground.**] Mere inadequacy of price is not a sufficient ground to set aside a judicial sale of real estate, unless it be so great as to shock the conscience of the court and raise the inference of unfairness or fraud, or unless there are circumstances of mistake or surprise; and a resale will not be ordered as a general rule upon an offer to increase the price brought at the sale, without the support of some special circumstances.

Where a person knowing that real estate was to be sold by virtue of a judgment took no action whatever to have it bring any larger sum than it was sold for, and gave no attention to the matter, he is not free from the imputation of laches upon a motion made by him to set such sale aside. (Wesson v. Chapman, 76 Hun, 592 [1894].)

—— **When ordered for inadequacy of price.**] A resale is not generally ordered for mere inadequacy of price, but it will be where there has been any surprise produced by the act of the person making it, or where the person seeking to open the sale, having an interest, has been misled by the device or concealment of the person making the sale. (Frances v. Church, Clark's Ch. 476.)

—— **Will not be ordered merely because a higher price is anticipated on a resale.**] A sale under a judgment will not be set aside in the absence of fraud, surprise or well-grounded misapprehensions, simply because a higher price can be reasonably anticipated on a resale of the premises. (Kellogg v. Howell, 62 Barb. 280 [Gen. T. 1872].)

—— **Inadequacy of price and insanity of mortgagee not a ground for a resale.**] In a foreclosure action an order should not be granted allowing the judgment and sale to stand, but directing the purchaser to account for profits

from possession and a resale, merely because there is evidence that the price was inadequate and that a mortgagee was insane at the time of the sale. (Provost v. Roediger, 32 St. Rep. 1101 [Sup. Ct. 1890].)

—— **When sale under execution will be set aside for inadequacy of price.]** When a sale of real estate under an execution will be set aside because of the inadequacy of the price paid. (Chapman v. Boetcher, 27 Hun, 606 [1882].)

—— **Inadequacy of price.]** Inadequacy of price itself may furnish ground sufficient to justify suspicion of fraud or mistake, and to set aside a judicial sale. (Arlington Square Savings Bank v. Cassidy, 5 N. Y. Wkly. Dig. 83 [Sup. Ct. 1877].)

—— **What constitutes laches and insufficient ground.]** The petitioner did not offer to bid for the property upon a resale any more than the price for which it was sold, and did not show that any one would bid any more; also, with knowledge of all the essential facts, it delayed for nearly two years before making the application. In the meantime the property had gone into the hands of a new corporation, which had expended large sums of money thereon, had mortgaged the same to secure bonds, and had issued stock to a large amount; so that if a resale were ordered it would be impossible to restore the parties to be affected thereby to their former position, and irreparable mischief might be done. Held, that the petitioner had no absolute legal right to have the sale set aside; that the court below had discretion to deny the application; that it did not appear it had abused its discretion, and, therefore, this court had no jurisdiction to review the order appealed from. (F. L. & T. Co. v. B. & M. T. Co., 119 N. Y. 15 [1890].)

—— **Ordered — where facts exist, casting suspicion on the sale had.]** A court of equity will set aside a sale and order a resale, although fraud may not be clearly established, where facts exist casting suspicion upon the fairness of the sale. (Fisher v. Hersey, 78 N. Y. 387 [1879].)

—— **An agreement to bid for another, when violated, is a ground for a resale.]** A resale should be directed in a foreclosure proceeding when plaintiff's agent, after arranging with the party having an interest in the equity of redemption to bid off the property for him at a certain price, and it is too late for another arrangement to be made, informs the party that he intends to bid for himself, which he does, and buys the property for a smaller amount than that which he agreed to bid by the arrangement, and then states that he has sold to a third person. (N. Y. Eastern Christian & Benevolent Assn. v. Bishop, 28 St. Rep. 22 [Sup. Ct. 1889].)

—— **Mistake of purchaser, justifying a resale.]** A purchaser at a judicial sale will be relieved from completing his purchase upon his giving indemnity against the expenses of a resale where it appears that he had bid upon the property and that it was struck down to him without his having seen the notices of sale or the handbills circulated thereat, and where he claims to have been mistaken in the location of the property and requested the auctioneer to put the property up for sale again. (Vingut v. Vingut, 42 St. Rep. 787 [Sup. Ct. 1891].)

—— **Sale in parcels.]** It is unnecessary when a resale of mortgaged premises is directed to be made in parcels that the notice of the resale should so specify. (Hoffman v. Burke, 10 N. Y. Wkly. Dig. 347 [Gen. T. 1880].)

—— "Difference and costs and expenses on the resale" — subsequent taxes included within.] (Ruhe v. Law, 8 Hun, 251 [1876].)

—— Foreclosure of a railroad mortgage — when a sale, had under a decree in, will not be set aside.] (Peck v. New Jersey & N. Y. R. R. Co., 22 Hun, 129 [1880].)

IRREGULAR SALE — Who may move to set aside an irregular sale.] An action to set aside a judicial sale for irregularity cannot be maintained even by one who was not a party to the original action. Every person whose rights are injuriously affected by a judgment or proceedings under it, has the right to move the court to set aside or amend them, although he is not a party to the action. Relief against a judicial sale for irregularity merely, can be had only by motion. (Gould v. Mortimer, 16 Abb. Pr. 448 [Sp. T. 1863]; 26 How. Prac. 167.)

—— Sale of corporate property not set aside on behalf of a minority stockholder.] A sale on foreclosure of corporate property should not be set aside at the instance of the holder of only a small number of shares where he is the only stockholder who seeks to avoid the transaction of which he complains and made no complaint until after the sale, unless he is refused the fair value of his share of the property. (Drake v. New York Suburban Water Co., 36 App. Div. 275 [1899].)

—— Sale void, when summons was served by publication and no property was attached.] Where a sale is bad under an execution upon a judgment issued in an action against a nonresident, where the summons was served by publication and no attachment was issued, no title passes to the purchaser. (McKinney v. Collins, 88 N. Y. 216 [1882]. See Code of Civil Procedure, § 707.)

—— Proper form of execution where an attachment has issued.] In an action wherein an attachment had been issued upon the ground that defendant, a resident of the State, had departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, the execution directed the sheriff to collect the judgment out of the attached personal property, and, if that was insufficient, out of the real estate. Held, that so far as the real estate was concerned, the execution was void, and the sale under it conveyed no title; that the provision of the Code of Civil Procedure (§ 1370, subd. 2), prescribing the form of execution, was peremptory, and that the attached real estate could not be resorted to until the remedy against the debtor's personal property, both attached and unattached, had been exhausted. (Place v. Riley, 98 N. Y. 1 [1885].)

—— Receiver of an insolvent corporation — sale of its assets without notice to the Attorney-General — irregularity — how cured.] The omission of receivers of an insolvent corporation, appointed in proceedings taken for its voluntary dissolution, to serve upon the Attorney-General notice of the application for an order directing the sale of its property by them, is cured by a subsequent order of the court, made upon due notice to the Attorney-General, confirming such sale, and directing the re-entry *nunc pro tunc* of the order authorizing the sale.

Upon such confirmation by the court the title of a purchaser at the sale becomes complete, and it is immaterial that stockholders of the corporation have received no notice of the application for the order of confirmation. (Johnson v. Rayner, 25 App. Div. 598 [1898].)

—— **Irregular appointment of a referee to sell does not vitiate the sale.]** In an action to foreclose a mortgage in Kings county, all the parties appeared save one, who was an absentee, and all of those appearing consented that the sale be by a referee; and the judgment directed the sale to be so made, the court holding that the consent of those appearing was a sufficient compliance with the provisions of the act of 1876 (chapter 439), which requires foreclosure sales in said county to be by the sheriff, unless all the parties to the action consent that it may be made by a referee. Held, that if the court erred, this did not render a sale by the referee void, and was not an objection to the title given on such sale. (Abbott v. Curran, 98 N. Y. 665 [1885].)

—— **Order of confirmation cures the omission of "a portion of the" land from advertisement of sale.]** An omission from a referee's advertisement of sale of a portion of the lands embraced in the action, and directed to be sold by the judgment, does not vitiate a sale by the referee of the omitted portion, where, upon motion made, on due notice to all the parties interested, the sale is confirmed and the irregularity does not constitute a defect in the title acquired on such sale. (Woodhull v. Little, 102 N. Y. 165 [1886].)

—— **Partition suit irregularly brought by the life tenant — the title acquired at the sale is good.]** Although a tenant for life may not maintain partition because not a joint tenant, or tenant in common with the remaindermen, yet the defect is not jurisdictional, and a decree of sale in such an action is not absolutely void; it may only be corrected on appeal. As against those made parties to the action, a sale under the decree gives a good title. (Cromwell v. Hull, 97 N. Y. 209 [1884].)

—— **Partition sale — purchase by a guardian in his own nome.]** A purchase of lands of infants at a partition sale by the guardian in his own name is presumptively void, and the burden rests upon one claimng under him to show that the purchase was for the benefit of the infants. (O'Donoghue v. Boies, 159 N. Y. 87, affg. 92 Hun, 3 [1899].)

—— **Who may attack an irregular sale.]** *Semble*, that any person interested in premises which have been sold in foreclosure proceedings may take advantage of such an irregularity as the failure to publish the notice of sale, by moving to set the sale aside on that ground, but such motion must be made within a reasonable time, or the irregularity will be deemed to have been waived, and a delay of nineteen years is unreasonable. (Farrell v. Noel, 17 App. Div. 319 [1897].)

ADJOURNMENT — The attorney can postpone a sale.] An adjournment may be made by plaintiff's attorney in a foreclosure sale. Code Civil Procedure, § 1678.)

—— **Sale in violation of a referee's promise to adjourn it.]** A sale in an action brought to foreclose a mortgage should be controlled solely by the referee appointed to conduct it; and where it appeared that the referee, after informing the attorney for the defendants that the sale would

be adjourned, then proceeded, at the instance of the plaintiff's attorney, and in violation of his promise, to sell the property, the court set the sale aside upon proof that it prejudiced the rights of the defendants, and appointed a referee to take an account of the purchaser's payments and expenditures upon, and his receipts from, the property, and directed that any balance found to be due to the purchaser be paid to him from the proceeds of the resale, before payment of the mortgage. (Angel v. Clark, 21 App. Div. 339 [1897].)

—— **Stay of proceedings — effect of.]** Where, after a referee has been appointed to sell real estate in pursuance of a judgment of foreclosure, and a notice of sale has been duly published, the defendant serves an undertaking to stay proceedings upon appeal in pursuance of section 341 of the Code of Procedure, the plaintiff is not required to abandon the proceedings instituted by him, but may adjourn the sale until it can be determined whether or not the sureties will justify. (Ward v. James, 8 Hun, 526 [1876].)

—— **Auctioneer's fees on.]** No fees can be allowed to an auctioneer for services rendered upon the adjournment of a sale by a referee. A referee is only entitled to receive the same fees for selling real estate as by law is allowed to a sheriff. (*Ib.*)

—— **Adjournment — day to which it is had — to be named.]** Upon an adjournment the day on which the sale is to be had should be named, but when the day is not named, through the default of the defendant, the sale will not be set aside. (La Farge v. Van Wagenen, 14 How. Pr. 54 [Sp. T. 1857].)

TAXES — Who liable for taxes, etc.] Who is liable on a mortgage foreclosure for the payment of taxes and assessments. (Mutual Life Ins. Co. v. Sage, 28 Hun, 595 [1883].)

—— **Terms of sale stating what taxes and assessments would be allowed.]** The provision in terms of sale, under which property is sold, in an action of partition, that "all taxes and assessments, duly confirmed and payable, which at the time of this sale are liens or incumbrances upon said premises, will be allowed by the referee out of the purchase money," refers only to those taxes and assessments, duly confirmed and payable, which were liens upon the premises on the day of the auction sale. (Ainslee v. Hicks, 13 App. Div. 388 [1897].)

—— **Agreement that a disputed assessment shall not be paid out of the proceeds — the municipality cannot object.]** Where all the parties interested in a foreclosure action, including the purchaser at the sale, agree that the disputed assessment shall not be paid out of the proceeds of the sale, an order to that effect may properly be made, notwithstanding the objection of the municipality which imposed the assessment. (Morgan v. Fullerton, 9 App. Div. 233 [1896].)

PURCHASER RELEASED — When a party is entitled to be released and have the sale set aside.] Where D. purchased at a sale, on execution, all the right, title and interest of T. in certain real estate, misled by the representation of the creditor's attorney that T. had a good title, and afterwards discovered that T. had conveyed the property prior to the docketing of judgment, held, that D. was entitled, on motion, to have the sale set aside, and to be released from his purchase. (Dwight's Case, 15 Abb. Prac. 250 [Gen. T. 1862]. See, also, German Savings Bank v. Muller, 10 Wkly. Dig. 67 [Gen. T. 1889].)

—— **Want of authority in attorneys.]** The plaintiff and several of the defendants in an action of partition were nonresidents of the United States. The nonresident defendants appeared by attorneys, but there was nothing in the judgment-roll showing the authority of such attorneys to appear for them.

The plaintiff's attorney died and an order was made substituting another attorney, but, so far as the record showed, without the consent of the plaintiff. This attorney died, and another attorney assumed to act for the plaintiff without any order of substitution.

Held, that a purchaser upon the sale should not be compelled to take the title. (McKenna v. Duffy, 64 Hun, 597 [1892].)

—— **Error in describing the owner of the equity of redemption in the summons.]** Where the owner of the equity of redemption who did not appear in the action, is designated in the summons and complaint as Emma J. Stockton, whereas her name was in fact Mary J. Stockton, and before the entry of judgment an *ex parte* order is entered correcting the error, but no amended or supplemental summons served, nor any amended notice of pendency of action filed, a purchaser at the sale had under the judgment does not acquire a marketable title, notwithstanding that the owner of the equity of redemption appeared in the surplus money proceedings. (Stuyvesant v. Weil, 41 App. Div. 551 [1889].)

—— **Sale subject to a mortgage already in judgment — purchaser relieved.]** Where, under a decree for the foreclosure of a second mortgage, by the terms of sale, as read by the auctioneer and signed by the purchaser, "the property is sold subject to a first mortgage of $5,000, due September, 1888;" and it appears that at the time of the sale the prior mortgage was in process of foreclosure, and a decree for the foreclosure thereof and the sale of the premises had actually been entered, before the time at which the purchaser was to take his deed, the purchaser is entitled to be relieved from his purchase. (Bradley v. Leahy, 54 Hun, 390 [1889].)

—— **Purchaser entitled to a good title.]** A purchaser at a foreclosure sale, not put upon his guard by some prior notice, may insist upon a good title, and will not be required to pay the purchase money and accept the deed where there is any serious defect in the title, unless it is remedied, although such defect was one existing prior to the giving of the mortgage of which the equity of redemption was foreclosed; but where he purchases with knowledge of the defect, its existence will not justify him in refusing to complete the purchase. (Fryer v. Rockefeller, 63 N. Y. 268; Jordan v. Poillon, 77 id. 518 [1879].)

—— **Purchaser is entitled to a marketable title.]** The purchaser of land at a judicial sale is entitled to a marketable title; the court cannot make a doubtful title good by passing upon an objection depending on a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right is vested. (Fleming v. Burnham, 100 N. Y. 1 [1885].)

—— **Marketable title — curing defects.]** A purchaser at a partition sale is entitled to demand a marketable title, *i. e.*, one free from a reasonable doubt

as to its validity. If an essential act has been omitted or unseasonably taken in the action which may render the judgment ineffectual as to any of the parties in interest, it is the duty of plaintiff to take the proper steps for curing the defects before he can be heard upon a motion to compel the the purchaser to complete his purchase. (Crouter v. Crouter, 133 N. Y. 55 [1892].)

——**Defect of title through nonjoinder of parties.**] When a purchaser at a sale under a foreclosure will not be compelled to complete his purchase because of the nonjoinder of parties. (Dodd v. Neilson, 90 N. Y. 243 [1882].)

——**Delay in perfecting defective titles excuses purchasesr from completing the sale.**] When purchasers refusing to complete a sale, because of a defect in the title, will be excused from completing it, although the title is sebsequently perfected, because of delay in perfecting it. (Rice v. Barrett, 99 N. Y. 403 [1885].)

——**Unpaid transfer tax.**] A purchaser at a foreclosure sale cannot be compelled to complete where the sale was of the entire title and a devisee of the owner of the equity of redemption, who was not a relative, has not paid the transfer tax, as in such case the tax is a lien which renders the title marketable. (Kitching v. Shear, 26 Misc. 436 [1899].)

——**Right of way over the land.**] The title to a lot bounded on a street, which, by legislative act, is moved ten feet after the conveyance by the original owner, is not marketable, where it appears that various grantees had or may claim the easement or right of way over the ten-foot strip of the former highway. (Scripture v. Morris, 38 App. Div. 377 [1899].)

——**Want of a provision in a judgment of partition for unknown remaindermen.**] Where the title was derived through a will which created a trust for two lives with remainder to the children then living and the descendants of such as may then be dead, a marketable title is not furnished by a judgment in an uncontested partition, commenced before the termination of the trust, which contains no provision for the benefit of unknown owners or after-born children, and the purchaser cannot be reqnired to complete. (Smith v. Secor, 157 N. Y. 402, affg. 31 App. Div. 103 [1898].)

——**Purchase under an honest misapprehension.**] In judicial sales the utmost fairness will be observed, and the purchaser will not be compelled to complete his purchase when he has bid at the sale under an honest misapprehension, and has subsequently discovered that he has not bought the property for which he supposed he was bidding, and at once applies for relief. (Dunn v. Herbs, 56 Hun, 457 [1890].)

——**Judicial sale — cannot be enforced with deduction from price for defect.**] Purchase at a foreclosure sale — the court cannot enforce it as to part, with a deduction from the price for the residue as to which the title is defective. (Thompson v. Schmeider, 38 Hun, 504 [1886].)

——**Premises destroyed by fire.**] When between the time of the purchase and that at which the purchaser is entitled to a deed, the premises are destroyed by fire, the purchaser will be relieved from his purchase. It is otherwise where the damage is slight. (Aspinwall v. Balch, 7 Daly, 200 [Sp. T. 1877].)

—— **Destruction of premises before the closing of the sale.]** Where, after the purchaser at a partition sale has signed a memorandum of sale and paid ten per cent of the purchase price, but before the date fixed for the closing of the sale, a building situate upon the premises is destroyed by fire, thus causing a depreciation in the rental value of the property of from eighty to ninety-six dollars per year, and the local authorities forbid the erection of another building to take the place of the one so destroyed, the purchaser should not be compelled to complete his purchase. (Harrigan v. Golden, 41 App. Div. 423 [1899].)

NOT RELEASED — Creditor's suit — based on an order directing a purchaser at a judicial sale to pay damages.] An order directing a purchaser at a judicial sale to pay the damage resulting from his failure to complete the same is to be regarded as a judgment and is a sufficient basis for a creditor's suit. (Lydecke v. Smith, 44 Hun, 454 [1887].)

—— **Gold clause in mortgage not a defect in title.]** The existence in a mortgage of a clause requiring the mortgage debt to be paid in gold, will not relieve a purchaser of the property at a receiver's sale from the duty of completing the purchase. (Blanck v. Sadlier, 153 N. Y. 551 [1897].)

—— **Unsatisfied mortgage apparently barred by the statute.]** The existence, unsatisfied of record, of a mortgage on property which is the subject of an action of partition, is not a tenable objection to the title, in the absence of proof tending to rebut the statutory presumption of payment, especially where the surviving mortgagee makes affidavit that the mortgage was paid shortly after it became due. (Paget v. Melcher, 42 App. Div. 76 [1899].)

—— **Presumption that judicial proceedings are regular.]** There always exists a presumption in favor of the regularity of judicial proceedings, which is strengthened by lapse of time, and which should not be lightly disregarded when such proceedings are attacked collaterally on a technical point of practice. (Lowerre v. Owens, 14 App. Div. 215 [1897].)

—— **Order for publication of summons having a court caption.]** Where an order for the publication of a summons, which is required by the Code of Civil Procedure to be made by a judge, was presented to a judge while he was holding Chambers and Special Term for the hearing of non-enumerated motions, and was signed by him with his initials, coupled with a direction for its entry, it was held, that, notwithstanding the fact that the order had a Special Term caption and used the word "court" in the body thereof, it would be presumed that it was made by the judge, as a judge, and not as the embodiment of the court held by him. (*Ib.*)

—— **Failure to file report of sale.]** The deed of a referee made upon a sale in foreclosure passes the title to the purchaser, notwithstanding the fact that the referee fails to file any report of sale, and that there is no proof that due notice of the sale was published as required by law. (Farrell v. Noel, 17 App. Div. 319 (1897].)

—— **The purchaser may stand upon referee's deed.]** The grantee in such a deed may rely thereon, and the burden rests upon a person attacking his title to show that the notice of sale was not properly published. (*Ib.*)

—— **Purchaser not relieved by a mere possibility of failure of title.]** A purchaser at a partition sale will not be compelled to accept a doubtful title,

but a mere possibility that he may be disturbed will not justify a refusal to accept a title. What evidence of the release of a condition is sufficient to make the title good. (Post v. Bernheimer, 31 Hun, 247 [1883].)

—— **A defect must be substantial.]** A purchaser at a judicial sale cannot reject the title unless the defect is a substantial one. A defect resting upon a mere contingency is not sufficient. (Oakley v. Briggs, 44 St. Rep. 397 [Sup. Ct. 1892].)

—— **Marketable title — a mere possibility of defect does not affect it.]** A purchaser at a judicial sale is entitled to a marketable title, that is, one free from reasonable doubt. He will not be compelled to take title where a doubtful question of fact, relating to an outstanding right, is not concluded by the judgment under which the sale was made.

If, however, the existence of the alleged fact, which is claimed or supposed to constitute a defect in or cloud upon the title, is a mere possibility, or the alleged outstanding right is but a very improbable or remote contingency, the court may, in the exercise of a sound discretion, compel the purchaser to complete his purchase. (Cambrelleng v. Purton, 125 N. Y. 610 [1891]. See Dana v. Jones, 91 App. Div. 496; Marshall v. U. S. Trust Co., 93 App. Div. 479.)

—— **Title not unmarketable because a turnpike road once crossed the land.]** A purchaser will not be relieved from completing a purchase at a judicial sale by the fact that a map of a turnpike company included a part of the premises, the road of such turnpike company having been discontinued in 1810, and no claim having been made in its behalf since such time nor substantiated by other records. (Oakley v. Briggs, 44 St. Rep. 397 [Sup. Ct. 1892].)

——— **Sale of right, title and interest only.]** A purchaser at a foreclosure sale cannot be relieved on the ground of a defective title simply because only the right, title and interest of the mortgagor was tendered where only the right, title and interest of the mortgagor was offered for sale. (Van Rensselaer v. Bull, 43 St. Rep. 340 [Sup. Ct. 1891].)

—— **Purchaser not excused by a failure to appoint committees for lunatic defendants.]** Purchaser at a foreclosure — when he will be compelled to complete the purchase, although two of the defendants were lunatics, for whom no committees had been appointed. (Prentiss v. Cornell, 31 Hun, 167 [1883].)

—— **Purchaser at judicial sale not relieved because of irregular service where jurisdiction is obtained.]** Where, in the service of summons by publication, defects exist in the notice attached to the summons which do not, however, prevent the court from acquiring jurisdiction, a purchaser at a judicial sale had in such action will be required to accept the title (Loring v. Binney, 38 Hun, 152 [1885].)

—— **Partition — erroneous construction of a will, not objected to.]** A purchaser at a partition sale will not be relieved from completing upon the ground that the decedent's will, through whom all the parties claimed title, was erroneously construed, where it appears that the question was fairly presented for litigation, and that there was no person having any possible interest in the title who was not made a party to the action. (Brown v. Mount, 38 App. Div. 440 [1899].)

—— **Purchaser not relieved from his purchase on account of defects of title of which he had notice.]** It is a well-settled rule that a purchaser at a mortgage foreclosure sale will not be relieved on account of apparent defects in the property, or of defects in the title of which he had notice, and in reference to which he made his bid.

Where an action is brought to foreclose a mortgage, and prior to the rendering of any decision therein, one of the defendants, who was the owner of an undivided interest in the premises covered by the mortgage, dies, and her heirs or devisees are not brought in as parties defendant, a judgment in the action against her is wholly without authority, and her estate in the premises sought to be foreclosed is wholly unaffected thereby. (Stephens v. Humphreys, 73 Hun, 199 [1893].)

—— **A slight variation in measurement is not a substantial defect.]** A variation of one-half inch in a distance of 141 feet does not constitute a substantial defect in the title, where it is not disputed that the purchaser will obtain a good title to all property included within the boundaries as described in the advertisement of sale. (Merges v. Ringler, 34 App. Div. 415, affg., 24 Misc. Rep. 317 [1898].)

—— **Encroachment of a wall on adjoining land.]** A purchaser will not be relieved because an old building on the premises encroaches on the street to such a slight extent that it is not probable that the city would raise an objection, and the city cannot, under the statutory provision, be allowed to remove the wall. (Merges v. Ringler, 34 App. Div. 415, affg. 24 Misc. Rep. 317 [1898]; Harrison v. Platt, 35 App. Div. 533 [1898].)

—— **Title acquired, good, although a party is allowed to come in and defend after the sale and succeeds.]** A purchaser acquires a good title where the proceedings are regular, although after a conveyance to the purchaser a defendant is allowed to come in and defend as authorized by the Code (§ 445), and succeeds in his defense. (Place v. Riley, 98 N. Y. 1 [1885].)

—— **Foreclosure by advertisement.]** The failure of the purchaser, at a sale under the foreclosure of a mortgage by advertisement, to file the affidavits of sale, which was made in due form, does not affect her title. (Matter of Lawson, 42 App. Div. 377 [1899].)

—— **Defective letters of administration.]** Defect in granting letters of administration does not impair the title acquired under a sale on an action prosecuted by an administrator as such as plaintiff. (Abbott v. Curran, 98 N. Y. 665 [1885].)

—— **Void process.]** Under a void process no title can be acquired. (Place v. Riley, 98 N. Y. 1 [1885].)

—— **Revenue stamps must be affixed to referee's deed.]** The purchaser at a judicial sale is entitled to a deed which will defend his title in any tribunal in which it is attacked or where he is called upon to assert it, and may require the referee to affix the revenue stamps required by the War Tax Act. (Loring v. Chase, 26 Misc. Rep. 318 [1899].)

—— **Judgment in partition conclusive where all parties in interest are brought in.]** Where all the parties interested in the property have been made parties to the partition action, the judgment therein, while unreversed, is conclusive in support of its validity (Butler v. Butler, 41 App. Div. 477 [1899].)

—— **Remedy where the purchaser fails to complete the purchase.]** Whether the court will compel a purchaser at a sale in foreclosure to complete the purchase or direct a resale to be had rests largely in its discretion; the remedy for the failure of the purchaser to comply with an order requiring her to complete the purchase is by contempt proceedings. (Burton v. Linn, 21 App. Div. 609 [1897].)

—— **Practice where the purchaser fails to pay the ten per cent.]** Where a purchaser upon a sale, had under an interlocutory judgment in an action for partition neglects to pay ten per cent. of the purchase price as required by the terms of the sale, and there has been no resale, the proper practice is to have the report of sale confirmed, to enter final judgment under section 1577 of the Code of Civil Procedure, and to tender a deed to the purchaser. It is only by this method that he can be placed in entire default.

There is no authority to make a tender of a deed until the confirmation of the report of sale and the entry of judgment. (Latourette v. Latourette, 25 App. Div. 145 [1898].)

—— **Assignee of bid — when he may be compelled to complete the purchase.]** One who purchases of the vendee, at a sale in partition, his bid, receives an assignment of the same in writing, requests the deed, and, upon subsequently asking to be relieved from taking title because of an alleged incumbrance, invites the institution of a proceeding by which he hoped to obtain an adjudication so relieving him, submits himself to the jurisdiction of the court by reason of his interference with the proceeding, and may be compelled to complete the purchase. (Archer v. Archer, 155 N. Y. 415 [1898].)

—— **Compensation for immaterial defects.]** Where the defects are not sufficient to authorize a rejection of the title, the court, in compelling performance, may allow compensation for the immaterial defects which appeared. (Merges v. Ringler, 34 App. Div. 415, affg. 24 Misc. Rep. 317 [1898].)

DOWER — Effect of a sale in reviving right of dower in some cases.] Where a deed or mortgage, executed by a husband and wife, conveying land owned by the husband, is defeated by a sale on execution under a prior judgment, the wife is restored to her original position, and may, after her husband's death, recover dower in the lands. (Hinchliffe v. Shea, 103 N. Y. 153 [1886].)

RECORD — Effect of recording assignment of mortgage.] The record of the assignment of a mortgage is notice to all persons of the assignee's rights as against any subsequent acts of the mortgagee affecting the mortgage, and protects the assignee against a subsequent unauthorized discharge of the mortgage by the mortgagee. (Larned v. Donovan, 155 N. Y. 341 [1898].)

—— The provision (1 R. S. 763, § 41] that "the recording of an assignment of a mortgage shall not be deemed, in itself, notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee," has no application to an action by the purchaser of mortgaged premises to remove the cloud of a recorded assignment of the mortgage, where, although the mortgagee had undertaken to satisfy the mortgage after its assignment and before the plaintiff's purchase of the premises, there is no evidence that the mortgagor made

any payment to the mortgagee, or gave him any consideration, for the satisfaction of the mortgage. (*Ib.*)

—— **For what necessary.**] One who purchases land from a mortgagee thereof, when the mortgage is on record, without making inquiry or requiring the production of the mortgage or of the note which it was given to secure, is not a *bona fide* purchaser as against a prior assignee of the mortgage, although the assignment was not recorded, since it is not necessary to record an assignment of a recorded mortgage as against a subsequent purchaser of the mortgaged premises, but only as against a subsequent purchaser of the mortgage itself. (Curtis v. Moore, 152 N. Y. 159 [1897].)

—— **Purchase of land from the mortagee after the assignment of the mortgage.**] The assignee of a recorded mortgage upon real estate which was conveyed by the mortgagor to the mortgagee after an assignment of the mortgage, has a valid lien as against a purchaser of the land from the mortgagee who took without notice of the assignment, notwithstanding the conveyance to the mortgagee as well as the conveyance from the mortgagee to the purchaser were recorded before the assignment was placed on record. (Curtis v. Moore, 152 N. Y. 159 [1897].)

—— **Recording a mortgage in a deed book.**] The record of a mortgage in a deed book is ineffectual to charge a *bona fide* purchaser of the mortgaged property with constructive notice of the existence of the mortgage. (Howells v. Hettrick, 13 App. Div. 366 [1897].)

—— **Assignment of mortgage acknowledged before one of the assignees — record thereof is invalid.**] The acknowledgment by a mortgage of an assignment of the bond and mortgage before one of the assignee's is a nullity, and the record of the assignment is invalid and does not constitute constructive notice of its existence. (Armstrong v. Combs, 15 App. Div. 247 [1897].)

—— **The failure to affix stamps required by the Revenue Law.**] A recording officer in the State of New York has no power to refuse to accept an instrument entitled to record under the laws of that State, because of the failure to affix sufficient revenue stamps thereto. (People ex rel. Brewing Co. v. Fromme, 35 App. Div. 459 [1898].)

DEFICIENCY — Judgment for deficiency against legal representatives.] If the mortgagor and obligor dies before the foreclosure of the mortgage, judgment for any deficiency may be recovered against his legal representatives in the foreclosure action. (In re Glacius v. Fogel, 88 N. Y. 434 [1882].)

WARRANTY — In prior deed — right of a purchaser at a foreclosure sale to recover thereon.] As to the right of a purchaser at a sale on foreclosure to recover damages for a breach of a covenant of warranty contained in the deed conveying the property to the mortgagor. (Mygatt v. Coe, 44 Hun, 31 [1887]; S. C., 124 N. Y. 212 [1891].)

SENIOR INCUMBRANCERS — Made parties to a foreclosure, may demand foreclosure of senior mortgage.] Action to foreclose a mortgage. Senior incumbrancers may be made parties defendant. Right of such an incumbrancer to demand a foreclosure of his mortgage as a counterclaim. (Metropolitan Trust Co. v. Tonawanda Valley Railroad Co., 43 Hun, 521 [1887].)

See PRIOR LIENS, *ante*, under Rule 60.

ADVERSE POSSESSION — Title founded on, sufficient.] When a purchaser of real estate at a judicial sale will be compelled to accept a title founded on adverse possession. (Ottinger v. Strasburger, 33 Hun, 466 [1884].)

—— When a purchaser will not be compelled to accept a title based thereon.] A purchaser at a sale in partition will not be compelled to take a title based on adverse possession to defend which he would be obliged to resort to parol evidence. (Gorman v. Gorman, 40 App. Div. 225 [1899].)

TITLE — Acquired on a mortgage foreclosure sale.] The effect of a foreclosure deed, as determined by the statute, is to vest in the purchaser the entire interest and estate of the mortgagor and mortgagee as of the date of the mortgage and unaffected by subsequent incumbrances and conveyances by the mortgagor. (Rector, etc., Christ Protestant Episcopal Church v. Mack, 93 N. Y. 488 [1883]; Batterman v. Albright, 122 id. 484 [1890]; McFadden v. Allen, 134 id. 489 [1892].)

VOID PROCESS — Bona fide purchaser under.] A *bona fide* purchaser acquires no title to land sold under a void process, and stands in no better position than one purchasing with full knowledge of the invalidity. (Place v. Riley, 98 N. Y. 1 [1885].)

NOTARY — What notary cannot be referee.] The notary before whom the affidavit on which application for a reference is based was verified, the court cannot appoint as the referee to sell. (Stewart v. Bogart, 2 Law Bulletin, 94 [1880].)

HAMILTON COUNTY — Notices in — in what newspapers published.] By chap. 202, Laws of 1873, all legal notices in the county of Hamilton are to be published in the Hamilton County Journal and the Hamilton County Democrat.

NEW YORK CITY — Fees on sale.] Sales of real estate hereafter made in the city and county of New York, under the decree or judgment of any court, may be made by the sheriff of said city and county, or by a referee appointed for that purpose by such judgment or decree, but when any sale is made by any officer other than the sheriff, no greater sum shall be charged or allowed as fees than as prescribed in section 2 of this act. (Laws of 1874, chap. 192, § 1. See Keim v. Keim, 43 App. Div. 88 [1899]; Code of Civil Procedure, § 3307, subd. 11; also § 3308.)

RULE 63.

Mortgage and Assignments to be Filed or Recorded before Conveyance — Expenses Allowed in Costs.

Whenever a sheriff or referee sells mortgaged premises, under a decree or order, or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage and any assignment thereof in the office of the clerk, unless such mortgage and assignments have been duly proved or acknowledged, so as to entitle the same to be recorded;

in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded, at full length, in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and, if filed with the clerk, he shall enter in the minutes the filing of such mortgage and assignments, and the time of filing. But this rule shall not extend to any case where the mortgage or assignments appear, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

See notes under Rule 62.

Rule 75 of 1858. Rule 76 of 1871. Rule 76 of 1874. Rule 67 of 1877, amended. Rule 63 of 1880. Rule 63 of 1884. Rule 63 of 1888. Rule 63 of 1896.

RULE 64.

Application for Surplus Moneys — Notice Thereof — Reference — Searches — Unsatisfield Liens.

On filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference, to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. The referee shall, in all cases, be selected by the court. The owner of the equity of redemption, and every party who appeared in the cause, or who shall have filed a notice of claim with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant or such owner has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office, directed to the claimant at his place of residence, as stated

in the notice of his claim, and upon the owner in such manner as the court may direct. All official searches for conveyances or incumbrances, made in the progress of the cause, shall be filed with the judgment-roll, and notice of the hearing shall be given to any person having or appearing to have an unsatisfied lien on the moneys in such manner as the court shall direct; and the party moving for the reference shall show, by affidavit, what unsatisfied liens appear by such official searches, and whether any, and what other unsatisfied liens are known to him to exist.

Rule 76 of 1858, amended. Rule 77 of 1871. Rule 77 of 1874, amended. Rule 68 of 1877, amended. Rule 64 of 1880. Rule 64 of 1884. Rule 64 of 1888, amended. Rule 64 of 1896.

See notes under Rule 62.

CODE OF CIVIL PROCEDURE.

§§ 743–754. Money paid into court — care and disposition thereof.
§ 1633. Disposition of surplus arising on the sale in a foreclosure action.

LIENS — Nature of.] The liens referred to in the rule are those which subject the estate to be sold under execution, without any further intervention of the court. Claims, however equitable, which have not matured into liens cannot be taken into consideration. (Husted v. Dakin, 17 Abb. 137 [Gen. T. 1857]; King v. Selby, 10 How. Prac. 333 [Sp. T. 1854].)

—— Liens determined by date of foreclosure sale.] The rights, as between the holder of a sheriff's certificate of sale, the time to redeem from which, by the owner of the equity of redemption, has not expired, and a second mortgagee, whose mortgage is not yet due, will be determined as of the date of the foreclosure sale. (Elsworth v. Woolsey, 19 App. Div. 385 [1897].)

—— Judgment creditor's lien.] Judgment creditors of a grantor of real estate, who has conveyed the same in fraud of his creditors, have, by virtue of their judgments, liens upon the premises so conveyed, which are entitled to priority in the order of time in which their respective judgments are docketed, and are not affected by the order in which suits to set aside such fraudulent transfer are instituted. (Wilkinson v. Paddock, 57 Hun, 191 [1890].)

—— Lien extinguished.] By a sale of land on a judgment the lien of the judgment and the right to redeem under it are extinguished. (Husted v. Dakin, 17 Abb. 137 [Sp. T. 1857].)

—— Claim on surplus moneys extinguished.] In like manner any claim upon surplus moneys arising upon the foreclosure of a prior mortgage is extinguished by such a sale. (Husted v. Dakin, 17 Abb. 137 [Sp. T. 1857].)

SURPLUS MONEYS — Creditor's lien extends to surplus money.] Creditors having liens upon lands sold under a prior judgment have the same liens upon the surplus moneys as they had upon the land previous to the sale. (Averill v. Loucks, 6 Barb. 470 [Gen. T. 1849].)

—— **Of an attorney on a judgment, will be protected.]** The lien of an attorney upon a judgment will be protected by the court on an application for surplus moneys. *Quære*, whether notice of such lien can be filed under Rule 77. (Atlantic Savings Bank v. Hiler, 3 Hun, 209 [1874].)

—— **Attorney's remedy for compensation.]** The remedy of an attorney for compensation for his services must be by action. His claim should not be allowed from the share of his client, a judgment creditor, in an action of foreclosure. (Floyd v. Clark, 16 Daly, 528 [N. Y. Com. Pl. 1880].)

—— **Priority of a lien creditor.]** Where there is a surplus fund in court, after a foreclosure against an executor, a creditor who has obtained a surrogate's decree against the estate will be preferred to legatees who claim the fund. (Clark's Case, 15 Abb. 277 [Sp. T. 1862].)

—— **Judgment confessed for partnership debt.]** A judgment confessed by two partners, in a firm consisting of three, to secure a partnership debt, is entitled to priority over subsequent judgments recovered against all the members of the firm. (Stevens v. Bank of Central New York, 31 Barb. 290 [Gen. T. 1859].)

—— **Subsequent incumbrancer, without notice — has no claim upon surplus.]** A subsequent incumbrancer has no claim upon the surplus moneys arising from a sale under a statute foreclosure, of which he had no notice. (Winslow v. McCall, 32 Barb. 241 [Sp. T. 1860]; Root v. Wheeler, 12 Abb. 294 [Sp. T. 1861]; Mutual Life Ins. Co. v. Truchnicht, 3 Abb. N. C. 135 [1877].)

—— Unless he releases to the purchaser all future claim upon the equity of redemption. (Waller v. Harris, 7 Paige, 168 [1838].)

—— Where a general creditor applies he should be made a party to the proceeding. (German Savings Bank v. Sharer, 25 Hun, 409 [1881].)

—— **Where second mortgagees have priority over judgment creditors whose judgments are prior in date of docket.]** (Tallman v. Farley, 1 Barb. 280 [Sp. T. 1847]. See Ray v. Adams, 4 Hun, 332 [1875]; Cook v. Kraft, 6 Barb. 410 [Gen. T. 1871]; S. C., 3 Lans. 515.)

—— **A junior mortgage taken as collateral security for another obligation.]** (Soule v. Ludlow, 3 Hun, 503 [1875].)

—— **An unrecorded mortgage has priorty over a subsequent judgment.]** (Thomas v. Kelsey, 30 Barb. 268 [Gen. T. 1859].)

—— **The mortgage first recorded is presumptively the prior lien.]** (Freeman v. Schroeder, 43 Barb. 618 [Gen. T. 1864]; S. C., 29 How. Prac. 263.)

—— **Such presumption may, however, be overcome.]** (Freeman v. Schroeder, 43 Barb. 618 [Gen. T. 1864]; S. C., 29 How. Prac. 263.)

—— **Purchasers of land sold under execution have priority over junior judgments.]** (Shephard v. O'Neil, 4 Barb. 125 [Sp. T. 1848].)

—— **Distribution of — notice of claims.]** Distribution of a surplus fund arising on a foreclosure; what claims may be considered by the referee; notice must be given to all persons interested in the fund. (Kingsland v. Chetwood, 39 Hun, 602 [1886].)

—— **Necessity of notice to creditors of deceased mortgagor.]** Notice of application for surplus moneys in foreclosure must be given to the creditors

of a decedent who was in his lifetime entitled to such moneys when the claimant instituting the proceeding knew the facts constituting the lien of the creditors upon the fund. (Felts v. Martin, 20 App. Div. 60 [1897]; German Savings Bank v. Sharer, 25 Hun, 409 [1881].)

—— **Tenant for years — has an equitable interest in.]** A tenant for years has an equitable interest, to the extent of the value of the remainder of his term, in the surplus moneys arising upon a sale under a mortgage prior to his lease where the lease is cut off by the foreclosure. (Clarkson v. Skidmore, 46 N. Y. 297, affirming 2 Lans. 238.)

—— **It goes to the heirs of the mortgagor.]** Where one dies seized of real estate incumbered by a mortgage which is thereafter foreclosed and the land sold, any surplus arising on the sale is to be regarded as realty and goes to the heirs of the devisees, not to an administrator, and an administrator cannot maintain an action to recover the same, and this is so although the mortgage provides that the surplus shall be paid to the mortgagor, his executors or administrators. (Dunning v. Ocean National Bank, 61 N. Y. 497 [1875].)

—— **Surplus money stands in place of land sold — widow's dower.]** The surplus moneys arising on a sale of land, under a mortgage foreclosure, stand in the place of the land in respect to those having liens or vested rights therein; and the widow of the owner of the equity redemption is entitled to dower in the surplus as she was before in the land. (Matthews v. Duryee, 45 Barb. 69 [Gen. T. 1864]; S. C., 17 Abb. 256; Elmendorf v. Lockwood, 4 Lans. 396 [Gen. T. 1871]; Blydenborgh v. Northrop, 13 How. Prac. 289 [Sp. T. 1856]; Fliess v. Buckley, 22 Hun, 551 1880].)

—— **When the value of an inchoate right of dower will not be paid to the husband.]** The sole persons interested in a surplus arising on a mortgage foreclosure sale being the owner of the equity of redemption, and his wife, who had an inchoate right of dower in the mortgaged premises, two-thirds of the money were paid to the husband, and the remaining one-third was deposited in court to secure the inchoate dower interest of the wife, who had obtained a judgment of separation from her husband and was dependent upon alimony awarded her thereby.

Held, that, under the circumstances, the court should not direct the payment of the money so deposited to the husband upon the execution of a bond with two sureties conditioned upon the payment to the wife, in case she survived the husband, of the income of the money during her life.

Semble, that in a proper case the court, in its discretion, might make such an order. (Emigrant Industrial Savings Bank v. Regan, 41 App. Div. 523 [1899].)

—— **What liens share in surplus.]** Only liens in existence at the time of the sale and conveyance are transferred to the surplus moneys arising therefrom; and a judgment which has ceased to be a lien by the lapse of more than ten years from date of its entry is not entitled to share in such surplus. (Nutt v. Cuming, 155 N. Y. 309 [1898].)

—— **The filing of a lis pendens creates no lien.]** The filing of a *lis pendens* without a complaint does not create a lien upon the land described in the *lis pendens* which will entitle the person filing the same to share in the surplus

arising from the sale of the land in foreclosure. (Albro v. Blume, 5 App. Div. 309 [1896].)

—— **The owner of an easement in the premises sold is entitled to share in the surplus.**] The owner of an easement in the mortgaged property, which easement extinguished by the foreclosure proceedings, is entitled to share in the surplus arising on a foreclosure sale. (Winthrop v. Welling, 2 App. Div. 229 [1896].)

—— **Mortgages given by a life tenant and by remaindermen — distribution of surplus arising on a foreclosure thereof.**] Where the life tenant of certain premises and the two remaindermen execute mortgages thereon, which recite that the life tenant and the remaindermen are indebted to the mortgagee in the sum named in the mortgages, and it does not appear who received the money obtained upon the mortgages, nor to what purposes it was applied, the presumption is, as between the three mortgagors, that they were each liable for one-third of the debt, and in surplus money proceedings, instituted after the foreclosure of the mortgages upon a default in the payment of interest, the life tenant is chargeable with the unpaid taxes and with one-third of the interest and the remaindermen with the other two-thirds of the interest, the costs and expenses of the foreclosure being deducted from the proceeds of sale before any division is made. (Fosdick v. Lyons, 38 App. Div. 608 [1899].)

—— **Inchoate right of dower.**] A woman having an inchoate right of dower in surplus moneys arising on a foreclosure sale is not entitled to a gross sum in lieu of such right. (Citizens' Savings Bank v. Mooney, 26 Misc. Rep. 67 [1899].)

—— **Effect of former judgment.**] In proceedings instituted to obtain surplus moneys arising from the foreclosure of a first mortgage upon certain lands it was shown that in an action brought against the person who executed the second mortgage upon the property sold under the foreclosure, and who claimed to own it, it was adjudged that the plaintiff therein was entitled to an undivided one-half interest in and to the mortgaged premises.

In an action commenced nearly two years after the second mortgage had been recorded, the second mortgagee not being made a party thereto.

Held, that such judgment would not affect the right to such surplus moneys of the second mortgagee, who was not a party to such action, if the mortgagor was the apparent legal owner of the premises in question at the time the second mortgage was given. (Mechanics' Savings Bank v. Selye, 83 Hun, 282 [1894].)

—— **A pending prior action, not a bar to a proceeding to distribute surplus moneys.**] On the payment into court of surplus moneys arising upon a mortgage foreclosure, one of the defendants in the action claimed the same as junior mortgagee, and moved for a reference to determine claims thereto; this claim and motion were resisted by certain other defendants, on the ground that there was a prior action pending, in which the right of the claimant was being contested, and in which a complete adjudication could be had. It appeared that in this prior action commenced by the mortgagor and then owner of the mortgaged premises, since deceased, against the claimant, an interlocutory judgment had been entered declaring an instrument executed by the

owner to the claimant in form of a deed to be a mortgage, and appointing a referee to ascertain the amount due the claimant thereunder; that it was upon this mortgage that the claimant based his claim to the surplus moneys, and that after the entry of said interlocutory judgment, the plaintiff in the action in which it was rendered, died, and the action had never been revived, and had since remained in a condition in which no accounting could be had therein.

Held, that such prior action was not a bar to the proceeding for the distribution of surplus moneys, and that the claimant was entitled to a reference. (Baker v. Baker, 70 Hun, 95 [1893].)

—— **When a claimant is not barred from application for a reference by a summons served upon another claimant.]** A motion for a reference to ascertain the amount due the respective claimants of surplus money resulting from the sale of real estate was denied on the ground that the moving party had already been served with a summons in an action brought to determine the rights of the parties to such fund. This is no reason for denying a similar motion by another claimant who has not been served with the summons in said action. (Toch v. Toch, 8 App. Div. 299 [1896].)

—— **Court has no power to displace a prior lien in favor of a subsequent one.]** Upon application for surplus moneys arising on foreclosure sale, it appeared that there were two mortgages which were liens upon the premises sold subsequent to the mortgage foreclosed; the senior one also covered other lands, which the proof showed and the referee found were of value more than sufficient to satisfy the mortgage, and the junior mortgage only covered those premises. Held, that the court had no power to displace the prior lien in favor of the junior mortgage, and to compel the owner of the former to resort to the other lands covered by it to obtain payment. (Quackenbush v. O'Hare, 129 N. Y. 485 [1892].)

—— **Form of orders for paying out.]** One entitled to surplus money is not aggrieved by an order requiring the referee to pay off liens upon proof thereof being made in a manner specified in the order, and without requiring payment first to be made by the purchaser. (Easton v. Pickersgill, 55 N. Y. 310 [1873].)

—— **Judgment — secured on appeal.]** When, while a judgment is marked "secured on appeal," a mortgage is given on property on which it would otherwise be a lien, and such judgment is thereafter by the court restored as a lien thereon, the mortgage is entitled to priority of payment out of the surplus money arising from the foreclosure of a prior mortgage. (Union Dime Savings Institution v. Duryea, 3 Hun, 210 [1874].)

—— **Lapse of judgment lien before foreclosure sale.]** If, at the time of the sale in a mortgage foreclosure, ten years have elapsed since the lien of the junior judgment lienor attached, such a lien is not payable out of the surplus, even though ten years had not elapsed at the time of the judgment in foreclosure. (Nutt v. Cuming, 155 N. Y. 309 [1898].)

—— **Notice of application to confirm report of referee though no exceptions be filed.]** Notice of motion to confirm referee's report must be given to all parties who appear in the action or have filed with the clerk notice of claim,

though the referee's report has been filed and notice of its making and filing has been given, and no exceptions have been filed thereto.

Rule 30 not applicable to these proceedings in so far as it is in conflict with Rule 64. (Van Voast v. Cushing, 32 App. Div. 116 [1898].)

—— **Surplus moneys — on a sale on foreclosure to be regarded as realty — where an action relating to them must be brought — Code of Civil Procedure, § 982.]** (Fliess v. Buckley, 22 Hun, 551 [1880]; American Life Ins. & Trust Co. v. Van Eps, 56 N. Y. 601 [1874]; Matter of Knapp, 25 Misc. 133 [1898].)

—— **A claim may be presented and established by the plaintiff as well as by any other person.]** (Field v. Hawxhurst, 9 How. Prac. 75 [Sp. T. 1853].)

—— **Distribution of — rights of junior mortgagees considered.]** (Oppenheimer v. Walker, 3 Hun, 30 [1874].)

PROCEEDINGS ON REFERENCE — It is a special proceeding.] The distribution among rival claimants of the surplus money arising on a mortgage foreclosure by action, is a special proceeding, and is governed by Rule 64 of the Supreme Court; the reference is one to hear and determine, subject to confirmation by the court, which has ample power to confirm, set aside or to refer back the report, but it is not authorized to make new findings or to change those already made. (Mutual Life Insurance Co. v. Anthony, 23 N. Y. Wkly. Dig. 427 [Sup. Ct. Gen. T. 1886].)

—— **Order of reference — Object of.]** The order of reference usually made to report as to the liens and claims against surplus money is not granted for the investigation and determination of contested claims. (Union Dime Savings Institution v. Osley, 4 Hun, 657 [1875].)

——— **Referee may inquire as to the validity of liens and conveyances.]** Upon a reference as to surplus moneys in an action for foreclosure, the referee has authority to inquire as to the validity of conveyances or liens, and conveyances as well as liens may be attacked as fraudulent. (Bergen v. Carmen, 79 N. Y. 146 [1879]. See Halsted v. Halsted, 55 id. 442 [1874]. See, *contra*, Snedecker v. Snedecker, 18 Hun, 355 [1879]; Husted v. Dakin, 17 Abb. 137 [Sp. T. 1857]; Tator v. Adams, 20 Hun, 131 [1880].)

—— **Power of referee to determine claims arising under a second mortgage.]** The referee appointed in proceedings for the distribution of surplus moneys arising on a foreclosure sale has power to determine the amount due under a second mortgage given by the mortgagor to secure the second mortgagee against any loss arising from the breach of a contract between the mortgagor and the second mortgagee. (Gutwillig v. Wiederman, 26 App. Div. 26 [1898].)

—— **Usury — may be set up by junior as against senior claim.]** The holders of a fourth mortgage may set up, before the referee, usury in a third mortgage. (Mutual Ins. Co. v. Bowen, 47 Barb. 618 [Gen. T. 1866].)

—— **Certificate of clerk.]** The party prosecuting the reference must produce a certificate of the clerk, with whom the report is filed and the surplus money deposited, showing that no notice of claim to such surplus was annexed to the report of sale, and that no claim to the same has been filed previous to the entry of the order of reference; or, if claims have been filed, stating the names of the claimants, and of their solicitors, if any, and their places of residence. (Hulbert v. McKay, 8 Paige, 651.)

—— **Duty of referee.**] The referee should ascertain, by the proper certificates and other evidence, that all claimants and other proper parties have been notified or summoned to attend before him on such reference, and the fact that such certificate and other evidence was produced before him, should be stated in his report. (Hulbert v. McKay, 8 Paige, 651.)

—— **Neglect to file notice of claim.**] An incumbrancer, who has neglected to file his notice of claim, may go before the referee and file his claim before him duly verified, and he will then be entitled to be heard upon such terms as to costs as the referee shall direct. (Hulbert v. McKay, 8 Paige, 651.)

—— **Proof of claim.**] The claims must be verified, and the referee may examine the claimants upon oath touching their claims. (Hulbert v. McKay, 8 Paige, 651.)

—— **Power of court over referee's report.**] Upon the coming in of the report of a referee appointed to ascertain the rights of claimants to surplus moneys produced on a sale under a decree of foreclosure, the court has the most ample power to confirm, set aside or refer back the same for further proofs as to its conscience shall seem just and equitable. While the moneys remain in the court undisturbed, the court may at any time vacate the order confirming the report, and refer the matter back to the referee for further proof. (Mutual Life Ins. Co. v. Salem, 3 Hun, 117 [1874]; Mutual Life Ins. Co. v. Anthony, 23 Wkly. Dig. 427 [Sup. Ct. Gen. T. 1886].)

—— **Notice of application to confirm report.**] Under Rule 64 of the General Rules of Practice it is necessary, on an application to confirm the report of a referee in surplus money proceedings, to give notice of such application to every party who has appeared in the foreclosure action or who has filed with the clerk notice of a claim to such surplus money, although the report of the referee has been filed and notice of its making and filing has been given, and no exceptions have been filed thereto.

Rule 30 of the General Rules of Practice, so far as it conflicts with rule 64, applicable in this respect to such a proceeding. (Van Voast v. Cushing, 32 App. Div. 116 [1898].)

—— **Default in appearing on reference.**] One having a lien but who fails to appear was allowed to open default upon filing an undertaking to pay costs in case she fails to establish her lien, held error. (Irving Savings Inst. v. Smith, 100 App. Div. 460.]

APPEAL — Order as to surplus moneys — when reviewable in the Court of Appeals.] When an order of the General Term, reversing an order of the Special Term as to the disposition of surplus moneys in a foreclosure suit, and sending the case back to the referee, imposes costs absolutely, it is in this respect a final decision, and an appeal can be taken therefrom to the Court of Appeals. (Bergen v. Carmen, 79 N. Y. 146 [1879].)

—— **What order is not final and is not appealable to the Court of Appeals.**] An order of the General Term reversing an order of the Special Term, which confirms a report of a referee appointed to determine as to conflicting claims to surplus moneys arising on a foreclosure sale, and ordering a new hearing before another referee, is not reviewable in the Court of Appeals. (Mutual Life Ins. Co. v. Anthony, 105 N. Y. 57 [1887].)

COSTS — What costs are allowable.] In proceedings as to the surplus moneys arising on sale of mortgaged premises, motion costs and reference fees only can be allowed. (Wellington v. Ulster County Ice Co., 5 N. Y. Wkly. Dig. 104 [Sup. Ct. 1877]; McDermott v. Mallory, 9 Hun, 59 [1876].)

—— **Suitable compensation allowed.]** The court has authority to allow a suitable compensation for costs and disbursements out of the funds. (N. Y. Life Ins. & Trust Co. v. Vanderbilt, 12 Abb. 458 [Sp. T. 1861]; Elwell v. Robbins, 43 How. Prac. 108 [Sp. T. 1872].)

—— **Unsuccessful claimant to surplus moneys — chargeable with costs.]** Unsuccessful claimants will be charged with the extra costs occasioned by their claims, where the claim of the successful party is just, and the amount of the surplus small, and a large amount of unnecessary costs has been occasioned in litigation. (Lawton v. Sager, 11 Barb. 349 [Sp. T. 1851]; Bevier v. Schoonmaker, 29 How. Prac. 411–422 [Gen. T. 1864].)

RULE 65.

Partition to Embrace all Lands in Common.

Where several tracts or parcels of land lying within this State are owned by the same persons in common, no separate action for the partition of a part thereof shall be maintained without the consent of all the parties interested therein; or without the special order of the court, made on notice to all parties who have appeared in the action, to be obtained before application for the relief demanded in the complaint; and if brought without such a consent or order, the share of the plaintiff may be charged with the whole cost of proceeding; and where infants are interested, the complaint shall state whether or not the parties owned any other lands in common.

Rule 77 of 1858. Rule 78 of 1871. Rule 78 of 1874. Rule 69 of 1877. Rule 65 of 1880. Rule 65 of 1884. Rule 65 of 1888. Rule 65 of 1896. Rule 65, as amended 1910.

CODE OF CIVIL PROCEDURE.

§ 340. When the County Courts have jurisdiction of an action for partition.
§ 447. Who are proper parties defendant.
§ 473. Guardian *ad litem* for infant defendant who is a nonresident or is temporarily absent.
§ 982. The action must be tried in the county in which the subject of the action or some part thereof is situated.
§§ 1532–1595. Provisions relative to actions for partition.
§§ 3252–3253. Additional allowances in partition actions.

§ 3297. Fees of referee on sale.
§ 3307. Fees of sheriff on sale.

PARTITION — No inherent power in the court.] The Supreme Court has no inherent power to partition and sell the real estate of infants; proceedings for that purpose must be authorized by the Legislature. (Muller v. Struppman, 6 Abb. N. C. 343 [Sp. T. 1878].)

—— Supreme Court — jurisdiction of.] The Supreme Court sitting at Special Term has all the judisriction, both legal and equitable, conferred by statute on the Court of Chancery and the former Supreme Court in proceedings for partition, and is to conduct the same, so far as they are applicable, in conformity with the provisions of the Revised Statutes. (Hewlett v. Wood, 3 Hun, 736 [1875].)

—— Action of partition to try title — allegations as to adverse title.] A plaintiff, seeking to try the title to land in an action of partition, is bound, under section 1542 of the Code of Civil Procedure, if cognizant of the facts upon which the adverse title is based, to allege such facts in his complaint; if ignorant thereof, he must aver his ignorance, in which event the adverse claimant must present his rights by answer. (Satterlee v. Kohbe, 39 App. Div. 420 [1899]. As to shares of infants. (Levine v. Goldsmith, 71 App. Div. 204 [1902].)

—— Specific liens on undivided shares should be determined by the interlocutory judgment.] Persons having specific liens, which appear of record as distinguished from general liens upon undivided shares of parties to a partition action, being necessary parties under section 1578 of the Code of Civil Procedure, the validity, priority and amount of such liens may properly be litigated before the referee, appointed to ascertain and report the rights, shares and interests of the several parties, and whether the land should be partitioned or sold, etc., and should be determined by the interlocutory judgment. (Winfield v. Stacom, 40 App. Div. 95 [1899].)

—— No exceptions need be filed to the referee's report.] Upon notice of the application for the confirmation of the report and for the entry of an interlocutory judgment thereon, the parties in interest are entitled to be heard upon any question adjudicated in the report, and which may properly be disposed of by the interlocutory judgment.

The filing of exceptions to the report of a referee, appointed in a partition action, is unnecessary to entitle the interested party to attack the report. (*Ib.*)

—— Lien upon premises partitioned — now asserted.] A party to an action of partition who claims a lien upon the premises must allege it in his answer and establish it by proof; the court has no power to amend the final judgment so as to direct the referee to pay him the amount of the alleged lien out of the proceeds of sale, as such an amendment would vary the rights of the parties as fixed by the decision of the court and the judgment entered thereon. (Smith v. Smith, 40 App. Div. 251 [1899].)

—— Cotenant out of possession may maintain partition.] *Semble*, that the modern tendency has been to relax the previous rule and to permit a

disseized cotenant to have his right and title determined in an action for partition. (Holder v. Holder, 40 App. Div. 255 [1899].)

—— **Consolidation of actions for partition.]** The Supreme Court cannot consolidate two actions for partition where the land described in one suit is situated in a different county from that described in the other suit, and where one or more parties in one suit are not parties to or interested in the other. (Mayor v. Coffin, 90 N. Y. 312 [1882].)

—— **When a sale, instead of actual partition, will be ordered.]** Where several parcels of land are covered by one large mortgage which it would be difficult to apportion, and the division which exists by separate buildings makes it more valuable than it would be as a whole, with the privilege of improving it, a sale should be allowed which would produce eleven or twelve per cent net instead of an actual partition. (David v. David, 31 St. Rep. 116 [Sup. Ct. 1890].)

—— **Issues tried in a partition suit — exceptions, where considered.]** As the Code of Civil Procedure provides (§ 1544) that issues of fact in an action for partition are triable by a jury, the trial court may not disregard the findings of the jury. Exceptions taken, therefore, on the trial before the jury may be considered on appeal from the judgment. (Jones v. Jones, 120 N. Y. 589 [1890].)

—— **Issues tried by a jury — motion for a new trial under section 1544 of Code of Civil Procedure, improper.]** In an action for partition it was ordered that the issues of fact be tried at Circuit, and certain questions were framed to be answered by the jury. Trial was so had, the questions were answered by the jury and upon written consent of all parties it was directed that the further hearing of the action should be before the court at Special Term. Upon such hearing the court made findings and conclusions of law incorporating in the former the findings of the jury, and an interlocutory judgment was entered thereon.

Held, that a motion for a new trial at General Term was properly dismissed; that the issues in the action were triable by a jury as matter of right. (Code Civil Procedure, § 1544.)

That the facts found by the jury were binding upon the Special Term; and so, the trial was not by the court without a jury within the meaning of the Code of Civil Procedure (§ 1001) authorizing a motion for a new trial after entry of an interlocutory judgment, where the decision "upon trial of an issue of fact by the court" directs such a judgment. (Bowen v. Sweeney, 143 N. Y. 349 [1849].)

—— **The interlocutory judgment should provide for existing liens.]** An interlocutory judgment entered in an action of partition which makes no provision for a judgment which is an apparently valid lien on the undivided share of one of the parties is irregular, and the assignee of the judgment is entitled to have it set aside upon motion. (Kelly v. Werner, 34 App. Div. 68 [1898].)

—— **Order confirming sale cures all prior irregularities.]** The final order of confirmation of sale in a partition suit has the force and effect of a judg-

ment which binds the parties, where there is complete jurisdiction, whatever irregularities or errors may have preceded it. (Woodhull v. Little, 102 N. Y. 165 [1886].)

—— **Jurisdiction of court is confined to property described in complaint.]** A suit in partition is a proceeding *in rem* and the jurisdiction of the court is confined to the property described in the complaint. (Sandford v. Town of Hempstead, 97 App. Div. 163.)

PROCEEDS OF SALE — When real estate.] Proceeds of sale in partition of the estate of an infant defendant are considered as real estate. (Denham v. Cornell, 7 Hun, 664 [1876]; In the Matter of Thomas, 1 id. 475 [1874].)

ALLEGATION AS TO OTHER LANDS — Omission to allege that the parties own no other land in common.] The omission of a plaintiff to allege that the parties do not own any other land in common in this State is not a ground of demurrer. Effect of a failure to comply with this rule in this respect. (Pritchard v. Dratt, 32 Hun, 417 [1884].)

—— **Motion to include other lands — bill of particulars thereof — plaintiff required to pay costs.]** Where, in action for the partition of lands, the defendants deny that the premises described in the complaint were the only lands, real estate or interest therein within the States owned in common by the parties to the action, and refuse to give any information concerning such other lands, the court may properly require such defendants to furnish a bill of particulars of the other lands of which, it is claimed, the parties were seized in common. *Semble*, under Rule 65, if there are parcels of land not included in the action, the plaintiff may be subjected to the whole of the costs of the action. (Crossman v. Wyckoff, 32 App. Div. 32 [1898].)

—— **Dismissal of the complaint in partition.]** Where the plaintiff in a partition suit fails to embrace therein all lands held by the parties in common, the complaint will be dismissed under the provisions of Rule 65. (Sanford v. Goodell, 82 Hun, 369 [1894]. See, also, Beetson v. Stoops, 91 App. Div. 185, and Sandiford v. Town of Hempstead, 97 App. Div. 163.)

RULE 66.

Reference as to Title and Sale in Actions for Partition of Real Property.

Where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a Special Term for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the complaint; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances under which the

same are held. Such referee and the referee appointed to sell shall in all cases be selected by the court.

Rule 78 of 1858. Rule 79 of 1871. Rule 79 of 1874, amended. Rule 70 of 1877, amended. Rule 66 of 1880. Rule 66 of 1884. Rule 66 of 1888. Rule 66 of 1896. Rule 66 of 1900, amended.

See notes under Rule 65.

CODE OF CIVIL PROCEDURE.

§ 1545. When and how the interests of infants and nonappearing or non-answering defendants are ascertained.

ABSTRACT OF TITLE — To be produced on reference.] The referee should require the complainant to produce abstracts of title as a tenant in common in the premises, and to trace it back to the common source of title of the several tenants in common, and he should give an abstract of the conveyances of the several undivided shares of the parties in the premises from the time the several shares were united in one common source. Hamilton v. Morris, 7 Paige, 29 [1837].)

—— Need not be annexed to report.] If the referee states explicity that he has caused the necessary searches to be made, and certifies what incumbrances there are, it is sufficient, and he is not required to annex to his report a search for mortgages, etc., affecting the title. (Noble v. Cromwell, 27 How. Prac. 289 [Court of Appeals, 1860]; S. C., below, 26 Barb. 475; 6 Abb. 59.)

REFEREE — Report of — how corrected.] Where, under an order of reference in a partition suit, "to inquire and report," the referee reports correct findings of fact, but erroneous conclusions of law thereon, upon the coming in of the report, the Special Term is not required to send it back for correction, but may, without exceptions, or independent of them, draw the proper legal conclusions from the facts. (Austin v. Ahearne, 61 N. Y. 6 [1874].)

—— Power of, as to incumbrances.] The referee is authorized to take proof and pass upon the question as to the validity of a mortgage upon an undivided share claimed by one of the parties, although there is no issue in the pleadings raising the question. (Halsted v. Halsted, 55 N. Y. 442 [1874]. See Code of Civil Procedure, § 1562.)

—— Report as to whether an actual partition can be had.] (Walter v. Walter, 3 Abb. N. C. 12 [1877].)

RULE 67.

Stay of Sale in Partition or Foreclosure — Notice.

No order to stay a sale under judgment in partition or for the foreclosure of a mortgage shall be granted or made by a judge

out of court, except upon a notice of at least two days to the plaintiff's attorney.

Rule 80 of 1858. Rule 81 of 1871. Rule 81 of 1874. Rule 72 of 1877. Rule 67 of 1880. Rule 67 of 1884. Rule 67 of 1888. Rule 67 of 1896.

CODE OF CIVIL PROCEDURE.

§ 775. Stays granted by a judge out of court — when not to exceed twenty days.

STAY OF PROCEEDINGS — Order containing stay and returnable in less than two days — irregular.] An order to show cause, if made by a judge out of court and returnable in less than two days, is irregular if it contains a stay of proceedings of sale under judgment in partition or foreclosure. (Asinari v. Volkening, 2 Abb. N. C. 454 [1877].)

—— By a party not in possession nor adjudged liable for a deficiency.] A person appealing from a judgment of foreclosure and sale, who is not in possession of the mortgaged premises, nor one against whom a judgment for deficiency has been awarded, is not entitled to a stay under section 1331 of the Code of Civil Procedure; if such a party desires a stay he should apply under sections 1351 and 1352 of that Code. (Rosenbaum v. Tobler, 31 App. Div 312 [1898].)

—— Foreclosure sale of an undivided interest — when not stayed.] A sale in foreclosure of an undivided interest in certain lands will not be stayed at the instance of the mortgagor, to the end that the premises may be sold under the judgment to be entered in an action of partition, in which the mortgagor is the plaintiff, solely because, in the opinion of an expert, a better price will be obtained by the mortgagor upon a sale of the whole property than she is likely to realize from the sale of her undivided quarter interest under the judgment in foreclosure. (Bradford v. Downs, 24 App. Div. 97 [1897].)

—— Sale not stayed to await the determination of condemnation proceedings.] A sale in foreclosure will not be stayed at the instance of a junior mortgagee until the conclusion of condemnation proceedings affecting the mortgaged premises — certainly where the moving party fails to give security that the property will finally sell for sufficient to cover the plaintiff's demand. (Weekes v. McCormick, 16 App. Div. 432 [1897].)

—— When a stay may be granted by a judge out of court.] A judge out of court may, under section 775 of the Code of Civil Procedure, grant an order staying a sale in foreclosure pending an appeal to the Court of Appeals from the judgment of foreclosure by purchasers of the mortgaged property who purchased after the execution of the mortgage and were not liable for any deficiency, and who surrendered possession of the premises to the mortgagee prior to the entry of the judgment. (Mutual Life Insurance Company v. Robinson, 23 Misc. Rep. 363 [1898].)

—— **Undertaking conditioned against waste — when effective as a stay.]** An undertaking under section 1331 of the Code, conditioned against the commission of waste, is effectual as a stay on appeal from a judgment of foreclosure only where the appellant giving it is in possession of the property. (Commercial Bank v. Foltz, 35 App. Div. 237 [1898].)

RULE 68.

Payment of Money into Court — Designation of Trust Companies — Filing Order, etc., with County Treasurer — Chamberlain of New York City.

Rule 68 repealed, 1910.

CODE OF CIVIL PROCEDURE.

§ 744. Comptroller to prescribe rules and regulations for the care and disposition of moneys paid into court, which shall be binding in the absence of special directions by the court into which the money was paid.

§ 745. Money to be paid to county treasurer (unless otherwise directed), and securities to be taken in his name.

§ 746. Funds, where and how deposited or invested.

§ 747. Power of each court by special order, to direct the disposition or investment of moneys paid into it.

§ 749. Power of certain officers to bring actions relative to money paid into court.

§ 750, On death or expiration of official term of county treasurer, securities and money paid into court vest in his successor.

§ 751. Authority for paying out money paid into court.

§ 1563. When proceeds of sale of a share in partition paid into court.

§ 1564. Application therefor — what papers to be presented on.

§ 1565. Satisfaction of liens on an undivided share.

§ 1740. When the surplus arising on sale of chattels, in actions to foreclose a lien thereon, is to be paid to the county treasurer.

§ 1967. District attorney to pay over money collected to county treasurer.

§ 2116. Governor to pay into court damages ascertained under writ of assessment of damages for real property taken by the State.

§ 2117. Investment of such money.

§ 2118. How such money is obtained by the claimant.

§ 2537. Money and securities in Surrogate's Court, to be deposited with county treasurer.

§ 2748. Legacy, when to be paid over to county treasurer.

§ 2786. Money arising on sale of real estate of a deceased person to pay debts to be paid to county treasurer.

***CHANCERY RULE — Investment.]** The Chancery Rule (180) providing for the investment of funds paid into court is still in force, modified by the General Rules of Practice. (Chesterman v. Eyland, 81 N. Y. 398 [1880].)

—— Payment to a referee.] The payment of money to a referee is not payment into court. (Becker v. Boon, 61 N. Y. 317 [1874].)

—— Officer protected in paying.] An officer who has been enjoined from paying money out of a court is protected in paying under an *ex parte* order, although unfairly obtained. (People ex rel. Morris v. Randall, 73 N. Y. 416 [1878].)

—— Payment into court.] The rule as to payment into court is applied by courts of equity according to the equities of each case. (Wood v. Rabe, 52 N. Y. Supr. Ct. 20 Jones & S. 479 [Gen. T. 1885].)

—— Payment into court — proper practice.] The proper practice to adopt in the case of the payment of money into court considered. (Wilson v. Doran, 39 Hun, 88 [1886].)

RULE 69.

Order for Payment out of Court; Accounts with Trust Companies; Draft to be Countersigned by Justice; What to be Stated in Draft.

All orders directing the payment of money out of court shall direct the payment to be made to the person entitled to receive the same, and all checks or drafts for the payment of money out of court shall be drawn payable to the order of the person entitled to the moneys; and shall specify in what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made. No order in any pending

* CHANCERY RULE 180.— Whenever a party, as tennnt for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum and of receiving and paying over the interest or income thereof, but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent. on the principal sum during the probable life of such person, according to the Portsmouth or Northampton tables. And where money belonging to an infant or an absentee, or to an unknown owner, is brought into court for his benefit, under a final decree in partition, if no direction for the investment thereof is contained in the decree, and the money is not applied for within six months thereafter, it shall be the duty of the register, assistant register, or clerk with whom the same is deposited, and without any special order for that purpose, to cause it to be invested in the public stocks or other permanent securities, or in the New York Life Insurance or Trust Company, to accumulate for the benefit of the party entitled thereto. He may also in like manner reinvest the income of such money, from time to time, without any special order for that purpose, whenever, in his opinion, the amount of such income is sufficient to render an investment thereof proper and beneficial to the person interested therein. And where money is brought into court, upon the sale of an infant's estate by a special guardian, if the infant will not arrive at age within six months thereafter, it shall be the duty of the register, assistant register, or clerk, to whose credit such money is deposited in bank, without any special order of the court for that purpose, to deposit such money in the Trust Company to accumulate, or to invest the same in the public stocks of this State or of the United States; or to invest it upon bond and mortgage on unincumbered real estate of double the value, exclusive of buildings, payable when the infant becomes of age, or sooner if required to be paid by the order of the court, with interest to be paid annually or semi-annually; and to reinvest the same from time to time as above directed.

action, for the payment of money out of court, shall be made, except on regular notice or order to show cause, duly served on the attorneys of all the parties who have appeared therein, or filed notice of claim thereto. When moneys are deposited by the order of the court in any trust company, the entry of such deposit in the books of the company shall contain a short reference to the title of the cause or matter in which such deposit is directed to be made, and shall specify also the time from which the interest or accumulation on such deposit is to commence, where it does not commence from the date of such deposit. The secretary of the company shall, on or before the first day of February in each year, transmit to the Appellate Division of the Supreme Court in the department in which the trust company is located, a statement of the accounts in each department, showing the amount, on the last preceding first day of January, including the interest or accumulation on the sum deposited to the credit of each cause or matter.

In every draft upon the trust company by the county treasurer or chamberlain, for moneys deposited with the said company, or for the interest or accumulation on such moneys, the title of the cause or matter on account of which the draft is made, and the date of the order authorizing such draft shall be stated, and the draft shall be made payable to the order of the person or persons entitled to the money. Any attorney or other person procuring an order for the payment of money out of court, shall obtain two certified copies of the order, both to be countersigned by the judge granting the same; one copy shall be filed with the county treasurer and the other shall accompany the draft drawn upon the depository and be filed with it, and the several banks and other depositories having trust funds of the court on deposit, are forbidden to pay out any of such funds without the production and filing of such certified and countersigned copy order. This provision is not intended to dispense with any of the requirements of this rule, as to the form of the draft, nor to apply to a case where periodical payments are directed to be made, as provided for by the last sentence of this rule, after the first payment from such fund shall have been made under an order of the court, in the manner herein specified. Where periodical payments are directed to be made out of a fund deposited with such company,

the delivery to the secretary of the company of one copy of the order authorizing the several payments shall be sufficient to authorize the payment of subsequent drafts in pursuance of such order.

Rule 83 of 1858, amended. Rule 84 of 1871, amended. Rule 84 of 1874. Rule 75 of 1877. Rule 70 of 1880, amended. Rule 70 of 1884, amended. Rule 70 of 1888, amended. Rule 69 of 1896. Rule 69, as amended 1910. See note under Rule 68.

CODE OF CIVIL PROCEDURE.

§§ 743–754. Payment into court, and care and disposition thereof.

RULE 70.

Gross Sum in Payment of Life Estate — How Ascertained.

Whenever a party, as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of five per cent. on the principal sum, during the probable life of such person, according to the Carlisle Table of Mortality.

Rule 84 of 1858, amended. Rule 85 of 1871. Rule 85 of 1874. Rule 76 of 1877, amended. Rule 71 of 1880. Rule 71 of 1884. Rule 71 of 1888. Rule 70 of 1896. Rule 70 of 1900, amended.

CODE OF CIVIL PROCEDURE.

§ 1553. What provision is made in an action for partition for dower interest, etc.
§ 1567. Sale, where a power interest exists in the entire property.
§ 1568. Effect of a sale free from dower.
§ 1569. Gross sum in lieu of dower, etc.
§ 1570. Ascertainment of value of inchoate dower interest, etc.
§ 1571. Release of dower.
§ 1583. Investment for tenant for life, etc.
§ 1617. In an action for dower, plaintiff may consent to receive a gross sum in lieu thereof.

§ 1618. Leave to defendant to pay a gross sum in lieu of dower.
§ 1619. Interlocutory judgment for sale — ascertainment of dower.
§ 1620. Consent to take a lot in lieu of dower.

NORTHAMPTON TABLES.] (See copy of Northampton tables, *post*, page 463.)

—— In action to recover damages for death.] In an action to recover damages occasioned by the death of plaintiff's intestate, the Northampton tables are properly received in evidence to show the probable duration of the life of the deceased. (Sauter v. N. Y. C. R. R. Co., 6 Hun, 447 [1876]; Schell v. Plumb, 55 N. Y. 592 [1874]; S. C., 16 Abb. [N. S.] 19 [Gen. T. 1873].)

—— Use of Northampton tables to estimate the value of a husband's life.] The Northampton tables may be used by the jury in estimating the probable duration of the life of a husband whose wife has sued under the Civil Damage Act to recover damages because of his death, resulting from his intoxication. (Davis v. Standish, 26 Hun, 608 [1882].)

CARLISLE TABLE OF MORTALITY.] (See copy of Carlisle Table of Mortality, *post*, page 465.)

CONTINGENT DOWER RIGHT — Rule for computation of.] The proper rule for computing the present value of the wife's contingent right of dower during the life of her husband, is to ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband, and the difference between those two sums will be the present value of her contingent right of dower. (Jackson v. Edwards, 7 Paige, 386–408 [1839].)

—— Gross sum in lieu of a life estate — discretionary with the court.] Except in the case of dower which is provided for by the Code of Civil Procedure, subdivision 3, section 2793, whether the widow shall have a gross sum in lieu of a life estate rests in the discretion of the court. The General Rules of Practice simply provide for the manner of estimating the gross sum when it is allowed. (Matter of Zahrt, 94 N. Y. 605 [1884].)

—— Gross sum not awarded for an inchoate right of dower.] A woman having an inchoate right of dower in surplus moneys arising on a sale in foreclosure is not entitled to a gross sum in lieu of such right. (Citizens' Savings Bank v. Mooney, 26 Misc. Rep. 67 [1899].)

—— When moneys representing an inchoate right of dower will not be paid to the husband.] The sole persons interested in a surplus arising on a mortgage foreclosure sale being the owner of the equity of redemption and his wife, who had an inchoate right of dower in the mortgaged premises, two-thirds of the money were paid to the husband, and the remaining one-third was deposited in court to secure the inchoate dower interest of the wife, who had obtained a judgment of separation from her husband, and was dependent upon alimony awarded her thereby.

Held, that, under the circumstances, the court should not direct the payment of the money, so deposited, to the husband, upon the execution of a bond with two sureties, conditioned upon the payment to the wife, in case she survived the husband, of the income of the money during her life.

Semble, that in a proper case the court, in its discretion, might make such an order. (Emigrant Industrial Savings Bank v. Regan, 41 App. Div. 523 [1899].)

RULE 71.

Fees on Executing a Commission of Lunacy — Committee May Pay Costs, When — Special Order of the Court — When Necessary.

On the execution of a commission of lunacy, etc., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to an allowance to be fixed by the court, not exceeding ten dollars for each day to each of such commissioners.

Where the costs and expenses exceed $250, besides witness' fees and allowances to commissioners, the committee shall not be at liberty to pay the same out of the estate in his hands, without a special order of the court upon notice to all parties who have appeared in such proceedings, directing such payment.

Rule 85 of 1858, amended. Rule 86 of 1871. Rule 86 of 1874. Rule 77 of 1877, amended. Rule 72 of 1880. Rule 72 of 1884. Rule 72 of 1888. Rule 71 of 1896.

CODE OF CIVIL PROCEDURE.

§ 340. The County Courts have jurisdiction of proceedings for the appointment of a committee.
§ 2320. Concurrent jurisdiction of courts as to committee of lunatic, etc.
§ 2321. Duty of court having jurisdiction.
§ 2322. Committee may be appointed.
§ 2323. Application for committee — by whom made.
§ 2323a. Application where incompetent is confined in State institutions — contents of petition — proceedings thereon.
§ 2323b. Costs and disbursements thereon.
§ 2324. Duty of certain officers to apply.
§ 2325. Contents, etc., of petition — proceedings on presentation thereof.
§ 2326. When foreign committee may be appointed.
§ 2327. Order for commission or for trial by jury in court.
§ 2328. Contents of commission.
§ 2329. Commissioners to be sworn — vacancies, how filled.
§ 2330. Jury to be procured — proceedings thereupon.

§ 2331. Proceedings upon the hearing.
§ 2332. Return of inquisition and commission.
§ 2333. Expenses of commission.
§ 2334. Proceedings upon trial by jury in court.
§ 2335. Subject of inquiry in cases of lunacy.
§ 2336. Proceedings upon verdict or return of commission.
§ 2336a. Limitations of sections 2325–2336.
§ 2337. Security to be given by committee.
§ 2338. Compensation of committee.
§ 2339. Committee under control of court — limitation of powers of.
§ 2340. Committee of property may maintain action, etc.
§§ 2341–2342. *Ib.*, to file inventory and account.
§ 2343. Property — when to be restored.
§ 2344. *Ib.*, disposition in case of death.

COSTS — Authority of committee to pay.] The committee are authorized to pay the costs of the attorney who conducted the proceedings upon the inquisition to an amount not exceeding $50. (Matter of Clapp, 20 How. Prac. 385 [Gen. T. 1861].)

—— Discretionary — will not be allowed unless proceedings are taken for the benefit of lunatic.] In proceedings to have a person declared a lunatic, or to traverse or supersede the commission, the cost rests in the sound discretion of the court, and will not be granted unless the proceedings are instituted for the benefit of the lunatic, and are instituted and prosecuted fairly and in good faith. (In the Matter of Beckwith, 3 Hun, 443 [1875].) In certain cases the costs will be allowed against the attorney instituting the proceedings. (Id.) When the cost of the proceedings cannot be charged against a petitioner proceeding in good faith. (Matter of McAdams, 19 Hun, 292 [1879]. See, however, Code of Civil Procedure, § 2336. See, also, Carter v. Beckwith, 128 N. Y. 312.)

—— Costs where the lunatic dies before the confirmation of the inquisition.] Where a person examined under a commission *de lunatico inquirendo* dies after the jury has found him to be insane, but before the finding has been confirmed by the court or any committee appointed, the costs of the commission are payable out of the estate. (Matter of Lofthouse, 3 App. Div. 139 [1896].)

—— Duty of committee to see that the issues raised by an alleged lunatic are properly tried.] Where the lunatic is allowed to traverse the inquisition, it is the duty of the committee to oppose the traverse and see that the issues are properly tried, and when on such traverse the alleged lunatic is found not to be of unsound mind, the committee is entitled to the legal expenses incurred, in the proceedings on the inquisition, and in opposing the traverse of it, including the bills of the attorneys of the committee, and a reasonable counsel fee upon the trial of the traverse, and all disbursements, and to be paid out of the funds of the estate in their hands. (Matter of Clapp, 20 How. Prac. 385 [Gen. T. 1861].)

RULE 72.

Reference on Default in an Action to Obtain a Divorce or Separation — Who May be Referee — Proof of Service of Summons and Complaint — Notice of Appearance, etc., Not Sufficient — Complaint for Divorce, Averments in — Plaintiff to be examined on Oath — Failure of Defendant to Answer.

When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, the court shall in no case order the reference to a referee nominated by either party nor to a referee agreed upon by the parties, nor without proof by affidavit conformable to the rules relating to the manner and proof of the service of the summons and complaint. Notice of appearance and retainer shall not be sufficient to excuse such proof.

When the action is for a divorce on the grounds of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and, also, where, at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff, and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the Code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be procured stating the above facts.

In an action for a divorce or for the annulment of a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll. The court may, however, in case the evidence is such that the public interest require that the examination of the witnesses should not be public, exclude all persons from the courtroom except the parties to the action and their counsel and the witnesses, and shall order such evidence, when filed with the clerk, sealed up and ex-

hibited only to the parties to the action or some one specially interested upon order of the court.

Rule 86 of 1858. Rule 87 of 1871, amended. Rule 87 of 1874, amended. Rule 78 of 1877. Rule 73 of 1880. Rule 73 of 1884. Rule 73, of 1888, amended. Rule 72 of 1896.

CODE OF CIVIL PROCEDURE.

§ 438, subd. 4. Service of summons may be without the State or by publication in actions for divorce, etc.
§ 831. Husband and wife not competent to testify against each other in an action or special proceeding founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery.
§ 1012. Reference not made, of course, by consent of parties in an action for divorce, etc.— court must designate a referee.
§ 1024. In actions for divorce, etc., a referee may be appointed to whom all the parties object.
§ 1229. In an action for divorce, etc., judgment can be rendered only by the court.
§ 1742. Action by woman married under sixteen to annul a marriage.
§ 1743. In what other cases a marriage may be annulled.
§ 1744. Action when a party was under the age of consent.
§ 1745. *Id.*, when a former husband or wife was living.
§ 1746. *Id.*, when a party was an idiot.
§ 1747. *Id.*, when a party was a lunatic.
§ 1748. Action by next friend of idiot or lunatic.
§ 1749. Issue of marriage annulled for idiocy or lunacy — entitled to succeed, etc.
§ 1750. Action on the ground of force, fraud, etc.
§ 1751. Custody, maintenance, etc., of issue of such a marriage.
§ 1752. Action on the ground of physical incapacity.
§ 1753. Certain proceedings regulated in action to annul a marriage.
§ 1754. Judgment annulling marriage; how far conclusive.
§ 1755. How next friend of infant, lunatic, etc., allowed to sue, etc.
§ 1756. In what cases actions for divorce can be maintained.
§ 1757. Answer — mode of trial — judgment by default — right of the co-respondent to appear.
§ 1758. Divorce, when denied, although adultery be proved.
§ 1759. Regulations when the action is brought by the wife.
§ 1760. *Id.*, when the action is brought by the husband.
§ 1761. Marriage — after divorce for adultery.
§ 1762. For what causes an action for separation may be brought.
§ 1763. In what cases it may be mantained.
§ 1764. What the complaint must state.
§ 1765. Answer in action for, may set up plaintiff's misconduct.

§ 1766. Support, etc., of wife and children, where the action is brought by the wife.
§ 1767. When judgment of separation may be revoked.
§ 1768. Married woman plaintiff, is deemed resident, when.
§ 1769. Alimony *pendente lite* in action for divorce or separation — costs — execution.
§ 1770. What is deemed a counterclaim in.
§ 1771. Court to give direction as to custody, etc., of children and support of plaintiff where the action is brought by the wife.
§ 1772. Security for support, etc., of wife and children.
§ 1773. Support, etc.— provisions for — when enforced by punishment for contempt.
§ 1774. Regulations respecting judgment by default in action for.

DEFAULT — This rule applies only to cases of default.] In an action by a wife for divorce on the ground of adultery, where the case is litigated, it is not incumbent upon the plaintiff to make affirmative proof of the allegations inserted in her complaint in compliance with the rules of the Supreme Court (Rule 73), *i. e.*, that the adultery charged was "without the consent, privity or procurement of the plaintiff," and that the latter has not voluntarily cohabitated with defendant since discovery of the fact; these are matters of affirmative defense. It is only to provide for a case of defendant suffering a default that these possible defenses are required to be negatived by plaintiff by verified complaint or affidavit. (McCarthy v. McCarthy, 143 N. Y. 235 [1894]; Lowenthal v. Lowenthal, 157 id. 236 [1898].)

—— The rule applies only where the defendant makes default, and has no application to contested actions. No rule can enlarge or abridge the rights conferred by the Code itself. (Ackerman v. Ackerman, 123 App. Div. 750; Freeman v. Freeman, 126 id. 601.)

—— What need not be proven on default.] If the verified complaint in an action for an absolute divorce avers the facts enumerated in Rule 72, *i. e.*, that the adultery was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since he discovered it or the adulterous intercourse; and that he had not since voluntarily cohabited with the defendant, the plaintiff need not and should not, on default, show these facts. If they are not averred in the complaint, then they should be shown by an affidavit. (Evans v. Evans, 27 Misc. Rep. 10 [Kings Sp. T. 1899].)

—— This rule applies only to cases of default, and the things stated in it are not a part of the plaintiff's case, but are matters of defense which the plaintiff is permitted to aver in the complaint, in anticipation of a default. (Evans v. Evans, 27 Misc. Rep. 10 [Kings Sp. T. 1899].)

JURISDICTION — Dependent on the statute.] The former Court of Chancery in this State had no jurisdiction to grant divorces independent of the statute on that subject. (Crain v. Cavana, 62 Barb. 109 [Gen. T. 1862].)

—— The power of the courts to declare a marriage void is derived exclusively from the statutes. (Peugnet v. Phelps, 48 Barb. 566 [Sp. T. 1867].)

—— The courts in this State have no common-law jurisdiction over the subject of divorce; their authority is confined altogether to the exercise of such express and incidental powers as are conferred by statute. (Erkenbrach v. Erkenbrach, 96 N. Y. 456 [1884]; Walker v. Walker, 155 id. 77 [1898].)

—— **After the dissolution of a marriage no action for divorce will lie.]** A judgment dissolving the marriage was recovered by a wife against her husband. Held, that it disabled the husband from further prosecuting an action brought by himself against her. (Jones v. Jones, 36 Hun, 414 [1885].)

—— **What facts sufficient to show residence in this State.]** Where the plaintiff was an opera singer and since her marriage had resided most of the time in New York city, had bank accounts there, and when filling engagements abroad gave New York city as her address, held sufficient to entitle plaintiff to sue in New York State. (Doeme v. Doeme, 96 App. Div. 284.)

JOINDER — Actions for divorce and for separation cannot be joined.] A cause of action for an absolute divorce cannot be united with one for separation, and in such case the failure of the plaintiff to separately state her cause of action does not deprive the defendant of his right to demur to the complaint. (Zorn v. Zorn, 38 Hun, 67 [1885]; Bucholz v. Bucholz, 1 How. Prac. [N. S.] 40 [N. Y. Sup. Ct. Sp. T. 1884].)

CONTRACTS — Agreement by a husband to support his wife living apart.] Agreement by a husband to support a wife living apart from him — not void as against public policy — when it is mutual the husband cannot revoke it without the consent of the wife. (Mann v. Hulbert, 38 Hun, 27 [1885].)

—— **Agreement by a wife to share her alimony with her attorney, is void.]** An agreement by a wife to compensate an attorney for conducting an action to be instituted by her against her husband for a separation, by giving him certain percentages of such sums as should be awarded her for alimony, is void as against public policy. (Van Vleck v. Van Vleck, 21 App. Div. 272 [1897].)

—— **Agreement to live apart as a consideration for a note.]** A note given by a husband to his wife for money loaned is void when part of the consideration is an agreement to live apart. (Friedman v. Bierman, 43 Hun, 387 [1887].)

—— **Agreement to renew marital relations — effect of its breach.]** Where an agreement has been entered into between a husband and wife to discontinue an action for divorce and resume marital relations, the husband has a right, on the breach of the agreement by his wife, to recover property transferred to her in consideration of such agreement. (Bolen v. Bolen, 44 Hun, 362 [1887].)

—— **The husband is liable for legal services rendered the wife in an action brought by the wife for a separation.]** An attorney may maintain an action against a husband to recover the value of legal services rendered by the attorney in the institution and prosecution of an action against the husband by the wife for a separation, upon the ground of cruel and inhuman treatment.

In such an action the plaintiff must show affirmatively that the suit was for the protection and support of the wife, and that the conduct of the husband was such as to render its institution and prosecution reasonable and proper.

Quære, whether the same rule exists in the case of an action for divorce. (Naumer v. Gray, 28 App. Div. 529 [1898].)

—— **Return to husband under his agreement to pay costs and expenses.]** After the commencement of an action for separation on the ground of cruel and inhuman treatment, an agreement was made by which the wife was to return and live with defendant as his wife, and he was to pay the costs and expenses of her attorney. After her return to him he served a verified answer in the action and refused to pay such costs and expenses. Held, that the court had power to compel the husband to pay the costs and expenses of the action as fixed by the court. (Smith v. Smith, 35 Hun, 378 [Sup. Ct. 1885]. See 99 N. Y. 639.)

MAINTENANCE — Decree for separation essential to one for maintenance.] Under section 54, 2 Revised Statutes,* a decree for maintenance could only be made as an incident to one for separation. (Douglass v. Douglass, 5 Hun, 140 [1875].)

ADULTERY — What averments as to the adultery are sufficient.] A complaint in an action for divorce because of adultery, which avers the adultery with a person whose name is unknown, between certain specified dates, and in a town or city named, and further avers that the plaintiff is unable more particularly to specify the time and place, is sufficient. (Mitchell v. Mitchell, 61 N. Y. 398 [1875].)

—— **Allegations as to time and place of adultery.]** In an action for divorce, allegations of adultery committed with persons unknown to the party pleading, must, nevertheless, state specifically times and places. Motion to make pleadings more definite and certain, when granted. (Tim v. Tim, 16 Abb. Prac. [N. S.] 39 [Sup. Ct. 1874]; Cardwell v. Cardwell, 12 Hun, 92 [1877]. See, however, Mitchell v. Mitchell, 61 N. Y. 398.)

—— **How adultery should be charged.]** (Clark v. Clark, 7 Rob. 276 [N. Y. Supr. Ct. Sp. T. 1867]; Anonymous, 17 Abb. 48 [N. Y. Supr. Ct. 1862]; Heyde v. Heyde, 4 Sandf. 692 [N. Y. Supr. Ct. 1852].)

—— **How set up in answer.]** The adultery should be set up in the answer in the same manner, and be accompanied with the same allegations as are required when charged in the complaint. (Morrell v. Morrell, 3 Barb. 236 [Gen. T. 1848]; S. C., 1 id. 318.)

—— **What allegations sufficient.]** Where the defendant alleged in her answer that the plaintiff, in February and March, 1867, at the cities of New York and Brooklyn committed adultery, and thereby contracted a veneral disease, which he communicated to the defendant some time about the month of March, 1687, held, that this was sufficient. (Clark v. Clark, 7 Rob. 276 [Sp. T. 1867].)

—— **Adultery of plaintiff connived at by defendant, no defense.]** The fact of the adultery of the husband, if connived at by the wife, does not prevent him from getting a divorce because of her adultery. (Bleck v. Bleck, 27 Hun, 296 [1882].)

—— **What does not constitute a procurement or connivance.]** Where the suspicions of a husband have been aroused, and he seeks to detect his wife's infidelity, if it exists, and takes no steps to prevent her carrying out her manifest purpose of meeting the man whom he suspects as being, and who proves to be, her paramour, leaving her to her own volition, his acts in so

* Repealed.

doing do not amount to the procurement of, or connivance at, his wife's adultery under section 1758 of the Code of Civil Procedure. (Pettee v. Pettee, 77 Hun, 595 [1894].)

—— **Decision sustaining finding of adultery not binding on the Court of Appeals.]** A finding by the General Term on conflicting evidence that there is evidence to support the affirmative finding of the jury upon the issue of adultery, is binding upon the Court of Appeals. (Lowenthal v. Lowenthal, 157 N. Y. 236 [1898].)

—— **Finding of jury upon the question of connivance not in issue.]** The finding of the jury that the defendant's adultery was connived at by the plaintiff may properly be disregarded where the question of connivance was not in issue. (*Ib.*)

—— **How connivance should be negatived.]** (Myers v. Myers, 41 Barb. 114 [Sp. T. 1863].)

—— **Judgment on finding of adultery in the absence of an affirmative defense.]** Where the answer sets up no affirmative defense and the jury find in favor of the plaintiff on the issue of adultery, which was the only issue presented to them, it is proper for the court to order judgment for the relief demanded in the complaint without making findings or conclusions, or filing a decision under section 1022 of the Code of Civil Procedure. (Lowenthal v. Lowenthal, 157 N. Y. 236 [1898].)

—— **Verdict upon issue of adultery is conclusive.]** The finding of the jury upon the issue of adultery is conclusive unless the verdict is set aside or a new trial is granted. (*Ib.*)

—— **Adultery of plaintiff — a defense and ground of affirmative relief.]** Adultery committed by the plaintiff is, when set up in the answer, a perfect defense to an action for an absolute divorce, and is also a ground for affirmative relief in the same action. (Anonymous, 17 Abb. 48 [1862].)

—— **Practice where affirmative defenses are tried in equity.]** It seems that when the answer in an action for divorce sets up affirmative defenses, and the only issue sent to a jury is that of adultery, and the other issues are tried in equity, it would be proper practice to return the finding on the issue of adultery to the Special Term, it being conclusive there, and then to file a decision as to all the issues, under section 1022 of the Code. (*Ib.*)

—— **What evidence is required to establish it.]** In a civil action the fact of adultery may be established by proof of such facts and circumstances as under the rules of evidence are competent to be proved, and which satisfy the mind of the tribunal required to pass upon the question of the truth of the charge. No further proof of the fact is required than of other facts in other actions. (Allen v. Allen, 101 N. Y. 658 [1886].)

—— **Counterclaim for annulment of the marriage — not good.]** A cause of action for annulment of a marriage cannot be set up as a counterclaim in an action for divorce or separation. (Taylor v. Taylor, 25 Misc. Rep. 566 [1898].)

REFERENCE — Proper form of order.] In an action for divorce, if no issue has been joined, a reference to take and report evidence is proper; where issue has been joined, the reference must be to hear and determine the issues.

(Sullivan v. Sullivan, 52 How. Prac. 453 [N. Y. Supr. Ct. Sp. T. 1877]. See Rule 72 as amended.)

—— **Affidavit and proof as to connivance, and that five years have not elapsed.]** Where the verified complaint in an action for absolute divorce contains averments that the adultery was committed without the consent, connivance or procurement of plaintiff; that five years have not elapsed since discovery thereof, and that plaintiff has not since then voluntarily cohabited with the defendant, the plaintiff need not, on default, show these facts by affidavit, nor is proof thereof necessary or proper. (Evans v. Evans, 27 Misc. Rep. 10 [1899].)

—— **Proceedings void if parties agree upon referee.]** Where, in a matrimonial action, the parties agree upon a referee, who is appointed by the court, and they proceed in disregard of the statutory provisions against such appointment, such procedure is not a mere irregularity, but the proceedings are unquestionably void. (Pratt v. Pratt, 2 App. Div. 534 [1896].)

—— Parties to an action for divorce cannot agree upon a referee to take testimony to be used upon the reference ordered by the court upon application for judgment. (White v. White, 66 Misc. Rep. 592.)

—— **Reference consented to — court to name referee.]** The spirit and intention of section 1012 of the Code of Civil Procedure is that the court, when a reference of an action brought for a divorce has been already consented to, must name a referee of its own motion, and without the consent or agreement, as to the person to be named, of the counsel or parties. (Ives v. Ives, 80 Hun, 136 [1894].)

—— **Naming a referee in the stipulation.]** In an action brought to secure a divorce, the parties thereto consented in open court to a reference, not to any particular person, but simply that the case should be referred, the plaintiff agreeing to it as a condition of her not at once proceeding to trial. Thereafter, by a stipulation entered into between the parties, to which the court acceded, a certain person was named as referee.

Held, that the plaintiff was not entitled to have the whole order vacated because that portion of the order, designating the particular person before whom the reference was to be tried, was improperly made. (*Ib.*)

—— **When the court cannot appoint another referee in place of the one agreed upon.]** Where the court vacates an order of reference for the reason that the matter was heard before a referee agreed upon by the parties, the reference falls when the order is vacated, and as the consent was not one to refer generally, but only to a particular referee, it is erroneous for the court to appoint a new referee. (Pratt v. Pratt, 2 App. Div. 534 [1896].)

—— **Review of evidence on a referee's report by the judge.]** How far a judge should review the evidence on the report of a referee on an application for divorce. (Anon., 3 Abb. N. C. 161 [N. Y. Supr. Ct. Sp. T. 1877]; Malcolm v. Foster, 5 Wkly. Dig. 310 [City Ct. of Brooklyn, Sp. T. 1877].)

—— **Court cannot set aside a referee's report and order issues to be tried at Circuit.]** In an action brought for divorce on the ground of adultery, a referee was appointed, under a stipulation of the parties, to hear and determine the action, who, after a trial, made a report in favor of the plaintiff.

On application to the Special Term for the confirmation of this report, the motion was denied and the issues in the action were sent to the Circuit for trial. Held, that the report of a referee upon such a trial stands as the decision of the court, which will not review the findings upon the merits but will only make such examination as may be necessary to ascertain whether the report has any support in the evidence, or whether there has been fraud or collusion or any evil practice in the case by either party. After such examination the application for judgment will either be granted or denied, but the report will not be set aside; and where the parties have agreed to a reference the court has no authority, in the absence of a reason sufficient in law, to disregard the order of reference and order a trial at the Circuit. (Ryerson v. Ryerson, 55 Hun, 191 [1890].)

—— **Can be reviewed only by the General Term.]** In an action brought to obtain an absolute divorce the Special Term has no power, after a trial before a referee, to examine the case upon the merits or to reverse the report of the referee for errors or irregularities committed on the trial, and the only manner in which the trial before the referee can be reviewed is by an appeal to the General Term. (Huntley v. Huntley, 73 Hun, 261 [1893].)

—— **Court cannot consider the evidence where the decision is against the divorce.]** Where the issues have been fully and fairly tried before a referee to hear and determine, his decision should stand as a guide for the court in rendering judgment unless some unjust, inadvertent or unwise ruling appears which tended to destroy the safeguards which the court throws around the indissolubility of the marriage tie. Upon motion to confirm the report of a referee appointed to hear and determine an action for divorce the court will not consider the evidence where the decision was against a divorce, as such a review is not within the scope of section 1229 of the Code. (Smith v. Smith, 7 Misc. Rep. 305 [Sup. Ct. 1894].)

—— **Power of the Special Term over the report of a referee in an action for divorce.]** The Special Term is not required, under section 1229 of the Code of Civil Procedure, to confirm the report of a referee appointed in an action for an absolute divorce, and to direct judgment accordingly, but may refuse to confirm it if the evidence certified does not support it satisfactorily to the conscience of the court.

Semble, that the Special Term cannot direct a judgment contrary to the report of the referee. (Gorham v. Gorham, 40 App. Div. 564 [1899]. See, however, Anonymous, 3 Abb. N. C. 161 [Sp. T. 1877]; Schroeter v. Schroeter, 23 Hun, 230 [1880]; Ross v. Ross, 31 Hun, 140 [1883].)

TRIAL — How conducted.] It is not proper, where a reference has been made to take proofs and report, with the referee's opinion, for the court to set aside the report and give judgment for the defendant. The issues should be tried by the court and the facts be found by it. (Myer v. Myer, 7 Wkly. Dig. 535 [Gen. T. 1878].)

—— **How case noticed for trial.]** After reference to take testimony and report with referee's opinion, a case must be brought on for trial on the usual notice and the evidence presented. A motion to confirm the referee's report at Special Term is improper. (Westheimber v. Westheimber, 1 Law Bull. 34 [Sp. T. 1879].)

—— **Issues must be settled, before notice of trial.]** The issues as to adultery, in an action for divorce, must be settled before notice of trial can be given or the cause placed on the calendar. (Leslie v. Leslie, 11 Abb. [N. S.] 311 [N. Y. Com. Pl. 1871].)

See notes under Rule 31.

—— **Issues only to embrace facts contested by the pleadings.]** In an action for divorce on the ground of adultery, issues are only to be made up for the trial of the facts contested by the pleadings. (Morrell v. Morrell, 3 Barb. 236 [1848]; Forrest v. Forrest, 6 Duer, 102 [Gen. T. 1856]; S. C., 3 Abb. 144.)

—— **What issue improper.]** An issue whether the party was guilty of adultery with a specified person at any time before the commencement of the action should not be allowed. (Strong v. Strong, 3 Rob. 675 [Gen. T. 1865]; S. C., 1 Abb. [N. S.] 233.)

—— **Right of third party charged, to attend, examine witnesses, etc.]** (Clay v. Clay, 10 N. Y. Wkly. Dig. 362 [Gen. T. July, 1880].)

—— **Corespondents may be served and appear.]** (Chapter 661 of the Laws of 1899.)

BY JURY.] Either party is entitled to demand a jury trial. A corespondent may defend the action. (Code of Civil Procedure, § 1757.)

—— **Jury trial — a matter of right.]** The issues as to adultery, raised in an action for divorce, must be tried before a jury unless a jury trial is waived. (Batzel v. Batzel, 42 N. Y. Supr. Ct. Rep. 561 [Sp. T. 1877].)

—— **Jury trial — not discretionary.]** The right to a trial of the issues by a jury in an action for divorce on the ground of adultery is a constitutional one and cannot be reduced to a discretionary one by the General Rules of Practice. To what class of cases General Rule No. 31 must be confined. (Conderman v. Conderman, 44 Hun, 181 [1887]; Whitney v. Whitney, 76 id. 585 [1894].)

—— **Finding of the jury — when conclusive.]** Where adultery is the sole issue, and that is tried by jury, their finding is conclusive on the court. (Lowenthal v. Lowenthal, 157 N. Y. 236, affg. 92 Hun, 385 [1895].)

—— **Rejecting verdict.]** This rule does not preclude the court from rejecting the verdict and ordering a new trial, on its own motion, on the final hearing, or from finding the question of fact for itself. (See Schroeter v. Schroeter, 23 Hun, 230 [1880]. See Lowenthal v. Lowenthal, 92 Hun, 385 [1895].)

—— **When the court may correct the wording of the verdict.]** Where in an action for divorce in which thirteen issues were submitted to the jury under a charge that unless the party on whom rested the burden of proof had proved his allegations the answer to the question should be "No," the jury rendered a verdict in which twelve of the issues were answered "No," while the other one was answered "Not proven." Held, that the court was justified in correcting the wording of the verdict and substituting the word "No" for the words "Not proven." (Cruikshank v. Cruikshank, 38 App. Div. 580 [1899].)

—— **Where the jury disagree as to some and agree as to one of the issues.]** Where the jury disagree as to all the issues except one, as to which they were directed to find for the defendant, there is a mistrial and no judgment

can be rendered thereon, but upon a new trial all the issues are to be considered. (Smith v. Smith, 27 Misc. Rep. 252 [1899].)

—— **The constitutional right overrides the Rules.]** Even though an application to frame issues is limited as to time by the General Rules of Practice, the constitutional right to a trial by jury in a divorce action cannot be impaired thereby. (Sigel v. Sigel, 28 Abb. N. C. 308 [N. Y. Supr. Ct. 1892].)

—— **Waiver — as to issues.]** In an action for divorce it is necessary that the questions to be tried by a jury be stated, and the parties have a right to have them settled for that purpose; and where the issues are stated and settled in pursuance of a stipulation of the attorneys for the parties, they respectively waive the right to have, preliminary to the trial, any more questions specifically stated and settled. (Whitney v. Whitney, 76 Hun, 585 [1894].)

—— **Waiver of jury trial.]** Where, on motion to confirm the report of a referee, in an action for divorce on the ground of adultery, it did not appear by the moving papers that a jury trial had been waived and consent to the reference given in writing and filed, held, that the reference was irregular and the motion must be denied. (Diddell v. Diddell, 3 Abb. 167 [Sp. T. 1856].)

—— **Notice for an equity term, not a waiver of a jury trial.]** The fact that a case is noticed for trial at an equity term does not waive the right to move after the trial of issues as to value or damages. (Eggers v. Manhattan Co., 27 Abb. N. C. 463 [N. Y. Supr. Ct. 1891].)

—— **Evidence considered and held sufficient to establish the fact of adultery necessary to authorize a decree of divorce.]** (Schreiber v. Schreiber, 3 Misc. Rep. 411 [Supr. Ct. 1893].)

NEW TRIAL — What reviewable on appeal.] In an action for divorce, a new trial of the issues will not be granted for other than substantial errors upon the trial. In an action for divorce where no motion for a new trial was made and no direction was given that it be heard, the person against whom the judgment was rendered is in no position to raise, upon an appeal therefrom, any question upon the rulings as to the reception or rejection of evidence at the trial of the issues submitted to the jury, or as to the force or weight of the evidence in support of the verdict. (Whitney v. Whitney, 76 Hun, 585 [1894].)

CONDONATION — It should be pleaded.] While the plaintiff in an action for absolute divorce is bound to negative the forgiveness of the offense on account of which relief is asked, and is bound to prove such fact where the defendant makes default, yet, where the defendant interposes an answer, he should, if he intends to rely upon the condonation as a defense, allege the same in his answer and establish it by proof. (Merrill v. Merrill, 41 App. Div. 347 [1899].)

EVIDENCE — In an action for divorce on the ground of adultery.] Admissibility of the confession of a defendant in an action for divorce on the ground of adultery. A decree will be granted when all just reason to believe that collusion exists is removed. (Madge v. Madge, 42 Hun, 524 [1886].)

—— **A husband cannot testify to his wife's adultery.]** A husband is forbidden by the provisions of section 831 of the Code of Civil Procedure to

testify to material facts tending to establish the charge of adultery alleged by him in his complaint to have been committed by his wife. (Colwell v. Colwell, 14 App. Div. 80 [1897].)

—— **Evidence of husband for his wife.]** A husband may testify for, but not against, his wife in an action for divorce. (Bailey v. Bailey, 41 Hun, 424 [1886]. See, also, Code of Civil Procedure, § 831.)

—— **The evidence of prostitutes must be corroborated.]** The courts regard the uncorroborated evidence of prostitutes and private detectives as insufficient to break the bonds of matrimony; but in divorce cases the courts must take such evidence as the nature of the case permits, circumstantial, direct or positive, and must bring to bear upon it the tests of observation and experience in the exercise of good judgment. It is to be weighed with prudence and care and effect must be given to its just preponderance. (Mott v. Mott, 3 App. Div. 532 [1896].)

—— **When evidence is the confession of defendant.]** When the evidence is a confession of defendant, it must be shown to be of such a character that no suspicion of collusion can arise, and it should be corroborated. (Diederichs v. Diederichs, 44 Misc. Rep. 591.)

DOWER — When a foreign absolute divorce will not bar dower.] The "misconduct which deprives a wife, divorced because thereof, of her right of dower, is only that kind of misconduct which, under our laws, is a ground for divorce, *i. e.*, adultery;" a decree of divorce granted in another State, on the ground of the wife's desertion of her husband, does not deprive her of her dower in lands of the husband and situate in this State. (Van Cleaf v. Burns, 133 N. Y. 540 [1892].)

—— **Effect of, on dower.]** In an action for divorce against a wife she is not deprived of dower till judgment is entered. (Schiffer v. Pruden, 64 N. Y. 47 [1876].)

JUDGMENT — Judgment forbidding guilty wife to use her husband's name.] A decree of absolute divorce obtained by a husband against his wife may prohibit the guilty wife from using the full name or surname of her husband. (Blanc v. Blanc, 21 Misc. Rep. 268 [1897].)

—— **A provision in a judgment for separation awarding the custody of minor children is in the discretion of the court.]** (Waring v. Waring, 100 N. Y. 570 [1885].)

—— **Foreign judgment of divorce obtained on service by publication — effect of a general appearance on a motion for alimony.]** Where a wife, after obtaining from the New Jersey Court of Chancery a decree of divorce from her husband, upon the service of process upon him by publication, makes a motion to amend the decree by inserting therein a provision for alimony, the general appearance on the motion of the husband's solicitor, who contests it on jurisdictional grounds and upon the merits, operates to confer jurisdiction on that court to render a judgment for alimony which will be recognized as valid by the courts of the State of New York. (Lynde v. Lynde, 41 App. Div. 280 [1899].)

—— **Foreign judgment awarding custody of children — effect of.]** Effect of a decree of divorce in a court of another State awarding to the mother the custody of the children. (People ex rel. Allen v. Allen, 105 N. Y. 628 [1887].)

—— **Effect of a foreign judgment for divorce where service is made by mail.]** (O'Dea v. O'Dea, 101 N. Y. 23 [1885].)

—— **Special Term not to vacate, add or subtract from the referee's decision in divorce.]** In an action for divorce the Special Term has no power, in hearing the motion for a vacation of the judgment, to reverse or add to or subtract from the decision of the referee; to obtain such a result the remedy is by appeal where the decision of the referee could be reviewed. (*Ib.* See, also, Boller v. Boller, 96 App. Div. 163.)

VACATION OF JUDGMENT — Proof required for the vacation of a judgment.] The proof must be clear and satisfactory to induce the court to interfere with a regular judgment alleged to have been fraudulently obtained; it is not sufficient merely to raise a suspicion or to show constructive fraud, but there must be proof of actual fraud. (Jones v. Jones, 71 Hun, 519 [1893].)

—— **Motion to set aside for fraud — proper practice — affidavit of defendant competent.]** Defendant's affidavit is proper on a motion to set aside a judgment of divorce for adultery, on the ground of fraud and collusion, though she might be incompetent to testify on the trial. The proper practice in such case is to apply by motion and not to bring an action. (Megarge v. Megarge, 2 N. Y. Wkly. Dig. 352 [Sup. Ct. 1876].)

—— **Default in payment of alimony — laches.]** Where the amount of alimony awarded to a wife in an action brought by her against her husband for a separation is unpaid, and the husband has left the State to escape the enforcement of the decree in such action, the motion of the husband, in a subsequent action brought against him by his wife for an absolute divorce, to open the default and set aside the judgment, if made nearly nine months after he received actual notice of the entry of the judgment in the divorce action, should be denied unless the alimony allowed in the judgment for divorce be first paid. (Weidner v. Weidner, 85 Hun, 432 [1895].)

—— **Remarriage not conclusive on a motion to open a default.]** Where, after judgment has been rendered by default in favor of the plaintiff, in an action brought for an absolute divorce on the ground of adultery, the plaintiff, with knowledge that an application is about to be made to open such default, remarries, the fact of such remarriage is not a good reason for denying the motion for a new trial if the circumstances connected with the default would otherwise justify the granting of such application. (Scripture v. Scripture, 70 Hun, 432 [1893].)

—— **Remarriage — out of this State — after divorce in this State forbidding it — effect of.]** (See Thorp v. Thorp, 90 N. Y. 602 [1882]; Marshall v. Marshall, 2 Hun, 238 [Gen. T. 1874].)

ALIMONY — Income of a trust fund may be reached under a judgment for alimony.] The surplus income of a trust fund created for the benefit of a husband may be reached under a judgment for alimony granted in an action for an absolute divorce brought against him by his wife. (Wetmore v. Wetmore, 140 N. Y. 520 [1896].)

—— **Decision as to alimony and counsel fees cannot be reserved until final judgment.]** In a matrimonial action, the question of alimony and counsel

fees cannot be reserved for decision after the trial of the action, except with the consent of the husband or his counsel. (Lonsdale v. Lonsdale, 41 App. Div. 224 [1899].)

—— **Reservation in the decree of the right to apply for alimony.]** Unless a provision for alimony is contained in the final judgment in an action for divorce, it cannot be awarded by the subsequent order. (Noble v. Noble, 20 App. Div. 395 [1897].)

—— **Enforcement of a foreign judgment for alimony — by execution.]** In an action in the Supreme Court of the State of New York upon a judgment for alimony rendered by a court of another State, the plaintiff will be granted a mere money judgment for the amount of the past due alimony, enforcible only by execution, and she will not be permitted to invoke the equitable remedies of sequestration, etc., provided by the foreign judgment for the enforcement of its provisions, or the remedies provided by the New York Code of Civil Procedure for the enforcement of a judgment for alimony rendered by a New York court. (Lynde v. Lynde, 41 App. Div. 280 [1899].)

—— **Failure to pay alimony not excused by poverty.]** A husband cannot excuse his failure to comply with the terms of a judgment, rendered in an action for divorce, requiring the payment of alimony, by setting up, in answer to a motion made to punish him for contempt, his present poverty or inability to pay. (Delanoy v. Delanoy, 19 App. Div. 295 [1897].)

—— **Proceedings to compel payment of alimony.]** The procedure upon a motion to compel such payment is to be taken under sections 2266 and 2268 of the Code of Civil Procedure, and the judgment is to be enforced under section 1773 of the same code, but a necessary prerequisite is service upon the husband of a certified copy of the judgment in question and a demand that he pay the amount due; and where it appears that just before the motion was made the wife served the husband in the city of New York with a copy of the judgment, she will not be allowed to excuse her failure to demand of him the alimony upon the ground that her husband was continuously absent from the State of New York. (*Ib.*)

—— **Cannot be enforced after death of husband.]** (Kellogg v. Stoddard, 89 App. Div. 137.)

—— **Alimony cannot be awarded in an action to annul a marriage.]** In an action by a woman to annul her marriage, no alimony can be granted. (Park v. Park, 24 Misc. Rep. 372 [1898].)

As to action for separation, see Hawley v. Hawley, 95 App. Div. 274.

SEPARATION — Action for, brought by wife — return of the wife to the husband terminates it.] The voluntary return of a wife to her husband, before the trial of an action brought by her in good faith and upon sufficient grounds for a separation, effectually terminates the action, although no order of discontinuance is entered, and authorizes the attorney for the wife, where the court has awarded no counsel fees or alimony in the action for a separation, to institute an action against the husband to recover the value of his services rendered in the former action. (Naumer v. Gray, 41 App. Div. 361 [1899].)

ACTION TO ANNUL MARRIAGE — Power of court.] Court may compel surgical examination of husband in an action to annul a marriage on the ground of impotency. (Gore v. Gore, 103 App. Div. 168.)

RULE 73.

Judgment by Default, When Granted — Proof Required.

Before judgment by default shall be granted in an action to annul a marriage on the ground that the party was under the age of legal consent, proof must be made showing that the parties thereto have not freely cohabited for any time as husband and wife, after the plaintiff had attained the age of consent. If the action is brought to annul the marriage, on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show that there has been no voluntary cohabitation between the parties as man and wife; and if it is brought to annul a marriage on the ground that the plaintiff was a lunatic, proof must be produced showing that the lunacy still continues; or that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

Rule 87 of 1858. Rule 88 of 1871, amended. Rule 88 of 1874. Rule 79 of 1877. Rule 74 of 1880. Rule 74 of 1884. Rule 74 of 1888, amended. Rule 73 of 1896.

See notes under Rule 72.

RULE 74.

Answer in an Action for Divorce — Trial.

The defendant in the answer may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.

Rule 89 of 1858. Rule 90 of 1871. Rule 90 of 1874. Rule 81 of 1877. Rule 75 of 1880. Rule 75 of 1884. Rule 75 of 1888. Rule 74 of 1896.

See notes under Rule 72.

RULE 75.

Questioning Legitimacy of Children.

On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If, upon default, proofs shall be taken upon the question of legitimacy, as well as upon the other matters stated in the complaint, and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

Rule 90 of 1858. Rule 91 of 1871. Rule 91 of 1874. Rule 82 of 1877. Rule 76 of 1880. Rule 76 of 1884. Rule 76 of 1888. Rule 75 of 1896.
See notes under Rule 72.

CODE OF CIVIL PROCEDURE.

§ 1759. Action by wife — legitimacy of children begotten prior to its commencement not affected.

§ 1760. Action by husband — legitimacy of children begotten before the offense charged not affected — legitimacy of other children may be litigated.

RULE 76.

Judgment Declaring Marriage Void, or Granting a Divorce, etc., Not to be by Default — Copy of Pleading or Testimony Not to be Furnished — No Judgment to be Entered Except by Court.

No judgment annulling a marriage contract or granting a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant; or in consequence of any neglect to appear at the hearing of the cause, or by consent. Every such cause shall be heard after the trial of the issue, or upon the coming in of the proofs at a Special Term of the court; but where no person appears on the part of the defendant, the details of the evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of any court, with whom the proceedings in an adultery cause are filed, or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of the suit, shall per-

mit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party or the attorney or counsel of a party who has appeared in the cause, without a special order of the court.

No judgment in an action for a divorce shall be entered except upon the special direction of the court.

Rule 91 of 1858, amended. Rule 92 of 1871. Rule 92 of 1874, amended. Rule 83 of 1877. Rule 77 of 1880. Rule 77 of 1884. Rule 77 of 1888, amended. Rule 76 of 1896.

——**Rule has force of a statute.**] The rule has all the force of a statute, and the court is not at liberty to disregard it. (Boyer v. Boyer, 121 App. Div. 647.)

——The granting of a divorce on the consent of the defendant is absolutely prohibited. (Taylor v. Taylor, 123 App. Div. 220.)

See notes under Rule 72.

RULE 77.

Receiver of Debtor's Estate — Power and Duties of — To be Allowed Costs — When He May Sell Doubtful Claims at Auction.

Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court or by the consent of all persons interested in the funds in his hands. But he may,

by leave of the court, sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

Rule 92 of 1858. Rule 93 of 1871. Rule 93 of 1874. Rule 84 of 1877. Rule 78 of 1880. Rule 78 of 1884. Rule 78 of 1888. Rule 77 of 1896.

CODE OF CIVIL PROCEDURE.

§ 90. Clerks, etc., in New York and Kings counties not to be receivers unless upon consent of the parties. See Judiciary Law, § 251.
§ 383. Limitation of time for bringing certain actions against.
§ 713. When a receiver may be appointed.
§ 714. Notice of application before judgment — necessary — unless party has failed to appear and time to do so has expired.
§ 715. Security to be given by — new bond may be required — removal.
§ 716. Certain receivers may hold real property.
§ 766. Death of receiver, does not abate action brought by.
§ 827. Special reference may be ordered to examine as to appointment of.
§ 1788. Appointment of receiver — temporary and permanent — powers of, etc. See General Corporations Law, §§ 104, 106.
§ 1789. Larger powers may be conferred on temporary receiver. See General Corporations Law, § 105.
§ 1877. Appointment of receiver in judgment-creditor's action — order for delivery of debtor's property to him.
§ 1890. Receivers, etc., are public officers within the meaning of section 1888 of the Code of Civil Procedure.
§ 2441. Receiver in supplementary proceedings — notice of application for the appointment of, to be given to the debtor.
§ 2447. Order requiring delivery of money or property by a third person to the receiver.
§ 2449. How such money or property applied to payment of judgment.
§ 2450. Balance of such money to be paid to judgment-debtor.
§ 2454. Notice of application for dismissal of supplementary proceedings.
§ 2464. When and how a receiver in supplementary proceedings may be appointed.
§ 2465. Notice to other creditors of application for receiver, when necessary.
§ 2466. Only one receiver to be appointed — former receivership may be extended.
§ 2467. Order appointing a receiver to be filed and recorded.
§ 2468. When the title to property vests in a receiver.
§ 2469. How receiver's title to personal property extended by relation.
§ 2470. County clerk to record order appointing a receiver — penalty for neglect.
§ 2471. Receiver to be subject to the control of the court.

§ 3271. Security of costs — when required in actions by.
§ 3320. Receivers' commissions.

RECEIVER — A receiver is an officer of the court.] (Latimer v. Lord, 4 E. D. Smith, 183 [N. Y. Com. Pl. 1855].)

—— **He must obey the orders of the court.]** (Lane v. Lutz, 1 Keyes, 206 [1864]; People v. Church, 2 Lans. 459 [Gen. T. 1870].)

—— **The money in his hands is held in custodia legis for whoever may prove title to it.]** (Carey v. Long, 12 Abb. [N. S.] 627 [N. Y. Supr. Ct. Sp. T. 1872].)

—— **Receivers of insolvent corporations — rights of.]** Receivers of insolvent corporations occupy the same position and have no better rights than the corporation had. (Cutting v. Damerel, 88 N. Y. 410 [1882].)

—— Receiver can maintain no action which could not be maintained by the corporation itself. (Bostwick v. Young, 118 App. Div. 490.)

—— **Liability of receiver.]** As to liability of receiver of banking corporation upon covenants of lease, see Prince v. Schlesinger, 116 App. Div. 500.

—— **Appointment of a new receiver, in case of the death of the debtor and first receiver.]** Where the court has appointed a receiver in a creditor's suit, and thereafter the receiver and judgment-debtor both die, the court may appoint a new receiver. (Nicoll v. Boyd, 90 N. Y. 516 [1882].)

—— **Motion to compel a receiver to sue.]** An order denying a motion to direct a receiver to sue is proper when notice of the application therefor was not given to all the parties to be proceeded against. A receiver, if he is derelict in attending to his duties, is responsible to the parties who have been injured. (People v. The Life Union, 84 Hun, 560 [1895].)

—— **Application for leave to bring an action in the name of a receiver in supplementary proceedings.]** Where an attorney makes application for leave to sue a county clerk in the name of the receiver in supplementary proceedings, for damages for said clerk's alleged official misconduct, and both the receiver and the judgment-creditor were unwilling that such an action be brought, the application is properly denied, as it does not comply with Rule 79. (Millis v. Pentelow, 92 Hun, 284 [1895].)

—— **Clerk of the court only appointed receiver by consent.]** Clerk of the court cannot be appointed a receiver unless all the parties consent, but a failure to obtain such consent is an irregularity only. (Moore v. Taylor, 40 Hun, 56 [1886].)

—— **Limit of a receiver's recovery.]** In an action brought by a receiver in supplementary proceedings to set aside a fraudulent conveyance, his recovery is limited to the amount of the judgment represented by him, and the expenses of the receivership and references. (Stiefel v. Berlin, 28 App. Div. 103 [1898].)

—— **Receiver's appointment cannot be attacked collaterally.]** The objection that no proper execution was issued upon the judgment under which the receiver was appointed and that such appointment was, therefore, irregular, is unavailable. (*Ib.*)

—— **Receiver appointed in an action to set aside fraudulent conveyances.]** A receiver appointed in an action to set aside a fraudulent conveyance is a common-law receiver. (Badger v. Sutton, 30 App. Div. 294 [1898].)

—— **Right to bring action.**] Every person who shall, in fraud of the rights of creditors and others, receive, take or in any manner interfere with the estate, property or effects of any deceased person or insolvent corporation, association, partnership or individual, shall be liable in the proper action to the executors, administrators, receiver or other trustee of such estate or property for the same or the value of any property or effects so received or taken, and for all damages caused by such acts to any trust estate. (Section 2, chap. 314 of 1858; Henderson v. Brooks, 3 N. Y. Sup. Ct. [T. & C.] 448 [Gen. T. 1874]; Britton v. Lorenz, 3 Daly, 23 [Com. Pl. 1869]; Barclay v. Quicksilver Mining Co., 6 Lans. 25 [Gen. T. 1872].)

—— **No extra-territorial power.**] An order appointing a receiver has no extra-territorial effect. (O'Callaghan v. Fraser, 37 Hun, 483 [1885].)

—— **Cannot sue in foreign jurisdiction.**] A receiver is an officer of the court which appoints him. He cannot sue in a foreign jurisdiction for the property of the debtor. (Booth v. Clark, 17 How. Prac. [U. S.] 322 [1854].)

—— **Payment of claims.**] Unsecured claims accruing prior to appointment of receiver, should not be paid from proceeds of receiver's certificates, without consent of mortgage bondholders. (Knickerbocker Trust Co. v. Tarrytown, etc., Ry. Co., 133 App. Div. 285.)

—— **Prosecuting action.**] When Supreme Court will enjoin receiver appointed by it in proceeding to dissolve domestic corporation from prosecuting in New Jersey action to determine ownership of stock of corporation. (Guaranty Trust Co. v. Edison United Phonograph Co., 128 App. Div. 591.)

—— **Accounting.**] When court has power to appoint referee to take and state account where receiver of corporation has disbursed large sums without taking vouchers. (Matter of Home Book Co., 60 Misc. Rep. 560. See, also, People v. Oriental Bank, 129 App. Div. 865; Adams v. Elwood, 123 id. 649; Katz v. Freeman, 114 id. 124; People v. Federal Bank of New York, Id. 374; People v. Republic Sav. Bank, 119 id. 502.

—— **Foreign receiver cannot maintain action for appointment of ancillary receiver.**] A receiver of an insolvent corporation of another State, resident therein and appointed by the court of that State having full jurisdiction, in a suit for the winding up of the affairs of the corporation, with power, so far as could be conferred by such appointment, to demand, sue for, receive and take into his possession all the property, effects and choses in action of the corporation, cannot maintain an action in this State against the corporation as sole defendant for the sole purpose of procuring the appointment in this State of an ancillary receiver, based on the fact that the corporation has property within this State that requires administration. (Mabon v. Ongley Electric Co., 156 N. Y. 196 [1898].)

—— **Action in the name of the corporation.**] He may continue an action in the name of the corporation. (Albany City Ins. Co. v. Van Vrankin, 42 How. Prac. 281 [Sp. T. 1872].)

—— **When entitled to affirmative judgment.**] (Raymond v. Security Trust & Life Ins. Co., 101 App. Div. 546.)

—— **Appointment of a receiver is no bar to an action against the corporation.**] The appointment of a receiver of an insurance company does not bar an action against the company. (Pringle v. Woolworth, 90 N. Y. 502 [1882].)

—— **Rights of action in a receiver, as regards fraudulent conveyances by his debtor.]** It is competent for a receiver appointed in supplementary proceedings to bring an action either to set aside and annul alleged fraudulent conveyances of real estate by the judgment-debtor, and for a reconveyance of the property by the fraudulent grantee, or to set aside the conveyances as a cloud on title, so as to leave the property subject to levy and sale on execution. (Wright v. Nostrand, 94 N. Y. 31 [1883]; Mandeville v. Avery, 124 id. 376 [1891])

—— **Action by temporary receiver of an insolvent corporation to recover moneys obtained under an unlawful preference.]** A temporary receiver of an insolvent corporation, appointed in an action of sequestration, has power under section 1788 of the Code of Civil Procedure to maintain an action to recover from a third party money collected by the defendant under a judgment entered against the insolvent corporation upon an offer made by it for the purpose of giving an unlawful preference, and the insolvent corporation is not a necessary or proper party defendant to such action. (Nealis v. American Tube & Iron Co., 150 N. Y. 42 [1896].)

—— **May select the court.]** He may bring the action in such court as he selects. (Rockwell v. Merwin, 45 N. Y. 166 [1871].)

—— **Suit by a particular attorney.]** The court will not authorize a receiver to bring suit by a particular attorney. (First Nat. Bank v. Navarro, 43 St. Rep. 813 [Sup. Ct. 1892].)

—— **When authorized, is bound to bring suit — should not be restrained.]** A receiver authorized by the court to sue is bound to proceed with the action, and should not be restrained by an injunction issued out of another court. (Winfield v. Bacon, 24 Barb. 154 [Sp. T. 1857].)

—— **Leave to sue improvidently granted.]** Leave to sue a receiver improvidently granted by the Supreme Court, may be withdrawn by the court, though sitting in another district. (Attorney-General v. North American Life Ins. Co., 6 Abb. N. C. 293 [1879].)

—— **Should not sue without authority of court.]** A receiver should not bring an action without the authority of the court. (Foster v. Townshend, 2 Abb. N. C. 29 [Court of Appeals, 1877]; Merrill v. Lyon, 20 Wend. 410 [Ct. of Errors, 1836].)

—— **Authority to defend an action must be given by the court itself.]** While the court may properly make an order authorizing a receiver, who has been made a party defendant to an action brought to foreclose a mortgage, to employ counsel to advise him as to a defense, an order authorizing him to defend, if so advised by his counsel, is improper, as the question whether the receiver shall be permitted to litigate the plaintiff's claim is one which must be decided by the court itself upon a proper petition or affidavit. (Troy Savings Bank v. Morrison, 27 App. Div. 423 [1898].)

—— **Receiver of a bank may sue its directors for gross negligence.]** The receiver of a national bank may sue one of its directors to recover damages sustained through gross negligence. If the receiver himself is one of the directors chargeable with negligence, the action may be brought by one or more stockholders, acting in behalf of all. (Brinckerhoff v. Bostwick, 88 N. Y. 52 [1882].)

—— **Order directing receiver of a bank to sue the directors will not be reversed on an appeal by the directors.**] An order directing the receiver of a bank to sue the directors thereof will not be reversed on an appeal by the directors where neither the receiver nor the stockholders join in such appeal. (People v. Commercial Bank, 6 App. Div. 194 [1896].)

—— **Costs and expenses of suit incurred by a trustee.**] A trustee may, where the trust estate is insufficient to reimburse him, recover in an action, against the beneficiary whom he represents his reasonable costs and other expenses incurred necessarily and in good faith in the prosecution or defense, by the express or implied consent of the principal or beneficiary, of an action or special proceeding relating to the demand secured or to the trust estate, as the case requires. (Code of Civil Procedure, § 1916.)

—— **A receiver who has prosecuted an action in good faith is entitled to costs.**] Where a receiver has acted in good faith in prosecuting an action it is proper that he should be allowed the costs and expenses of its prosecution. The court has power under sections 827, 1015, 3236 and 3251 of the Code of Civil Procedure to provide for the payment, out of moneys in the hands of a receiver, of the fees of a referee who took the testimony and examined the account of the receiver in pursuance of an order of the court. (Matter of Merry, 11 App. Div. 597 [1896].)

—— **If leave not granted, personally liable for costs.**] A receiver should apply to the court for leave to sue as such. If he neglects to do so and judgment is recovered against him, he will not, as a general rule, be exempted from personal liability for costs. (Smith v. Woodruff, 6 Abb. Pr. 65 [Sp. T. 1858]; Phelps v. Cole, 3 Code R. 157 [Sp. T. 1850].)

—— **Want of funds to pay costs — evidence of bad faith in bringing action.**] A want of funds by the receiver to pay the costs of an action brought by him against a third person, in which he is unsuccessful, ought to be conclusive evidence of bad faith on his part, within the provision of the Code of Procedure (§ 317) which charges trustees with costs personally when they have been guilty of bad faith. (Cumming v. Egerton, 9 Bosw. 684 [Sp. T. 1863].)

—— **What not sufficient ground to compel payment of costs personally by receiver in default of assets.**] The fact that a receiver against whom a judgment for costs has been recovered has had in his hands funds sufficient to pay it and has paid other claims larger in amount, is not a ground for compelling him to pay such judgment on motion. (Devendorf v. Dickinson, 21 How. Prac. 275.)

—— **Assignee in bankruptcy — liable for costs.**] An assignee in bankruptcy who prosecutes unsuccessfully an action which has been brought by the bankrupt in a court of this State, which was pending when the cause of action was transferred to the assignee, is liable personally for costs, under section 321 of the Code of Procedure. (Reade v. Waterhouse, 12 Abb. [N. S.] 255 [Supr. Ct. 1872].)

—— **Personal liability for costs incurred by his unnecessary defense — notice.**] Where a receiver made a party to an action brought to foreclose a mortgage, although served with a notice that no personal claim is made against him, interposes an answer denying any knowledge or information sufficient to form a belief as to the matters contained in the complaint, he

becomes, upon his default at the trial of the action, liable for costs, but only to the extent of the costs, incurred by the interposition of his answer; and before the plaintiff can charge the receiver, personally, with the payment of the costs, he is entitled to due notice of the application for such relief. (First National Bank v. Washburn, 20 App. Div. 518 [1897].)

—— **Costs not personally charged against, without special order.]** In the absence of a special order, made because of mismanagement, costs cannot be collected out of an administrator. (Lindsay v. Deafendorf, 43 How. Prac. 90 [Sp. T. 1872].)

—— **Order for payment of costs out of fund.]** When a receiver of an insurance company prosecutes an action for the recovery of money for the enhancement of the fund of which he is the receiver, and fails to recover, the defendant is entitled to costs, and to an order for their payment, out of any funds in the hands of the receiver. (Columbian Ins. Co. v. Stevens, 37 N. Y. 536 [1868].)

—— **Liability where he continues an action.]** When such receiver continues the prosecution of an action begun by the company, before his appointment, he is chargeable with the costs in like manner as if he were made a party plaintiff. (*Ib.* See, however, People v Knickerbocker Life Ins. Co., 106 N. Y. 619.)

—— **Cannot enforce trust resulting to creditors, where the debtor pays for land conveyed to another.]** A receiver appointed in proceedings supplementary to execution cannot maintain an action to enforce the trust created by the Revised Statutes in favor of the creditors of one who pays the consideration for lands which are conveyed to another. (Underwood v. Sutcliffe, 77 N. Y. 58 [April, 1879].)

—— **Two receivers of the same property, not appointed.]** It was not the practice of the Court of Chancery to appoint two separate receivers of the same property in different suits; but the proper course is to extend the receivership in the first suit over the second, subject to the legal and equitable claims of all parties. And the rights of the parties in each suit are substantially the same as if different persons had been appointed at the several times when such receivership was granted and extended. (Howell v. Ripley, 10 Paige, 43 [1843]; Code of Civil Procedure, § 2466.)

—— **Second receiver may be appointed.]** Where one receiver has been appointed in proceedings supplementary to execution in favor of one judgment creditor a second receiver may be appointed in an action to set aside such proceedings on the ground of collusion. (Connolly v. Kretz, 78 N. Y. 620 [1879].)

—— **Second receiver in foreclosure.]** In a proper case a receiver should be appointed upon the foreclosure of a paramount mortgage given by a corporation, although a receiver has previously been appointed of the property of such corporation in an action instituted for the foreclosure of a junior mortgage. (Holland Trust Co. v. Consolidated Gas & Electric Light Company, 85 Hun, 454 [1895].)

—— **Reference as to claims — may be without his consent.]** The consent of the receiver is not necessary to an order of the court directing a reference

to report as to the settlement of claims. (Guardian Savings Ins. v. Bowling Green Savings Inst., 65 Barb. 275 [Gen. T. 1873].)

—— **Enforcement of claims against a receiver.]** Proceedings to compel a receiver to pay claims cease upon the discharge of the receiver. Power of the court to vacate an order discharging the receiver. (Matter of the New York & Western Union Telegraph Company v. Jewett, 43 Hun, 565 [1887].)

—— **Funds in a receiver's hands — paid out on motion.]** As the funds in the hands of a receiver are *in custodia legis*, it is unnecessary for a petitioner asking a payment therefrom, to file a bill for the purpose of establishing his equity, and the court may properly direct the claim to be paid on a summary application by petition. (People v. Bank of Dansville, 39 Hun, 187 [1886].)

—— **Receiver, after order for publication of the summons — appointed without notice.]** Where an order of publication has been granted under section 438 of the Code against the owner of the mortgaged premises, the court has jurisdiction under section 714 of the Code to grant, without notice to the owner, an order appointing a receiver of the rents, issues and profits of the premises. (Fletcher v. Krupp, 35 App. Div. 586 [1898].)

—— **Relative rights of a prior mortgagee and a receiver appointed without notice for a junior mortgagee.]** The right of a prior mortgagee to the rents under an assignment thereof from the mortgagor is superior to that of a junior mortgagee under an order appointing a receiver in an action to foreclose the junior mortgage, made without notice to the prior mortgagee. (Harris v. Taylor, 35 App. Div. 462 [1898].)

—— **Receiver in supplementary proceedings — appointed only on notice.]** A receiver cannot be appointed in proceedings supplementary to execution without notice to the judgment debtor. (Vandeburgh v. Gaylord, 7 Wkly. Dig. 136 [Sp. T. 1878]; Ashley v. Turner, 22 Hun, 226 [1880]; Morgan v. Van Kohnstamme, 11 N. Y. Wkly. Dig. 181 [1880].)

—— **The title to a judgment debtor's real estate vests by operation of law in a receiver appointed in supplementary proceedings.]** The title to real estate owned by a judgment debtor of whose property a receiver has been appointed in supplementary proceedings, vests in the receiver by operation of law upon the filing of the order appointing the receiver or a certified copy thereof in the proper county clerk's office; no conveyance is necessary to transfer the title to the receiver, nor has the court any power to compel the judgment debtor to execute such a conveyance. (Moyer v. Moyer, 7 App. Div. 523 1896].)

—— **A receiver in supplementary proceedings should not determine adverse claims.]** A receiver in supplementary proceedings who, without asking for the advice and direction of the court, assumes to decide the rights of adverse claimants, does so at his peril. (Matter of Hone, 153 N. Y. 522 [1897].)

—— **In supplementary proceedings — both debtor and creditor are represented by.]** A receiver appointed in supplementary proceedings represents not only the debtor, but the creditor at whose instance he was appointed. (Cummings v. Egerton, 9 Bosw. 684 [Sp. T. 1863].)

—— **Receiver in supplementary proceedings takes title only to real estate in this State.]** Receiver in supplementary proceedings. The title to only

such real estate of the debtor as lies within the State is vested in him. (Smith v. Tozer, 42 Hun, 22 [1886].)

—— **The receiver's title is superior to that of a bona fide assignee, after the filing of the order.]** The title of a receiver appointed in supplementary proceedings to claims upon which the debtor has brought suit is superior to that of a *bona fide* assignee of such claims under an assignment made subsequent to the filing of the order appointing the receiver. (Fitzpatrick v. Moses, 34 App. Div. 24 [1898].)

—— **When not appointed.]** A receiver will not be appointed in supplementary proceedings where the only property discovered on the examination is some contingent fees in cases untried or not determined. (Gibney v. Reilly, 26 Misc. Rep. 275 [1899].)

—— **The order, made without notice, cannot be questioned collaterally.]** While a judgment-debtor is entitled to notice of application for a receiver in third party proceedings, the order of appointment cannot be questioned collaterally because of failure to give such notice. (Gomprecht v. Scott, 27 Misc. Rep. 192 [1899].)

—— **Notice to the attorney of record of the debtor, insufficient.]** Service of notice of application for the appointment of a receiver upon the attorneys of record of the debtor in the action in which the judgment was obtained is not equivalent to service on the debtor personally, and is insufficient. (Catholic University of America v. Conrad, 27 Misc. Rep. 326 [1899].)

—— **Where the order appointing a receiver in supplementary proceedings is to be filed.]** Where the order appointing a receiver in supplementary proceedings must be filed. (Fredericks v. Niver, 28 Hun, 417 [1882].)

—— **Receiver's title is a qualified one.]** The receiver's title is a qualified one, in the nature of a security for the plaintiff in the judgment. Subject to the right of the receiver to resort to the land to pay the judgment, the title remains in the judgment-debtor, and a conveyance of such real estate by him transfers the title thereto, subject to the claim of the receiver. Such receiver is a necessary party to any action brought to apply the land to the payment of the judgment. (Moore v. Duffy, 74 Hun, 78 [1893].)

—— **Of rents and profits, no power to pay for repairs.]** A receiver of rents and profits appointed in a foreclosure suit has no power, without the order of the court, to lessen the funds in his hands by expenditures for repairs. (Wyckoff v. Scofield, 103 N. Y. 630 [1886].)

—— **A receiver held liable for rent, when.]** In an action brought against a receiver of the "freehold and leasehold" and of the personal property of a testator, to whom the tenants were directed to attorn, to recover rent accruing under a lease, the defendant admitted that he paid the amount of the rent to September 1, 1878, and in May, 1879, sublet the premises.

Held, that from the admissions in the answer it was to be inferred that defendant went into possession at the time he qualified as receiver, and that he paid rent from that time up to the date specified. (Wells v. Higgins, 132 N. Y. 459 [1892].)

That it was immaterial as to whether defendant was appointed receiver of the real estate or simply of the rents and profits, as he was appointed re-

ceiver of the personalty and the lease went to him as such (1 R. S. 722, § 5; 2 id. 82, § 6), and, therefore, that he was liable for the rent accruing up to September 1, 1879. (*Ib.*)

—— **Where in an action to set aside a conveyance in fraud of creditors, the receiver cannot recover rents and profits.**] In an action brought by a receiver appointed in supplementary proceedings to set aside as fraudulent a conveyance of real estate executed by the judgment-debtor, so as to subject the property to levy and sale on execution, where the receiver simply proves his appointment without showing the proceedings necessary to vest in him title to the real estate, he is not entitled to recover the rents and profits. (Wright v. Nostrand, 98 N. Y. 639 [1885].)

—— **Equitable interests pass to a receiver.**] The equitable interest of the next of kin in the estate of an intestate is property which passes by operation of law to a receiver duly appointed. (Matter of Estate of Rainey, 5 Misc. Rep. 367 [Orange Co. Surrogate's Ct. 1893].)

—— **The court may forbid interference with the property in the receiver's hands.**] A court having power to appoint a receiver of the assets of an insolvent corporation may, in aid of that appointment, forbid any after interference by way of levy and seizure by attachment or execution with the property in his possession. (Woerishoffer v. N. R. Con. Co., 99 N. Y. 398 [1885].)

—— **Motion to determine right to funds — in what district to be made.**] Where a receiver has been appointed in proceedings had for the compulsory dissolution of a corporation under 2 R. S. 462,* an application to determine the right of a person to share in the assets, must be made in the district in which the receiver was appointed. (Rinn v. Astor Fire Ins. Co., 59 N. Y. 145 [1874].)

—— **Right of temporary receiver of partnership.**] A temporary receiver appointed in an action for dissolution and settlement of a partnership, is a mere common-law receiver with no title to the partnership property, and has no authority to maintain an action to recover partnership assets paid out by one partner on account of his individual indebtedness. (Felter v. Maddock, 11 Misc. Rep. 297 [N. Y. Com. Pl. Gen. T. 1895].)

—— **A temporary receiver — powers of.**] Where a temporary receiver, appointed in an action to sequestrate the property of a corporation, has duly executed and filed the requisite bond, and thereafter, under the judgment in the action, is continued a permanent receiver, while a further bond may be exacted in the discretion of the court, he is under no obligation to furnish it until required to do so, and his failure to do so does not affect his power to act as permanent receiver. (Jones v. Blun, 145 N. Y. 333 [1895].)

—— **What must be proved before appointment.**] As to what must be proved before court will be justified in appointing receiver, see People v. Oriental Bank, 124 App. Div. 741.

—— **Not for the purpose of ousting a partner from management.**] Receiver should not be appointed in action brought by a partner simply for the purpose of ousting another partner from the management. (Shubert v. Laughlin, 122

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* Repealed.

App. Div. 701. See, also, Greenwald v. Gotham-Attucks Music Co., 118 App. Div. 29.)

—— **In foreclosure proceedings.]** When court will regard appointment of receiver in foreclosure proceedings as improper. (Jarmulowsky v. Rosenbloom, 125 App. Div. 542. See, also, Pizer v. Herzig, 121 App. Div. 609; Woerishoffer v. People, 120 id. 319; Baier v. Kelley, 55 Misc. Rep. 368.)

—— As to bond of receiver, see Coe v. Patterson, 122 App. Div. 76.

—— Will not be appointed in foreclosure unless it is shown property is inadequate security. (Rabinowitz v. Power, 115 N. Y. Supp. 266.)

—— **Ancillary receiver.]** When motion for ancillary receiver is properly denied. (Chicago Title & Trust Co. v. German Ins. Co., 119 App. Div. 347.)

—— **Receiver's title to property.]** As to title to and possession of property by receiver, see Michel v. Betz, 108 App. Div. 241; Stearns v. Early, 49 Misc. Rep. 615; St. Paul Hotel Co. v. Seagrave, 48 id. 657.)

—— **Failure to file bond.]** Order may be made *nunc pro tunc* and his failure to file a bond cannot be attacked collaterally. (Boynton v. Sprague, 100 App. Div. 443.)

—— **Commissions of.]** (See Adams v. Elwood, 104 App. Div. 138.)

—— How far the title to corporate property vests in him. See CORPORATIONS, *post.*

INSTRUCTIONS — A receiver is entitled to.] A receiver is entitled to receive instructions from the court as to his duty. (Smith v. N. Y. Consolidated Stage Co., 18 Abb. 419 [N. Y. Com. Pl. 1864; Curtiss v. Levit,, 1 id. 274 [Gen. T. 1855]; In the Matter of Van Allen, 37 Barb. 225 [Sp. T. 1861]; People ex rel. Atty.-Gen. v. Security Life Ins., etc., Co., 79 N. Y. 267 [1879].)

—— **Application by a party not interested — disregarded.]** A receiver will not be instructed by the court on the application of a party who is not interested in the suit. (Vincent v. Parker, 7 Paige, 65 [1838]. See, however, Howell v. Ripley, 10 id. 43 [1843].)

CONTEMPT — To sue a receiver without leave.] Suing a receiver without permission of the court, is a contempt. (Taylor v. Baldwin, 14 Abb. 166 [Chamb. 1862]; Rich v. Loutrell, 9 id. 356 [Sp. T. 1859].)

—— **Action against a receiver — good until the court interferes.]** If a receiver, when sued, fails to apply to the court for protection, the action may be continued as though permission to bring the same had been obtained from the court. (Camp v. Barney, 4 Hun, 373 [1875].)

—— **The court has jurisdiction although the suit is without leave.]** The commencement of an action against a receiver without leave does not affect the jurisdiction of the court. When an action has been so commenced the court acquires jurisdiction of the receiver by the service of the summons upon him, and the remedy of the receiver is either to apply for a stay of proceedings upon the part of the plaintiff or his punishment for contempt of court, or both, and upon an application therefor, if the court believes that the case is a proper one for granting leave, permission to make the receiver a party defendant will be granted *nunc pro tunc.* (Hirshfeld v. Kalischer, 81 Hun, 606 [1894].)

—— **Interference with a receiver in collecting rents is a contempt.]** In supplementary proceedings, where a debtor interferes with a receiver who has properly filed his order of appointment, while collecting rents from the tenants occupying his real property, the debtor is guilty of a contempt of court. (Vt. Marble Co. v. Wilkes, 30 N. Y. Supp. 381 [Sup. Ct. 1894].)

—— **Refusal of a judgment-debtor to deliver goods.]** Refusal of a judgment-debtor to deliver possession of his store and goods to a receiver in supplementary proceedings is a contempt of court, which is not excused by a statement that the goods were commingled with goods consigned to him for sale so that it was impossible to separate them without a day's labor and going over the stock piece by piece. (Matter of Camerick, 34 App. Div. 31 [1898].)

—— **Interference with the receiver's possession.]** Interference by a judgment-debtor with the receiver's possession after he surrendered his property to the latter constitutes a contempt of court. (Sainberg v. Weinberg, 25 Misc. Rep. 327 [1898].)

—— **Failure to pay to a receiver as directed, money deposited in the name of the debtor's wife.]** A judgment-debtor is not excused from complying with an order directing him to pay to the receiver moneys deposited in bank in the name of his wife, from whom he has a power of attorney to use the fund as his own, by proof that he was an insurance broker and was accustomed to deposit in such account checks received for premiums and pay the companies with his own checks, in the absence of evidence identifying the money in bank as that of the insurance companies. (Matter of Weld, 34 App. Div. 471 [1898].)

—— **When a failure to appear on an adjourned day is not a contempt.]** Where a judgment-debtor who, after a partial examination and a payment made on account failed to appear on the third adjourned day, appears on the return of an order to show cause, makes oral excuse and submits to further examination, a refusal to punish for the contempt is not an abuse of discretion. (Lassere v. Stein, 25 Misc. Rep. 423 [1898].)

—— **A receiver's right of action — dependent on the filing of his bond.]** An action cannot be maintained by a receiver unless proof is given of the filing of his bond, when, by the order appointing him receiver, his power to take the property is dependent upon such bond. (Hegewisch v. Silver, 50 St. Rep. 448 [Sup. Ct. 1892].)

CORPORATIONS — In the case of corporations.] A receiver of a corporation represents both it and its creditors and stockholders. (Atty.-Gen. v. Guardian Mut. Life Ins. Co., 77 N. Y. 272 [1879]; Mason v. Henry, 152 id. 529 [1897].)

—— **A receiver not appointed unless a clear necessity be shown.]** A receiver of a corporation will not be appointed unless the persons who invoke such action clearly establish that the remedy is necessary to protect their interests from imminent and serious injury. (Thalmann v. Hoffman House, 27 Misc. Rep. 140 [1899].)

—— **Limitation on the power to appoint a receiver of a corporation.]** The power of the Supreme Court to appoint a receiver of a corporation is limited

to the cases prescribed by statute. (Lehigh Coal Co. v. Central R. R. of New Jersey, 43 Hun, 546 [1887].)

—— **Default in interest justifies a receivership.]** Where a railroad company has failed to pay interest the bondholders are entitled to a receiver, even if the affairs of the company are shown to be properly managed. (Van Benthuysen v. Central New England & Western R. R. Co., 45 St. Rep. 16 [Sup. Ct. 1892].)

—— **The title to corporate property does not vest in a temporary receiver.]** A temporary receiver appointed prior to the Code of Civil Procedure was not vested with the title to the property of the corporation. (Herring v. N. Y., L. E. & W. R. R. Co., 105 N. Y. 340 [1887]. See Decker v. Gardner, 124 id. 334.)

—— **How far the title to corporate property vests in a temporary receiver.]** It seems, that a temporary receiver is vested with the title to the corporate property so far as the purposes of his trust require. (Matter of Smith Company, 31 App. Div. 39 [1898].)

—— **To what property the receiver takes title.]** A receiver of an insolvent national bank acquires no right to property in the custody of the bank which it does not own as against the owner. (Corn Ex. Bank v. Blye, 101 N. Y. 303 [1886].)

—— **How far the receiver's appointment dates back.]** The appointment of a receiver of a corporation made in proceedings for its voluntary dissolution relates back to the date when his appointment was made and not to the filing of the petition in the dissolution proceedings. (Matter of Muehlfeld & Haynes Piano Co., 12 App. Div. 492 [1896].)

—— **Property transferred to a receiver.]** All the corporate property and all the title to property of a corporation is transferred to the receiver of such corporation upon his appointment, even though a trust has been created concerning such property. (Matter of Home Providence Safety Fund Assn., 39 St. Rep. 437 [Sup. Ct. 1891].)

—— **Relative rights of a sequestration and mortgage foreclosure receiver in future earnings.]** Where a corporate mortgage purports to include future earnings and products, but also provides that until default the mortgagor shall have the use of the earnings in the conduct of its business, and that on default the trustee may enter into possession, exercise the corporate functions and appropriate the earnings, the mortgagor does not, as against general creditors, operate as a lien on the earnings until actual entry and possession under it, and as between a receiver in sequestration proceedings and a receiver on foreclosure the former is entitled to debts and accounts due the company for sales of its products. (New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 159 N. Y. 137, revg. 30 App. Div. 98 [1899].)

—— **But what act a receiver does not make himself a party to an action against the corporation.]** How far a receiver of an insolvent corporation who conducts an appeal taken by the company from a judgment recovered against it before its dissolution, is bound by a judgment recovered against the company upon a new trial ordered by the appellate court. (People v. Knickerbocker Life Ins. Co., 106 N. Y. 621.)

—— **Not made a party after his final discharge.]** A receiver of a bank who has been finally discharged cannot be allowed to intervene in proceedings to reach newly-discovered assets. (Matter of Grand Central Bank, 27 Misc. Rep. 116 [1899].)

—— **Not a necessary party to a foreclosure.]** He is not a necessary party to a mortgage foreclosure suit against the corporation. (People v. Knickerbocker Life Ins. Co., 43 Hun, 574 [1887].)

—— **Receiver's certificates, issuing of.]** Power of the court in an action to foreclose a mortgage on the property of a railroad corporation to authorize a receiver to issue certificates of indebtedness for work and labor. (M. T. Co. v. T. V. & C. R. R. Co., 103 N. Y. 245 [1886].)

—— **Enforcible only in the court directing their issue.]** Receiver's certificates must be enforced in the court directing their issue. (Passage v. Danville & Mt. Morris R. R. Co., 41 App. Div. 182 [1899].)

—— **Effect of a receiver's certificate on a prior mortgage lien.]** Receiver of a corporation. Power of the court to direct him to issue certificates to pay wages due to employees. When they cannot be made to affect a prior lien by mortgage. (Raht v. Attril, 42 Hun, 414 [1886].)

—— **Receiver — authority to issue certificates of indebtedness.]** Receiver of a railroad. Power of the court to authorize the issue of certificates of indebtedness and to give them priority over existing mortgage liens. (Metropolitan Trust Co. v. Tonawanda Railroad Co., 40 Hun, 80 [1886].)

—— **Receiver of a corporation — a judgment should be entered against him as receiver and not personally — when it may be so entered after he has been discharged as a receiver.]** In an action brought by the creditor of a corporation against a receiver thereof in his official capacity no personal judgment can be rendered against him. The judgment must be rendered against him as receiver and must be made payable out of funds held by him in that capacity. The fact that the receiver has been discharged during the pendency of the action brought by the creditor and has transferred all the property and assets held by him to another corporation or person pursuant to an order of the court, does not render it improper to thereafter enter a judgment in an action against him as receiver when it is made payable out of funds held by him and applicable to that purpose. (Woodruff v. Jewett, 37 Hun, 205 [1885].)

—— **Receivers of a corporation — in what district the application for the appointment must be made.]** Chapter 378 of 1883, in relation to receivers of corporations including the ninth section thereof, which provides that the application shall be made in the judicial district where the principal office of the corporation is located, applies only to receivers of corporations appointed in proceedings in bankruptcy. (U. S. Trust Co. v. N. Y., W. S. & B. R. Co., 35 Hun, 341 [1885]; affd., 101 N. Y. 478 [1886].)

—— **Act of 1897 limiting to receivers the right to enforce the liability of stockholders in a bank.]** Chapter 441, Laws of 1897, limiting to the receivers of a bank the right to enforce the liability of stockholders under section 52 of the Banking Law, although given a retroactive effect, is not unconstitutional

as to either the stockholders or creditors, as it only affects the remedy. (Persons v. Gardner, 42 App. Div. 490, affg. 26 Misc. Rep. 663 [1899].)

—— **Receiver of foreign corporations.]** An auxiliary receiver of a foreign corporation, appointed in the State of New York, is merely the custodian of the property within the State for the purpose of preserving the assets in order that creditors may reach them without being compelled to go to a foreign jurisdiction to prove their claims, and has only the powers conferred by the order appointing him. (Buckley v. Harrison, 10 Misc. Rep. 683 [N. Y. Com. Pl. Gen. T. 1894].)

—— **Power of the courts of the State of New York.]** The courts of the State of New York have power, on the application of stockholders of an insolvent foreign corporation doing business and having assets in the State of New York (but no officers empowered to hold such assets), to appoint a receiver of such corporation for the purpose of preserving the assets within their jurisdiction for the protection of domestic creditors. (Hall v. Holland House Co., 12 Misc. Rep. 55 [N. Y. Com. Pl. Gen. T. 1895].)

—— **Domestic creditors only represented.]** A receiver so appointed represents only the domestic creditors of the corporation. (Hall v. Holland House Co., 12 Misc. Rep. 55 [N. Y. Com. Pl. Gen. T. 1895].)

—— **Where a receiver of a foreign corporation will be appointed.]** Where a foreign corporation in taking its funds out of the State of New York thereby injures persons residing within the State, the court, in an action brought to prevent this course, may appoint a receiver for said corporation, the power of the court not being dependent upon its jurisdiction of the person of defendant. (Glines v. Supreme Sitting Order of Iron Hall, 22 Civ. Proc. R. 437 [Sup. Ct. 1892].)

—— **A receiver of a national bank, not a foreign receiver.]** A receiver of a national bank of another State, appointed by the United States Comptroller of the Currency, will not be treated by the courts of the State of New York as a foreign receiver, and can sue therein to recover an assessment levied upon the shareholders of the bank. (Peters v. Foster, 56 Hun, 607 [1890].)

—— **Receiver of insolvent insurance corporations.]** The provisions of section 1785 of the Code of Civil Procedure, relative to actions for the dissolution of corporations on the ground of insolvency, are limited in the case of mutual insurance companies by the provisions of section 43 of chapter 690 of the Laws of 1892, providing for the service of a requisition on the officers of such a corporation requiring them to make the deficiency good. (People v. Equitable Mutual Fire Ins. Co., 12 Misc. Rep. 556 [N. Y. Com. Pl. Sp. T. 1895].)

—— **Advances by a receiver to a corporation.]** Where the stock of a corporation is among the assets of a receiver, he may make advances to such corporation. (Kalbfleisch v. Kalbfleisch, 37 St. Rep. 183 [Sup. Ct. 1891].)

—— **Loan to a receiver of a corporation whose appointment was void.]** A loan to a receiver of a corporation whose appointment was subsequently declared void, cannot be enforced. (Ludington v. Thompson, 4 App. Div. 117 [1896].)

—— **Appointment by a final judgment supersedes a prior appointment of a temporary receiver in another action.**] The appointment, by a final judgment of the Supreme Court of the State of New York, of a permanent receiver of the property within this State of a foreign corporation, with power to collect and distribute the same, supersedes a prior appointment by the same court, although made in another action and in another judicial district, of a temporary receiver appointed to preserve the property of the same corporation until a final judgment for its distribution should be entered. (Glines v. Binghamton Trust Co., 68 Hun, 511 [1893].)

—— **Receiver's disbursements in preserving property.**] A receiver is authorized to incur expenses and charges for the preservation and use of the property which comes into his hands by virtue of the receivership. (Rogers v. Wendell, 54 Hun, 540 [1889].)

—— **Preferential payment, when not proper for supplies.**] A person who furnishes supplies to an elevated railroad company prior to the commencement of an action to foreclose a mortgage upon its property, in which a temporary receiver was subsequently appointed, is not entitled to a preferential payment of his claim out of the assets in the hands of such receiver, where there is no provision in the order appointing the receiver authorizing him to pay any of the corporation's debts. (Mercantile Trust Co. v. Kings County El. R. Co., 40 App. Div. 141 [1899].)

—— **A receiver may assert the unconstitutionality of a statute of limitations.**] The receiver of a corporation who is seeking to enforce the common-law liability against the directors is entitled to assert the unconstitutionality of a statute limiting the time within which such action may be commenced. (Gilbert v. Ackerman, 159 N. Y. 118 [1899].)

—— **When court will appoint receivers of corporations.**] Court will appoint receivers in an action brought in name of people to dissolve corporation which has remained insolvent for a year, although receivers have been appointed by Federal court in an action by nonresident creditors. (People v. N. Y. City Ry. Co., 57 Misc. Rep. 114; Weber v. Wallerstein, 111 App. Div. 700; Dolan v. Conlan, 114 id. 570.)

—— Receiver of corporation which is not insolvent will not be appointed merely for the reason that an owner of half of the stock is dissatisfied with the management. (Hastings v. Tousey, 121 App. Div. 815.)

—— **Duty of court** taking possession of railroad and appointing receiver therefor. (Rochester Trust, etc., Co. v. Oneonta, etc., Ry. Co., 122 App. Div. 193.)

—— **Deputy Attorney-General as receiver.**] In a case where a receiver of a bank has been appointed at the instance of the Attorney-General, held, that a deputy attorney-general who resigned his position for that special purpose should not be appointed counsel to the receiver. (People v. Brooklyn Bank, 125 App. Div. 354.)

—— **Foreign corporation.**] As to appointment of receivers of foreign corporations, see Courtright v. Vreeland, 64 Misc. Rep. 46; Kenkart v. Bodenmann, 64 Misc. Rep. 140.)

—— **Receiver pendente lite.]** Held, in Matter of Howell v. German Theater, (64 Misc. Rep. 110), that common-law receiver of property of corporation may be appointed *pendente lite* without making him receiver of corporation. (See, also, Joseph v. Herzig, 130 App. Div. 707.)

—— **In action for sequestration of property of domestic corporation.]** It is improper to appoint temporary receiver on complaint unaccompanied by affidavit showing necessity. (Federman v. Standard Churn Mfg. Co., 128 App. Div. 493.)

—— **Misconduct of officers.]** Not sufficient to justify appointment of receiver unless it is shown to court's satisfaction that such action is necessary for the preservation of the rights of creditors or stockholders. (Fenn v. Ostrander, 132 App. Div. 311.)

COMMISSIONS — By what statute governed.] The act of 1883 (chapter 378), in relation to receivers of corporations, including the second section thereof, in reference to receiver's fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in said section. The allowance of commissions to such a receiver is governed by the provisions of the Code of Civil Procedure (§ 3320) providing for the allowance by the court or the judge where not "otherwise specially prescribed by statute." (U. S. Trust Co. v. N. Y., West Shore & Buffalo R. R. Co., 101 N. Y. 478 [1886].)

—— Receivers of insolvent corporations — their commissions are to be determined by the law in force at the time of the appointment of the receiver. (People v. The Mutual Benefit Associates, 39 Hun, 49 [1886].)

—— **Commissions of a temporary receiver — by what act governed and on what computed.]** The amount of the commissions of a temporary receiver appointed on an application for the voluntary dissolution of a corporation is governed by section 3320 of the Code of Civil Procedure. Section 76 of chapter 8 of part 3 of the Revised Statutes applies only to permanent receivers.

Such commissions are not to be computed simply upon the cash which actually comes into the hands of the temporary receiver, appointed under section 2423 of the Code of Civil Procedure, but he may be entitled, in an extreme case, to two and one-half per cent of the value of the property coming into his hands for receiving and protecting the same, such amount to be determined and allowed by the court. (Matter of Smith Company, 31 App. Div. 39 [1898].)

—— Receiver's commissions — amount thereof. (See Code of Civil Procedure, § 3320.)

—— **Allowance — increase of when less than $100.]** Act amending section 3320, in relation to receiver's commissions, by providing that if his commissions do not amount to $100, the court or judge may, in his discretion, allow him such a sum, not exceeding $100, as shall be commensurate with the services rendered. (Laws 1889, chap. 94. See, also, People v. Oriental Bank, 129 App. Div. 865; People v. Brooklyn Bank, 64 Misc. Rep. 538; People v. Knickerbocker Trust Co., 127 App. Div. 215.)

MOTIONS AFFECTING — Sequestration of the property of a corporation, appointment of a receiver.] Action to sequestrate the property of a corporation. Notice of a motion to appoint a receiver must be given to the Attorney-General. When a second receiver of the company may object to the invalidity of the order appointing the first. Powers and duties of the receiver appointed in an action for sequestration. (Whitney v. N. Y. & Atlantic Railroad Co., 32 Hun, 164 [Gen. T. 1884].)

—— Service of papers on Attorney-General.] Motions affecting receivers of insolvent corporations. What papers must be served upon the Attorney-General under chapter 378 of 1883. (Greason v. Goodwillie-Wyman Co., 38 Hun, 138 [Gen. T. 1885].)

—— Receiver — notice of motion for his appointment.] A general judgment creditor of a corporation is not entitled to notice of motion for the appointment of a receiver thereof. (Morrison v. Menhaden Co., 37 Hun, 522 [Gen. T. 1885].)

RULE 78.

Receiver — When He May Sue — Costs.

Whenever a receiver, appointed under proceedings supplementary to execution, shall apply for leave to bring an action, he shall present and file with his application the written request of the creditor in whose behalf he was appointed, that such action be brought; or else he shall give a bond with sufficient security and properly acknowledged and approved by the court, to the person against whom the action is to be brought, conditioned for the payment of any costs which may be recovered against such receiver. And leave to bring actions shall not be granted except on such written request, or on the giving of such security.

In all other cases where a receiver applies to the court for leave to bring an action, he shall show in such application that he has sufficient property in his actual possession to secure the person against whom the action is to be brought for any costs which he may recover against such receiver; otherwise the court may require the receiver to give such bond conditioned for the payment of costs, and with such security as is above mentioned.

Rule 85 of 1877. Rule 79 of 1880. Rule 79 of 1884. Rule 79 of 1888. Rule 78 of 1896.

See notes under Rule 77.

RULE 79.

Who May be Referee, and the Duties of a Referee.

Except in a case provided for by section 1011 of the Code of Civil Procedure, no person, unless he is an attorney of the court in good standing, shall be appointed sole referee for any purpose in any pending action or proceeding. Nor shall any person be appointed a referee who is the partner or clerk of the attorney, or counsel, of the party in whose behalf such application for such appointment is made, or who is in any way connected in business with such attorney or counsel, or who occupies the same office with such attorney or counsel. All moneys received by a referee appointed to sell real property shall be forthwith deposited by the referee in his own name as referee in a bank or trust company authorized to receive on deposit court funds; and if there be no such depository in the city or town in which the referee resides, then he shall deposit such moneys forthwith in a depository located in an adjoining city or town, or with the county treasurer of the county in which the action or special proceeding is pending; and such moneys so deposited shall not be withdrawn, except upon the order of the court.

Rule 86 of 1877. Rule 80 of 1880. Rule 80 of 1884. Rule 80 of 1888. Rule 79 of 1896. Rule 79, as amended, 1910.

—— **Referee — qualifications of.**] (See section 1024 of the Code of Civil Procedure. See, also, Fortunato v. Mayor, 31 App. Div. 271; Baird v. Mayor, 74 N. Y. 382.)

—— When referee not disqualified. (Fleck v. Cohn, 131 App. Div. 248, citing Sentenis v. Ladew, 140 N. Y. 463.)

RULE 80.

Sequestration of Property — Motion for Receiver — Where Made — Effect of, on Subsequent Suits — Removal of.

All motions for the sequestration of the property of corporations, or for the appointment of receivers thereof, must be made in the judicial district in which the principal place of business of said corporations, respectively, is situated, except that in actions brought by the Attorney-General in behalf of the people of this State, when it shall be made to appear that such sequestration is a

necessary incident to the action, and that no receiver has already been appointed, a motion for the appointment of one may be made in any county within the judicial district in which such action is triable. No motion can be made, or other proceeding had for the removal of a receiver, elsewhere than in the judicial district in which the order for his appointment was made. And where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property in which a receiver is necessary.

Rule 87 of 1877. Rule 81 of 1880. Rule 81 of 1884. Rule 81 of 1888. Rule 80 of 1896.

CODE OF CIVIL PROCEDURE.

§ 1784. Action by judgment-creditor for sequestration. See General Corporation Law, § 100.

§ 1788. Appointment of receivers temporary and permanent — powers of, etc. General Corporation Law, §§ 104, 106.

§ 1789. Larger powers may be conferred on temporary receivers. See General Corporation Law, § 105.

—— **Title to real estate.]** How far it vests in the sequestrator. (Foster v. Townsend, 2 Abb. N. C. 29 [Ct. of App. 1877.] See Code of Civil Procedure, § 1772; Donnelly v. West, 17 Hun, 563–568.)

See notes under Rule 77.

RULE 81.

Receiver — Power of, to Employ Counsel.

No receiver shall have power to employ more than one counsel, except under special circumstances and in particular cases requiring the employment of additional counsel, and in such cases only upon special application to the court, showing such circumstances by his petition or affidavit, and on notice to the party or person on whose behalf or application he was appointed. This rule shall apply to all receivers, present and future; and no allowance shall be made to any receiver for expenses paid, or made, or incurred in violation of this rule.

Rule 88 of 1877. Rule 82 of 1880. Rule 82 of 1884. Rule 82 of 1888. Rule 81 of 1896.

ATTORNEY —As to the employment of an attorney.] (See Corey v. Long, 12 Abb. [N. S.] 427 [N. Y. Supr. Ct. Sp. T. 1872].)

—— **Who should not be employed.]** An attorney who has been employed by either of the parties to the action in which the receiver was appointed should not be employd by the receiver. (Warren v. Sprague, 4 Edw. 416; Panton v. Zebley, 19 How. Prac. 394 [N. Y. Supr. Ct. Sp. T. 1860]; Cumming v. Egerton, 9 Bosw. 684 [N. Y. Supr. Ct. Sp. T. 1863].)

—— **Employment of a receiver's partner.]** While the employment by a receiver of his partner as counsel in legal matters relating to the receivership is not to be commended, yet, when it clearly appears that the receiver has not and is not to share in the compensation for such services, there is no law which prevents such employment and payment. (Matter of Simpson, 36 App. Div. 562 [1899].)

—— **Commission to take testimony — the rule is not applicable to.]** The rule has no application to proceedings under a commission to take testimony for use outside of the State. (Matter of Garvey, 25 Misc. Rep. 353 [1898].)

—— **A stranger cannot object.]** A stranger sued by the receiver cannot object that he has employed an improper attorney. (Warren v. Sprague, 11 Paige, 200 [1844]; Ryckman v. Parkins, 5 id. 543 [1836].)

—— **Compensation of.]** Where the expenses of a receivership have consumed nearly one-half of the fund and the attorney for the receiver has received nearly one-third of it, the receiver should not be authorized to pay him any further sum, though his services may be worth more. (Kernochan v. Ballance, 26 Misc. Rep. 435 [1899].)

See notes under Rule 77.

RULE 82.

Examination of a Party Before Trial.

When an examination is required under sections 870, 871, 872 of the Code of Civil Procedure, the affidavit shall specify the facts and circumstances which show, in conformity with subdivision 4 of section 872, that the examination of the person is material and necessary.

Rule 21 of 1871, amended. Rule 21 of 1874, amended. Rule 89 of 1877. Rule 83 of 1880. Rule 83 of 1884. Rule 83 of 1888. Rule 82 of 1896.

CODE OF CIVIL PROCEDURE.

§ 870 *et seq.* Deposition of a party before trial.

See note under Rule 14.

APPLICATION — What must be shown.] Applicant must show that the examination is necessary to enable him to prepare his pleading. (Hynes v. McDermott, 7 Daly, 313 [1878]; Winston v. English, 14 Abb. Prac. [N. S.] 119 [Gen. T. 1873] S. C., 44 How. Prac. 498; Duffy v. Lynch, 36 id. 509 [Sp. T. 1869]; Greene v. Herder, 7 Rob. 463 [Sp. T. 1865]; Heishon v. Knickerbocker Life Ins Co., 13 J. & S. 34 [1879].)

—— The Code and Rules require that facts and circumstances be stated, showing the materiality and necessity of the testimony. (Hughes v. Harbor & Suburban, etc., Ass'n, 131 App. Div. 184. See, also, Mithertz v. Goldschmidt Bros. Co., 64 Misc. Rep. 460; Ward v. Hoffman Co., 121 App. Div. 636; Boscowitz v. Sulsbacher, No. 1, Id. 878; Ryan v. N. Y. Central, etc., R. R. Co., 124 id. 34.)

—— Where a complaint seeking an accounting by an agent has been served and demurrer thereto is pending, so that as yet there are no issues of fact to be tried, the plaintiff is not entitled to examine the defendant before trial. (Sprague v. Currie, 129 App. Div. 365. See, also, Gould v. Gould, 125 id. 375; Turck v. Chisholm, 53 Misc. Rep. 110.)

—— The special circumstances required by the Code (§ 872, subd. 5) are present when it is apparent that witness is hostile and under the control of the adverse party. (Automobile Club of America v. Canavan, 128 App. Div. 426.)

—— Plaintiff in partition action held entitled to examination of witness before trial for the purpose of obtaining facts necessary for service by publication. (Schwarz v. Robinson, 129 App. Div. 404.)

—— An order which is directed against the officers of the corporation individually and does not require the defendant corporation to be examined will be vacated. (Herrman v. Tapley Co., 64 Misc. Rep. 466.)

—— Referee has power to examine party and to issue *subpœna duces tecum*, although the court in granting the order for examination before trial had refused to direct the production of books and papers. (Littlefield v. Gansevoort Bank, 62 Misc. Rep. 339.)

—— Practice of the courts is to regard the privilege of examining opposing party as a substantial right when free from abuse. (Bender v. Bork, 52 Misc. Rep. 295; Gilroy v. Interborough-Met. Co., 55 id. 32.)

—— Where the affidavit complies with the requirements of the Code and of the General Rules of Practice, court has no power to make other requirements. (Shonts v. Thomas, 116 App. Div. 854.)

—— Fact that cause is actually on trial before referee is not ground for vacating order for examination before trial. (Hallenborg v. Greene, 120 App. Div. 813.)

—— Plaintiff not entitled to order for the examination of officers of corporation defendant in order to ascertain upon whom to serve summons so as to obtain jurisdiction over another corporation. (Grant v. Greene Consol. Copper Co., 118 App. Div. 853. See, also, McKeand v. Locke, 115 id. 174; Hill v. McKane, Id. 537; Istok v. Senderling, 118 id. 162; McKenna v. Tully, 109 id. 598; Turck v. Chisholm, 53 Misc. Rep. 110; Bender v. Bork, 52 id. 295; Hirschfield v. Rosenthal Co., 51 id. 644; Hinds, Noble & Eldredge v. Bonner, 52 id. 461; Lewis v. City of Buffalo, 115 App. Div. 735; Bankers' Money Order Ass'n v. Nachod, 120 id. 732; Crompton v. Dobbs, 119 id. 331; Merrill & Baker v. Woolworth, 53 Misc. Rep. 253; Grant v. Leopold, 61 id. 79; Solar Baking Powder Co. v. Royal Baking Powder Co., 128 App. Div. 550; Lowther v. Sullivan, 63 Misc. Rep. 51; Wilkens v. Torrens, 133 App. Div. 646; Regan v. Gorham Co., 129 id. 315; Schweinberg v. Altman, 131 id. 795;

Cohen v. Hecht, 128 id. 511; Loewy v. Gordon, 129 id. 459; Brick v. Shaff, 128 id. 264; Oakes v. Star Co., 119 id. 358; Chittenden v. San Domingo Imp. Co., 132 id. 169; Chartered Bank of India v. North River Ins. Co., 136 id. 646; Mithertz v. Goldschmidt Bros. Co., 64 Misc. Rep. 460; Akhurst v. Nat'l Starch Co., Id. 445; Hughes v. Harbor & Sub. Bldg., etc., Ass'n, 131 App. Div. 184; Segschneider v. Waring Hat Mfg. Co., 134 id. 217; Wilkens v. Am. Bank of Lorrean, 133 id. 646.)

—— **Affidavit for the examination of a party.]** To authorize the granting of an order for the examination of a party before trial, the affidavit must specify the facts and circumstances showing the testimony of the party to be material and necessary; it is not sufficient to allege that the testimony of the party is material and necessary for the party making the application and the prosecution of the action, and that the party cannot safely proceed to trial without examining him. (Crooke v. Corbin, 23 Hun, 176 [1880]; Burnett v. Mitchell, 26 Misc. Rep. 547 [1899].)

—— **Examination not ordered when the witness is privileged to refuse to testify.]** The affidavit did not show that there was any fact to which the witness could testify, except such as would be privileged. Held, that an order directing examination thereon should be reversed on appeal. (Abbott-Downing Co. v. Faber, 87 Hun, 299 [1895].)

—— **Affidavit on information and belief.]** An affidavit for an examination of a defendant before trial, made on information and belief, is sufficient if it states the grounds of belief. (Leach v. Haight, 34 App. Div. 522 [1898].)

—— **The affidavit should be made by the plaintiff.]** An affidavit on an application for an order for the defendant's examination before trial should be made by the plaintiff, and not by the plaintiff's attorney alone. (Ziegler v. Lamb, 5 App. Div. 47 [1896].)

—— **When the affidavit may be made by a third person.]** An affidavit to procure the examination of a party before trial may be made by a third person having knowledge of the facts. (The Railway Age & Northwestern Railroader v. Pryibil, 18 Misc. Rep. 561 [1896].)

—— **Existence of a cause of action — materiality.]** What allegations do not establish the existence of a cause of action — materiality of the testimony — how it must be alleged. (Hale v. Rogers, 22 Hun, 19 [1880].)

—— **Materiality to be shown.]** An application by a defendant should show how the facts are material to the defense. (Schepmoes v. Boussan, 1 Abb. N. C. 481 [Com. Pl. 1877].)

—— **Order not granted to enable a party to ascertain testimony of opponent's witnesses and procure their evidence.]** The motion will not be granted merely to enable a party to find out what his opponent's witnesses will swear to, or enable a party to procure other evidence to be used upon the trial. What are insufficient allegations in the affidavit used upon motion. (Leary v. Rice, 15 App. Div. 397 [1897].)

—— **Testimony to be used upon the trial.]** It should appear affirmatively that it is the intention of the moving party to use the testimony on the trial. (Batterson v. Sanford, 13 J. & S. 127 [1879]; McCormack v. Coddington, 98 App. Div. 13.)

—— **Express statement that the deposition will be used on the trial is unnecessary.]** It is not necessary that an affidavit used to procure an order to examine an adverse party before the trial of an action shall expressly state that the plaintiff intends to use the proposed deposition of the defendants upon the trial of the action; it is sufficient that the necessary inference to be derived from the facts alleged and the statements made by the moving party is that he intends to read the testimony upon the trial. (St. Clair Paper Mfg. Co. v. Brown, 16 App. Div. 317 [1897].)

—— **What allegations in petition of Attorney-General are insufficient.]** In a proceeding by the Attorney-General, under the act to prevent monopolies (chap. 383, Laws of 1897), the allegations in the petition for an order to examine witnesses were held insufficient for not stating sources of his information, etc. (Matter of Attorney-General, 22 App. Div. 285 [1897].)

—— **Order for examination served before the summons, bad.]** An order for the examination of a party before trial, made and served before the action has been commenced by the service of summons, is without jurisdiction and cannot be enforced even after subsequent service of summons. (Brandon Manufacturing Co. v. Pettingill, 2 Abb. N. C. 162 [Sp. T. 1877].)

—— **Before issue.]** A party to an action could be examined under rule of 1871 at the instance of the adverse party, under section 391 of the Code of Procedure, immediately on commencement of an action, and before issue. (Glenney v. Stedwell, 64 N. Y. 120 [1876], 1 Abb. N. C. 327, note; McVickar v. Ketchum, 1 Abb. Pr. [N. S.] 452 [Gen. T. 1865]; S. C., 4 Rob. 657; followed in Fullerton v. Gaylord, 7 id. 559 [Sp. T. 1867]; Duffy v. Lynch, 36 How. Prac. 509 [Sp. T. 1869]; Hadley v. Fowler, 12 Abb. Prac. [N. S.] 244 [Sp. T. 1872].)

—— **Bill of discovery.]** Could be maintained before issue joined. (2 Barb. Ch. Prac. 105, 106.)

—— **Before suit brought.]** The Code authorizes the granting of an order, before an action has actually been commenced in a court of record, for the examination of a person against whom such an action is "about to be brought" upon the application of the person who is about to bring the action. (Mer. Nat. Bank v. Sheehan, 101 N. Y. 176 [1886].)

—— **It must be a judge's order — ex parte.]** The Supreme Court has no power to make a court order for the examination of the plaintiff in an action as a witness before trial, upon a contested motion, brought on to be heard pursuant to a formal notice thereof. The proper practice, under section 873 of the Code of Civil Procedure, regulating applications of this character, is to apply *ex parte* to a judge who, if the papers are sufficient, must make the order. (Wiechers v. New Home Sewing Machine Co., 38 App. Div. 1 [1899].)

—— **Scope of the examination.]** The examination is not to enable defendant to ascertain whether he has a defense, but to enable him to obtain testimony in support of a defense which he has good reason to suppose he has. (Winston v. English, 44 How. Prac. 398.)

—— **Questions tending to criminate.]** Examination of the plaintiff before trial — when it will be ordered — right of the party examined to refuse to

answer questions tending to incriminate him. (See Sprague v. Butterworth, 22 Hun, 502; Batterson v. Sanford, 13 Jones & S. 127 [1879].)

—— Party examined is bound to answer all questions which relate confessedly to the issues involved. (Mudge v. Gilbert, 43 How. Prac. 219 [Sp. T. 1872].)

—— Objection that the examination may require witness to incriminate himself is without force when it appears that any criminal prosecution for a penalty is barred by the statute of limitations. (Meade v. Southern Tier Masonic Relief Ass'n, 119 App. Div. 761.)

—— **Not allowed simply to show false representations.]** An examination of a party before trial will not be ordered where its only purpose is to show that he has been guilty of obtaining property by false representations. (Yamato Trading Co. v. Brown, 27 Hun, 248 [1882].)

—— **Not allowed simply to show a party guilty of a crime.]** The examination of a party before trial cannot be ordered when all the evidence sought for must tend to show him guilty of a crime or render him infamous. (Kinney v. Roberts, 26 Hun, 166 [1882].)

—— **Names.]** The application may be granted for the purpose of ascertaining the names of persons whom the applicant desires to join by amendment as parties. (Glenney v. Stedwell, 1 Abb. N. C. 327 and note [Ct. of App. 1876]; S. C., 64 N. Y. 120.)

—— **Complaint — preparation of.]** Examination of defendant to enable plaintiff to prepare his complaint may be had. (Havemeyer v. Ingersoll, 12 Abb. Prac. [N. S.] 301 [Sp. T. 1871].)

—— **When not allowed to enable the plaintiff to frame his complaint.]** A witness cannot be examined under sections 871 to 876 of the Code of Civil Procedure for the purpose of enabling a plaintiff to frame a complaint in an action which is not yet commenced. (Matter of Anthony & Co., 42 App. Div. 66 [1899].)

—— **Not granted to enable a party to learn his opponent's evidence.]** An examination before trial will not be granted merely to enable the moving party to learn his opponent's evidence, or to enable the moving party to procure other evidence to be produced upon the trial. (Leary v. Rice, 15 App. Div. 397 [1897].)

—— **Not allowed to discover a cause of action against persons not parties.]** An examination of a defendant before trial should not be granted to enable his adversary to ascertain whether he has a cause of action against other persons who have not been made parties to the action. (Ziegler v Lamb, 5 App. Div. 47 [1896].)

—— **Not denied, because the party will be present at the trial.]** An order for the examination of a party before trial will not be denied, simply because the party to be examined states that he will be present at the trial. (Presbrey v. Public Opinion Co., 6 App. Div. 600 [1896]; Press Publishing Co. v. Star Co., 33 id. 242 [1898].)

—— **Examination before trial does not preclude an examination at the trial.]** The fact that a party has been examined before trial does not preclude his examination at the trial. (Berdell v. Berdell, 27 Hun, 23 [1882]; Misland v. Boynton, 79 N. Y. 630 [1880].)

—— **Duty of judge where the papers in form are correct.]** Upon the presentation to a judge of an affidavit complying in form with the requirements of section 872 of the Code of Civil Procedure, he must grant an order for the examination of a party before trial, but when the party to be examined comes into court then the proceedings must be subject to judicial control, and he can vacate the order upon cause shown. (Levy v. Loeb, 5 Abb. N. C. 157 [N. Y. Supr. Ct. Gen. T. 1878].)

—— **Practice on a motion to vacate.]** A motion to vacate an order for the examination of a party before trial, made upon the original papers, although on notice, may be made at the Special Term for the transaction of *ex parte* business. (Byrnes v. Ladew, 15 Misc. Rep. 413 [1896].)

—— In action to annul a marriage court may compel defendant to submit to surgical examination when ground of action is impotency. (Gore v. Gore, 103 App. Div. 168.)

—— **When granted.]** Where all the material facts are in the possession of defendant. (Tanenbaum v. Lippman, 89 App. Div. 17.)

OBJECTION — Must be by motion before trial.] A party desiring to object to a deposition on the ground that the witness refused to answer proper questions must do so by motion, and not wait until the trial and then object to the reading of the deposition. (Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77 [1875]; Vilmar v. Schall, 61 id. 564 [1875]; Elverson v. Vanderpoel, 9 Jones & S. 257 [N. Y. Supr. Ct. 1876]; Richardson & Boynton Co. v. Schiff, 93 App. Div. 368.)

PARTY — Meaning of.] The term "party to an action" (Code of Civil Procedure, § 870), includes only parties to the record, not parties in interest. (Seeley v. Clark, 78 N. Y. 220.)

THIRD PERSON — Examination of, to enable the complaint to be made more definite and certain.] Employees of a corporation which is not a party to an action may be compelled, under sections 871 and 872 of the Code of Civil Procedure, to submit to an examination by the plaintiff when such employees are alleged to have knowledge of facts which will enable the plaintiff to make its complaint more definite and certain by separately stating and numbering its causes of action, as required by an order granted at the instance of the defendants. (People v. Armour, 18 App. Div. 584 [1897].)

—— Where an executrix suing a corporation to recover the value of legal services rendered by her testator has been ordered to serve a bill of particulars and has no personal information concerning the value of the services rendered, she is entitled to an order for an examination by third persons who at the time of the testator's employment were officers of the defendant corporation. (Chittenden v. San Domingo Improvement Co., 132 App. Div. 169.)

BOOKS AND PAPERS — Production of, on an examination before trial.] An order for the examination before trial of a corporation may, under subdivision 7 of section 872 of the Code of Civil Procedure, properly contain a provision requiring officers to be examined to produce books belonging to the corporation. (Press Publishing Co. v. Star Co., 33 App. Div. 242 [1898]; Horst v. Yuengling Brewing Co., 1 id. 629 [1896].)

—— **An examination of the adverse party and a discovery of his books cannot both be had in one proceeding.]** It seems, that an examination of the

adverse party and a discovery and inspection of his books and papers cannot be had in one proceeding, and the provisions of section 388 of the Code of Procedure relating to the latter object cannot be invoked to sustain an order for the former object. (Havemeyer v. Ingersoll, 12 Abb. [N. S.] 301 [Sp. T. 1871].)

—— **Discovery of books and papers is a proceeding independent of the right to their production on the trial, or by a party examined before the trial.]** The right to inspection of books and papers with a view to the discovery of evidence is distinctly recognized by statute, and is not to be confounded with the production of them as evidence upon the trial, or on the examination of a party as a witness before trial. (Lefferts v. Bramton, 24 How. Prac. 257 [N. Y. Com. Pl. Gen. T. 1862].)

—— **To annex document to commission to examine witness.]** The court has no power in an action upon a draft, to order it to be annexed to a commission issued to take the examination of witnesses residing out of the State. (Butler v. Lee, 32 Barb. 75 [Gen. T. 1860]; S. C., 19 How. Prac. 383.)

—— **Examination of a machine imposed as a condition.]** The court cannot compel the defendant, who asks to examine the plaintiff before trial, to allow the attorney for the plaintiff to examine the machine upon which the plaintiff was injured. (Cooke v. Lalance Grojean Mfg. Co., 29 Hun, 641 [1883].)

PHYSICAL EXAMINATION — Examination of a plaintiff's person, not ordered.] The Supreme Court has no inherent power, and, in the absence of a statute conferring the right, may not, in advance of the trial of an action for personal injuries, compel the plaintiff, on the application of the defendant, to submit to an examination of his person by surgeons appointed by the court, with a view to enable them to testify on the trial as to the existence or extent of the alleged injury. (McQuigan v. D., L. & W. R. R. Co., 129 N. Y. 50 [1891].)

—— **Inspection of plaintiff's person, in an action for malpractice — ordered.]** Where, in an action for malpractice against a surgeon to recover damages for an alleged unskillful operation performed by him on the body of the plaintiff, a child of about seven years of age, he, upon petition and affidavit asked that the plaintiff be required to appear and submit to a personal inspection of the affected part, by the defendant and such other skillful and competent surgeons as he might name under the direction of a referee appointed by the court for that purpose, held, that the court had power on such application to compel a discovery of the character of the one sought for, and that this was a proper case in which to exercise it, and accordingly ordered and directed an examination of the alleged injured part by expert surgeons appointed by the court for that purpose. (Walsh v. Sayer, 52 How. Prac. 334 [Sp. T. 1868]. See *contra*, Roberts v. Ogdensburg & L. C. R. R. Co., 29 Hun, 154 [1883]. See on this subject Code of Civil Procedure, § 873.)

—— **Physical examination of female plaintiff.]** A female plaintiff is entitled as of right to have inserted in an order for her physical examination before trial a provision that a female physician make the examination, without making any special application for it as a favor or privilege. (Lawrence v. Samuels, 17 Misc. Rep. 559 [1896].)

—— **A nonresident plaintiff is bound to obey an order for her physical examination before trial.**] A person who, after commencing an action in the State of New York, to recover damages for personal injuries sustained by her through the alleged negligence of the defendant, removes from the State, is bound to obey an order of the Supreme Court of the State of New York, for her oral and physical examination before trial, when it is brought to her attention or that of her attorney. (Campbell v. Bauland Co., 41 App. Div. 474 [1899].)

—— **Failure to serve the order or to pay witness fees.**] The fact that the defendant is unable to make service of the order within the State of New York, as required by the statute pursuant to which the order was made, does not afford any ground for vacating it, in view of the duty of the plaintiff to submit herself to the jurisdiction of the court; nor does the failure of the defendant to pay the plaintiff the witness fees required by section 874 of the Code of Civil Procedure, furnish such ground, as, until the plaintiff affords the defendant an opportunity to serve her within the State, the defendant is under no obligation to pay such fees. (*Ib.*)

—— **Examination to determine the physical condition of an applicant for the position of policeman.**] It seems, that the court has no power to require a person seeking to compel by mandamus his appointment as a policeman, to submit to a physical examination for the purpose of determining his physical ability to perform the duties of his position. (People ex rel. Mosher v. Roosa, 43 App. Div. 611.)

—— **Affidavit to procure order for physical examination.**] An affidavit to procure an order for the physical examination of the plaintiff in an action for personal injuries, which states the nature of the action, and that defendant is ignorant of the nature and extent of the injuries complained of, complies sufficiently with the requirements of Rule 83. Such affidavit need not state that defendant intends to read the testimony on the trial. It is sufficient if the affidavit shows that he proposes to use the testimony so obtained on the trial. (Green v. Middlesex R. R. Co., 10 Misc. Rep. 473 [1894].)

—— **Depositions of physicians taken thereon.**] Where a plaintiff has been required to submit to a physical examination, under the provisions of section 873 of the Code of Civil Procedure, before a referee and two physicians, the depositions of the physicians who testified before the referee are not competent evidence upon the trial of the action when the witnesses themselves can be produced. (Green v. Middlesex Valley R. R. Co., 31 App. Div. 412 [1898]. See Gore v. Gore, 103 App. Div. 168.)

—— **Physical examination, effect of persistent refusal to submit to.**] Plaintiff who persists in refusing to undergo physical examination ordered by court, not permitted to prosecute action. (Smith v. N. J., etc., R. Co., 123 App. Div. 493.)

—— **Personal service of order necessary.**] Power of court to compel plaintiff to submit to physical examination is statutory and hence to be strictly construed and for that reason personal service of the order must be made. (Miller v. Nevins, 115 App. Div. 139.)

—— **Bad faith alone is sufficient to defeat right.**] Bad faith alone is sufficient to defeat the right of examination before trial, provided all

the requirements of the Code of Civil Procedure and of the Rules of Practice have been complied with. (Tirpak v. Hoe, 53 Misc. Rep. 532. See, also, Pitt v. Dunlap, 54 Misc. Rep. 115; Geis v. Geis, 116 App. Div. 362; Wood v. Hoffman, 56 Misc. Rep. 66; Orlando v. Syracuse Rap. Transit R. Co., 109 App. Div. 356; Goldberg v. Zirinsky, 100 N. Y. Supp. 251; Potter v. Village of Hammondsport, 112 App. Div. 91.)

—— **When physical examination refused.]** A defendant sued by a woman to recover damages caused by indignities and assault will not be allowed a physical examination of plaintiff before trial as an adverse witness under section 873 of the Code of Civil Procedure, where the purpose is not to obtain evidence of physical injuries but to inquire into the previous history and condition of the woman. (Smyth v. Lichtenstein, No. 2, 137 App. Div. 335.)

APPEAL — To the Appellate Division.] An order granting an application for the examination of a party before trial is reviewable by the Appellate Division. (Fiske v. Smith, 9 App. Div. 208 [1896].)

PENALTY — Striking out pleading.] If a party refuses to answer a material and proper question, his pleading may be stricken out. (Richard v. Judd, 15 Abb. Prac. [N. S.] 184 [Gen. T. 1874].)

—— **Contempt.]** For failure to answer, a party may be punished as for contempt. (Kieruan v. Abbott, 1 Hun, 100 [Gen. T. 1874].)

CODE OF PROCEDURE, § 388 and § 391 — Relate to different subjects.] Sections 388 and 391 of the Code of Procedure relate to entirely different subjects, and cannot be united for the purpose of aiding proceedings under either. (Havemeyer v. Ingersoll, 12 Abb. Prac. [N. S.] 301 [Sp. T. 1871]. See Code of Civil Procedure, §§ 803, 870.)

—— **The Supreme Court is the successor of the former Court of Chancery.]** (Milton v. Richardson, 21 Misc. Rep. 380 [1897].)

NOTICE — To attorney.] When a party to an action who is required to attend before a judge to be examined under section 391 of the Code of Procedure has appeared by attorney, notice of such examination must be served on the attorney as well as the party. (Plummer v. Belden, 8 Hun, 455 [Gen. T. 1876].)

RULE 83.

Courts May Make Further Rules.

The Appellate Division in each department, and the various courts of record, may make such further rules in regard to the transaction of business before them respectively, not inconsistent with the foregoing rules as they in their discretion may deem necessary.

Rule 96 of 1871. Rule 96 of 1874. Rule 90 of 1877. Rule 84 of 1880. Rule 84 of 1884. Rule 84 of 1888, amended. Rule 83 of 1896.

Appellate Division may make a rule requiring the notice of sale of real estate on execution to include a diagram of the property. (Francis v. Watkins, 72 App. Div. 15; 76 N. Y. [110 St. Rep.] 106.)

RULE 84.

Practice in Cases not Covered by these Rules.

In cases where no provision is made by statute or by these rules the proceedings shall be according to the customary practice as it formerly existed in the Court of Chancery or Supreme Court, in cases not provided for by statute or by the written rules of those courts.

Rule 93 of 1858. Rule 97 of 1871. Rule 97 of 1874. Rule 91 of 1877. Rule 85 of 1880. Rule 85 of 1884. Rule 85 of 1888. Rule 84 of 1896.

APPENDIX.

ANNUITY TABLE.*

TABLE *Showing the Value of an Annuity of One Dollar on a Single Life, According to the Northampton Table of Mortality, at Five per cent Interest, Referred to in General Rule No. 70.*

Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.
1	11.563	33	12.740	65	7.276
2	13.420	34	12.623	66	7.034
3	14.135	35	12.502	67	6.787
4	14.613	36	12.377	68	6.536
5	14.827	37	12.249	69	6.281
6	15.041	38	12.116	70	6.023
7	15.166	39	11.979	71	5.764
8	15.226	40	11.837	72	5.504
9	15.210	41	11.695	73	5.245
10	15.139	42	11.551	74	4.990
11	15.043	43	11.407	75	4.744
12	14.937	44	11.258	76	4.511
13	14.826	45	11.105	77	4.277
14	14.710	46	10.947	78	4.035
15	14.588	47	10.784	79	3.776
16	14.460	48	10.616	80	3.515
17	14.334	49	10.443	81	3.263
18	14.217	50	10.269	82	3.020
19	14.108	51	10.097	83	2.797
20	14.007	52	9.925	84	2.627
21	13.917	53	9.748	85	2.471
22	13.833	54	9.567	86	2.328
23	13.746	55	9.382	87	2.193
24	13.658	56	9.193	88	2.080
25	13.567	57	8.999	89	1.924
26	13.473	58	8.801	90	1.723
27	13.377	59	8.599	91	1.447
28	13.278	60	8.392	92	1.153
29	13.177	61	8.181	93	.816
30	13.072	62	7.966	94	.524
31	12.965	63	7.742	95	.238
32	12.854	64	7.514		

*Taken from "Jones on Annuities," vol. 1, p. 244.

RULES FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at 5 per cent. for one year, upon the sum to the income of which the person is entitled. Multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life estate of each person in said sum.

EXAMPLES.

Suppose a widow's age is thirty-seven, and she is entitled to dower in real estate worth $350.75. One-third of this is $116.91⅔. Interest on $116.91 for one year at 5 per cent. (as fixed by the 70th rule) is $5.85. The number of years' purchase which an annuity of one dollar is worth, at the age of thirty-seven, as appears by the table, is twelve years and $\frac{249}{1000}$ parts of a year, which multiplied by $5.85, the income for one year, gives $71.65 and a fraction as the gross value of her right of dower.

Suppose a man, whose age is fifty, is tenant by the curtesy in the whole of an estate worth $9,000. The annual interest on the sum, at 5 per cent. is $450. The number of years' purchase which an annuity of one dollar is worth, at the age of fifty, as per table, is $10\frac{269}{1000}$ parts of a year, which multiplied by $450, the value of one year, gives $4,621.05, as the gross value of his life estate in the premises, or the proceeds thereof.

NOTE.— The values in this table are calculated on the supposition that the annuities are payable yearly.

See note to Rule 70, *ante*.

CARLISLE TABLE OF MORTALITY.

TABLE *Showing the Value of an Annuity of One Dollar on a Single Life, According to the Carlisle Table of Mortality, at Five per cent. Interest, Referred to in General Rule No.* 70.

Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.
0	12.083	35	14.127	70	6.336
1	13.995	36	13.987	71	6.015
2	14.983	37	13.843	72	5.711
3	15.824	38	13.694	73	5.434
4	16.271	39	13.541	74	5.190
5	16.590	40	13.389	75	4.989
6	16.735	41	13.244	76	4.792
7	16.790	42	13.101	77	4.609
8	16.786	43	12.956	78	4.422
9	16.742	44	12.805	79	4.210
10	16.669	45	12.648	80	4.014
11	16.581	46	12.480	81	3.799
12	16.495	47	12.301	82	3.606
13	16.406	48	12.107	83	3.406
14	16.316	49	11.892	84	3.211
15	16.227	50	11.660	85	3.009
16	16.145	51	11.409	86	2.830
17	16.067	52	11.154	87	2.685
18	15.988	53	10.892	88	2.597
19	15.905	54	10.624	89	2.495
20	15.818	55	10.347	90	2.339
21	15.727	56	10.063	91	2.321
22	15.629	57	9.771	92	2.412
23	15.526	58	9.478	93	2.517
24	15.417	59	9.199	94	2.569
25	15.304	60	8.940	95	2.596
26	15.188	61	8.712	96	2.555
27	15.065	62	8.487	97	2.428
28	14.942	63	8.258	98	2.278
29	14.827	64	8.016	99	2.045
30	14.723	65	7.765	100	1.624
31	14.617	66	7.503	101	1.192
32	14.506	67	7.227	102	0.753
33	14.387	68	6.941	103	0.317
34	14.260	69	6.643		

RULES FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at 5 per cent. for one year upon the sum to the income of which the person is entitled. Multiply this

interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person in said sum.

EXAMPLES.

Suppose a widow's age is thirty-seven, and she is entitled to dower in real estate worth $350.75. One-third of this is $116.91⅔. Interest on $116.91 for one year at 5 per cent. (as fixed by the 70th Rule) is $5.85. The number of years' purchase which an annuity of one dollar is worth at the age of thirty-seven, as appears by the table, is thirteen years and $\frac{843}{1000}$ parts of a year, which multiplied by $5.85, the income for one year, gives $80.98 and a fraction as the gross value of her right of dower.

Suppose a man whose age is fifty is tenant by the curtesy in the whole of an estate worth $9,000. The annual interest on the sum at 5 per cent. is $450. The number of years' purchase which an annuity of one dollar is worth at the age of fifty, as per table, is 11.660 parts of a year, which, multiplied by $450, the value of one year, gives $5,247 as the gross value of his life estate in the premises, or the proceeds thereof.

NOTE.— The values in this table are calculated on the supposition that the annuities are payable yearly, first payment due one year hence. These values, with those for joint and survivorship life interest, may be found in "Commutation Tables for Joint Annuities and Survivorship Assurances Based on the Carlisle Mortality, by David Chisholm." London, Charles & Edwin Layton, 1858.

SUPREME COURT.

RULES MADE BY THE APPELLATE DIVISIONS OF THE SEVERAL DEPARTMENTS.

Special Rules Regulating Practice in the First Judicial Department.

RULES FOR THE HEARING OF APPEALS FROM THE CITY COURT OF THE CITY OF NEW YORK, AND FROM THE MUNICIPAL COURT IN THE BOROUGHS OF MANHATTAN AND THE BRONX.

RULE I.

Term.

There shall be a term of the Supreme Court for the hearing of appeals from the City Court and the Municipal Court of the City of New York in the boroughs of Manhattan and the Bronx which shall commence on the first Monday of October, November, December, January, February, March, April, May and June in each year and shall continue from day to day during each of said months until all appeals ready for hearing are heard and disposed of. This term of the court shall hold its sessions in the Court House in the county of New York, and shall be held by three justices of the Supreme Court, duly designated to hold said term, and shall be known as the Appellate Term.

RULE II.

Calendar and filing return.

The clerk of such term of the Supreme Court shall make up a calendar of all appeals to be heard each term, and publish the same in the "Law Journal" at least eight days before the com-

mencement of the term. No appeal shall be placed on such calendar unless the return from the court below is duly filed with the clerk of such term at least ten days before the commencement of the term; nor, in the case of appeals from the City Court, unless an affidavit is filed with such clerk at least ten days before the commencement of the term, by which it appears that three copies of such return, duly printed as required by the General Rules of Practice, have been served upon the attorney for the respondent. Upon such return being filed as aforesaid, and in the case of appeals from the City Court upon an affidavit as aforesaid being also filed, the clerk shall place the appeal upon the calendar in the order in which the return was filed.

Upon an appeal from the City Court the judgment or order of the court shall be entered in the office of the Clerk of the Supreme Court; a certified copy of such judgment or order shall be annexed to the return from the City Court, which certified copy and return shall be transmitted to the City Court, as required by section 1345 of the Code of Civil Procedure. Upon an appeal from the Municipal Court the judgment or order of the Appellate Term shall be entered in the office of the Clerk of the Supreme Court, and a certified copy thereof annexed to the return received from the Municipal Court, which return and certified copy of the judgment or order shall be returned to the District of the Municipal Court from which the appeal was taken, as provided by section 327 of chapter 580 of the Laws of 1902, which shall remain on file in the said Municipal Court.

RULE III.

Failure to file return and motion for dismissal therefor.

In appeals from the City Court, in case the appellant does not cause the return to be filed with the clerk of the Appellate Term and print and serve three copies thereof upon the attorney for the respondent, as required by the General Rules of Practice, within twenty days after the settlement of the case upon appeal, and in case of an appeal from an order of the City Court within fifteen days after service of the notice of appeal upon the attorney for respondent, the respondent may move, upon five days' notice, on the first day of the term of such court, to dismiss the appeal, and the appeal shall be dismissed unless the time of the

appellant to cause such return to be filed and copies thereof to be printed and served be extended by the justices assigned to hear such appeals, or one of them, for good cause shown.

In appeals from the Municipal Court of the City of New York, if the appellant does not procure the return to be made to the appellate court within the time prescribed by section 317 of chapter 580 of the Laws of 1902, the respondent may move upon five days' notice, on the first day of the term, to dismiss the appeal, and such appeal shall be dismissed unless the justices assigned to hear such appeals, or one of them, for good cause shown, shall extend the time.

RULE IV.

Attachment — motion for.

If the justice of the Municipal Court whose duty it is to cause a return to be filed with the Appellate Term shall not make such return within the time prescribed by section 317, chapter 580, of the Laws of 1902, either party may move the Appellate Term, upon notice to the attorney for the adverse party and to such justice to compel such return by attachment.

RULE V.

Briefs — form and filing — submission of appeal — argument.

The cases and points and all other papers furnished to the Appellate Term on an appeal from the City Court shall be printed as provided for in Rule 43 of the General Rules of Practice. The points on an appeal from the Municipal Court shall be printed as therein provided or typewritten. In every case on appeal from the City Court or the Municipal Court the appellant must, on or before the Monday preceding the first day of the term at which the appeal is noticed for argument, file with the clerk of the Appellate Term the requisite number of copies of his points to be used upon the hearing, indicating thereon the number of the appeal on the calendar published in the "Law Journal," and shall also, on or before the Monday preceding the first day of said term, serve a copy of said points upon the attorney for the respondent. Upon failure so to do the appeal may, when called for argument in its regular order on the calendar, be dismissed or the hearing thereof adjourned to the next term, as the court may determine. Not later than twelve o'clock noon on the Saturday preceding the

first day of the term the respondent must serve a copy of his points upon the attorney for the appellant or upon the appellant's counsel, and file with the clerk the requisite number of copies thereof to be used upon the argument, said copies also to contain the number of the case upon the calendar as published in the "Law Journal." No further time for filing points will be granted and no other points will be received or considered unless the court shall by its own motion direct further points to be submitted.

No appeal will be heard or received on submission unless it has been noticed for argument and proof of service thereof filed with the clerk of the Appellate Term on or before the Monday preceding the first day of the term. All appeals must be heard or submitted when regularly called for argument, unless the court, for cause shown, shall adjourn the hearing until a subsequent term; and no appeals shall be submitted without argument unless the points have been filed and served as hereinbefore provided. In the argument of an appeal from an order or from a judgment of the Municipal Court not more than fifteen minutes shall be occupied by counsel on either side; and in the argument of an appeal from a judgment of the City Court not more than thirty minutes shall be occupied by counsel on either side, except by express permission of the court.

RULE VI.

Default in appearance — result and effect.

If the appellant does not appear upon the call of the calendar, the judgment or order appealed from shall be affirmed. If the appellant appears and the respondent fails to appear, the appellant may either argue, or submit his case, but judgment of reversal by default will not be allowed.

RULE VII.

Application for leave to appeal — reargument — motion for.

Motions for reargument and applications for leave to appeal from a determination of the Appellate Term to the Appellate Division under section 1344 of the Code of Civil Procedure must be made upon written notice to the adverse party on the first day of the term next succeeding the term at which the case was decided. Such motions and applications must be based upon an affidavit or

a statement setting forth concisely the points claimed to have been overlooked or misapprehended by the court, with proper reference to the authorities relied upon, and the reason why such reargument should be granted or appeal allowed, together with a copy of the opinion, if any. The briefs may be either printed or typewritten. All motions and applications must be submitted without oral argument.

An appeal to the Appellate Division from an order granting a new trial will not be allowed unless the appellant files with his notice of application for leave to appeal a stipulation that if the order appealed from be affirmed, or the appeal therefrom be dismissed, judgment absolute may be rendered against him.

A party desiring an order staying proceedings pending a motion for reargument or an application for leave to appeal must serve the notice provided for in this rule. Upon an affidavit showing the service of such notice, a copy of the moving papers and a statement in such affidavit setting forth the reasons why a stay should be granted, an application for a stay will be entertained. Application for such an order must be made to the justices of the Appellate Term who heard the appeal, or one of them, by presenting the same to the clerk of the Appellate Term, by whom it will be brought to the atttention of the court.

RULE VIII.

Motions generally — practice — calendar.

Five days' notice of motion shall be given of all motions made in the Appellate Term, except motions for restitution, under section 323 of the Municipal Court Act. In all motions noticed for the first day of the term a notice of such motion, whether founded upon an order to show cause or a regular notice of motion, with proof of service thereof, together with a note of issue, must be filed with the clerk of the Appellate Term on the Friday preceding the commencement of the term. The motion calendar will be published on the Saturday preceding the commencement of the term, but no motion will be placed thereon except upon compliance with this rule. The motion calendar will not be called and no oral argument will be allowed. The briefs of counsel and the answering affidavits, if any, must be filed with the clerk at or before twelve o'clock noon of the first day of the term.

All motions, other than those made under Rules three and seven, whether upon an order to show cause or by regular notice of motion, may be made returnable upon any day of the term.

Except when the Appellate Term shall otherwise direct, all decisions, either in cases upon appeal or on motion, will, when announced, be accompanied by an order duly signed. A motion for resettlement of such order must be made upon two days' notice.

CALENDAR RULES ADOPTED BY THE APPELLATE TERM.

RULE I.

The calendar of appeals from orders and judgments of the City Court will be called in the forenoon of the first day of the term at 10 o'clock A. M. The calendar of appeals from orders and judgments of the Municipal Court will be called on the second day of the term at 10 o'clock A. M.

RULE II.

In motions for leave to appeal or for reargument an indorsement must be made upon the motion papers stating the term of the court at which the case was argued or submitted. If an appeal upon the calendar is affected by a motion, the motion papers and the note of issue must be indorsed with the calendar number of such appeal.

RULE III.

Briefs of counsel, when reference therein is made to the testimony given upon the trial, must give the number of the folio in the printed case if an appeal from the City Court, and the number of the page in the record if an appeal from the Municipal Court. If the appellant's brief fails to comply with this rule the appeal may be dismissed. If the respondent's brief is deficient in this respect the appeal may be considered on the appellant's brief alone.

RULES FOR THE REGULATION OF THE TRIAL TERMS OF THE SUPREME COURT IN THE FIRST JUDICIAL DISTRICT AND TO REGULATE THE CALENDAR PRACTICE THEREIN.

RULE I.

The general calendar of issues of fact to be tried by a jury in the County of New York shall consist of three separate calendars, known respectively as Calendar No. 1, Calendar No. 2 and Cal-

endar No. 3, which shall be made up from time to time as ordered by the Appellate Division of the Supreme Court in the First Department, and these calendars shall remain for the successive Trial Terms of the court until new calendars are made up. New causes that have been regularly noticed for trial and a note of issue filed as prescribed by the Code of Civil Procedure shall be put at the foot of the proper calendar. Parties filing a consent may have a cause on either of the calendars reserved generally. A cause which has appeared on the calendar of the Circuit Court, the Superior Court of the city of New York, or the Court of Common Pleas for the city and county of New York, or on a calendar of the Trial Term of the Supreme Court, where the parties shall have omitted to file a note of issue so as to have the same placed on a new calendar, may be placed on the proper calendar at the foot thereof by the justice calling the Friday calendar on application of either party, on two days' notice to the adverse party. Causes placed on the several calendars hereinbefore provided for shall be classified as follows: Upon Calendar No. 1 there shall be placed actions to recover for personal injuries or for death against railroad companies. Upon Calendar No. 2 there shall be placed actions for libel, slander, false imprisonment, malicious prosecution and all other actions sounding in tort, except actions for personal injuries against railroad companies and actions to recover damages for conversion of personal property. Upon Calendar No. 3 there shall be placed actions for damages for the conversion of personal property, actions on contract and to recover damages for a breach of a contract, and all other actions not hereinbefore directed to be placed upon Calendars Nos. 1 and 2. A note of issue must specify the particular nature of the action and the calendar upon which the same shall be placed, as required by section 977 of the Code of Civil Procedure; and the clerk shall not receive a note of issue unless it complies with this provision.

Am'd May 23, 1904.

RULE II.

Any cause "reserved generally," where the same has been reached in its regular order, or in which a new trial shall have been ordered, may be placed on the calendar for any Friday on filing a consent with the clerk; or either party may apply to the justice calling the Friday calendar upon any Friday upon two

days' notice, for an order placing such cause upon the Friday calendar to be called for trial. All motions or applications for orders in respect to the calendar, except as provided by Rules 3, 5, 6 and 7 must be made to the justice calling the Friday calendar.

RULE III.

A party entitled to have a cause preferred under sections 791 and 793 of the Code of Civil Procedure, may apply upon notice, to the court at Part 2 of the Trial Term to have such preference awarded. If such application for a preference is granted, the court shall direct such cause to be placed upon the appropriate day calendar for a day certain for trial, and called after the causes then upon the said day calendar marked ready. If the party who has moved for such a preference shall not be ready to proceed with the trial when the cause is called for trial, the said cause shall thereupon be stricken from the day calendar, retaining its position on the general calendar which it would have had if no preference had been ordered.

Am'd May 23, 1904.

RULE IV.

There shall be twenty Trial Terms of the Supreme Court, to be known respectively as Trial Term, Part I, Part II, Part III, Part IV, Part V, Part VI, Part VII, Part VIII, Part IX, Part X, Part XI, Part XII, Part XIII, Part XIV, Part XV, Part XVI, Part XVII, Part XVIII, Part XIX and Part XX. Each of said parts shall commence on the first Monday of January, February, March, April, May, June, October, November and December in each year, and shall continue to and until the fourth Friday of the term, and until the end of any trial actually commenced on or before the fourth Friday of the term, or the final disposition of any application or motion in an action tried at such term, and until the terms shall be adjourned without day by the justice assiged to hold the same.

Parts III, VIII and XIV of such Trial Terms shall open at 10:15 and the other parts at 10:30 A. M. on each day during the term, except Saturdays, Sundays, and legal holidays. Part I of the Trial Term shall be the Criminal Term of the Supreme Court for the trial of indictments, and shall be held in the Criminal Court Building or in the County Court House, in

the county of New York. Part II of the Trial Term shall be the Trial Term for the disposition of the special calendar. Parts III and IV of the Trial Term shall try and dispose of cases from General Calendar No. 1. Parts V, VI, VII, VIII, IX, X and XI of the Trial Term shall try and dispose of causes from General Calendar No. 2. Parts XII, XIII, XIV, XV, XVI, XVII and XVIII of the Trial Term shall try and dispose of causes from General Calendar No. 3. Parts XIX and XX of the Trial Term shall try and dispose of causes from General Calendars Nos. 1, 2 and 3, as shall from time to time be ordered by the Appellate Division, and whenever there shall not be cases on the day calendar of either Nos. 1, 2 or 3 to occupy all the parts designated to try and dispose of causes from such calendar, the part or parts not so occupied shall try and dispose of cases from the other day calendars.

RULE V.

Subdivision 1. There shall be a special calendar on which shall be placed for trial all questions of fact ordered or directed to be tried by a jury, all issues and questions of fact in special proceedings and all issues and questions of fact which have been stated for trial in pursuance of section 970 and section 971 of the Code of Civil Procedure. Such calendar shall be called and the causes thereon tried and disposed of at Part II of the Trial Term.

Subd. 2. In any action wherein the plaintiff seeks to recover a debt or liquidated demand upon a bond or other obligation for the payment of a specific sum of money; a bond or undertaking on appeal; a negotiable instrument; an account stated; for wages, salary or compensation for services; upon a policy of insurance; for rent or hire of real or personal property; for money had and received; for money loaned; for goods sold and delivered; on a statute where the sum sought to be recovered is a sum of money other than a penalty; or on a guaranty, the plaintiff may, at the first term at which the cause shall have been placed upon the general calendar, upon five days' notice to the defendant, and upon competent proof by affidavit of the facts upon which the cause of action is based, apply to the justice holding Part II of the Trial Term for an order placing said cause upon the special calendar for trial. Copies of the affidavit and exhibits, if any, upon which the application is based, must be served with the notice of the

application. If, upon the affidavits so submitted and the affidavit of the opposing party, the court shall be satisfied that there is no substantial defense to the action, or that the answer was not interposed in good faith, or was interposed for the purpose of delay, the court may place the cause upon the special calendar for Trial Term, Part II. The court may, in its discretion, deny the application, with or without costs, or upon terms as to stipulating in relation to the admission of facts not actually controverted, consenting to the examination before trial of a party or witnesses, or the production of books, papers or documents, or the giving of security to secure the plaintiff in the event of final judgment being in his favor. The papers upon which such application shall be made and the answering affidavits, if any, must be filed with the clerk of Trial Term, Part II, on or before 12 o'clock noon of the day for which the application is noticed, and no oral argument will be heard upon such application.

Subd. 3. In an action on contract, express or implied (other than a contract to marry), either party may apply to Part II, Trial Term, on two days' notice to the adverse party, for an order placing the cause upon the special calendar. Upon such application, if it satisfactorily appears by affidavit and the pleadings that the trial of the action will not occupy more than two hours, and that no good reason exists why the action should not be promptly tried, the justice to whom the application is made may, by order, direct the cause to be placed on the special calendar to be called in Trial Term, Part II, and dispose of the same in its regular order thereon. The papers upon which the application is made and the answering affidavits, if any, must be filed with the clerk of Trial Term, Part II, at or before 12 o'clock noon of the day for which the application is noticed, and no oral argument will be heard upon such application.

Subd. 4. All causes and all questions and issues of fact to be placed on the special calendar shall be so placed in the order of filing with the clerk of Part II, Trial Term, of the order directing the cause to be so placed, or of the order or direction for the trial by jury, or of the order stating the issues or questions of fact to be tried by jury, and shall be called and tried in the order in which the same are placed on such special calendar, unless postponed for good cause shown by affidavit. If the trial of any

cause is placed upon the special calendar upon the ground that the trial thereof will not occupy more than two hours shall actually occupy more than that time the court may, in its discretion, send the cause to the foot of General Calendar No. 3. If at any time there shall be more causes upon the special calendar than can be promptly tried and disposed of at Trial Term, Part II, the justice holding said part may send said causes, or any of them, to Trial Term, Part XIV, where they shall be placed upon the day calendar and tried and disposed of in like manner as the other causes on said day calendar.

RULE VI.

The clerk shall make up a separate day calendar for each day of the term of the causes from Calendars Nos. 1, 2 and 3 set down for trial on such day. The day calendar of causes from General Calendar No. 1 shall be called at Trial Term, Part III, at 10:15 o'clock. The day calendar of causes from General Calendar No. 2 shall be called at Trial Term, Part VIII, at 10:15 o'clock. The day calendar of causes from General Calendar No. 3 shall be called at Trial Term, Part XIV, at 10:15 o'clock. The causes on each of the day calendars shall remain thereon from day to day until they are tried or otherwise disposed of. Causes on the day calendar from Calendar No. 1 shall be sent for trial to Parts III and IV. Causes on the day calendar from Calendar No. 2 shall be sent for trial to Parts V, VI, VII, VIII, IX, X and XI. Causes on the day calendar from Calendar No. 3 shall be sent for trial to Parts XII, XIII, XIV, XV, XVI, XVII and XVIII. Such causes shall be tried in the parts in which they are called or to which they shall be sent for trial in the order in which they appear on the day calendars. No application to postpone the trial of a cause shall in any case be entertained after such cause has been sent to a part for trial. A cause which has once been sent to a part for trial shall not be again placed on the day calendar, except by order of the justice holding the part from which it was sent, for good cause shown to him by affidavit, but such cause shall remain in the part to which it has been sent for trial until finally disposed of. When the causes upon the day calendar called in either Part III, Part VIII or Part XIV shall have been disposed of, causes upon the day calendar of either of the other parts may be sent to

any part not actually engaged in the trial of a cause. When a cause has been tried and the jury has disagreed, or for any reason there has been a mistrial, or a juror has been withdrawn, the cause may be restored to the Friday call calendar or to the day calendar in the part from which it was sent for trial, or may be set down for trial upon another day of the same week at which it was tried by the justice holding the part from which it was sent for trial. In case Part II, Trial Term, shall not have business enough to occupy it during court hours causes from either Parts III, VIII or XIV shall be sent to it for trial.

RULE VII.

The special deputy clerk assigned to Part 2 of the Trial Term shall have charge of the general and preferred calendars herein provided for. All orders relating to the calendar and all notes of issue of causes to be placed upon the calendars shall be filed with the said clerk of Part 2 of the Trial Term. The clerk shall each week make up three calendars of causes from the general calendars for trial at Trial Term, which calendars shall be published at least two days before the same are called. These calendars shall be called by the justice of the court holding Trial Term, Part 3, as provided in Rule VI, on Friday of each week, at 2 o'clock P. M., unless another day is specially fixed by him, to call such calendars. Causes on such calendars may be set down for trial on any day in the week following. In case it should appear upon the call of either of the calendars on Friday that the number of cases set down for trial on the following week will not be sufficient to occupy the available time of all the Trial Terms of the court, to which the cases are to be assigned, the justice holding Supreme Court, Trial Term, Part 3, shall order a calendar of cases from the proper general calendar, to be made up and called on Wednesday morning at 10 o'clock. Upon the call of such calendar, cases may be set down for any day of the week in which the calendar is so called, or for the succeeding week.

When a case has appeared and been called for the second time on either of the call calendars, on the subsequent call it must, when reached, be assigned to the day calendar for trial or go to the foot of the proper general calendar, unless it should be made to appear by affidavit to the satisfaction of the court that the

cause should be further adjourned, in which case it shall be adjourned to such time as the court shall fix, and when the case is again called the same must be assigned to the day calendar for trial, or go to the foot of the general calendar.

When a case has been thus set down on a call of either of the calendars on any Friday or Wednesday for trial, and appears upon the day calendar, it must be tried or go to the foot of the general calendar, unless it appears by affidavit to the satisfaction of the justice calling the day calendar that, in consequence of the happening of an event since the cause was set down for trial, the trial cannot, with justice to one of the parties, proceed. The court may then by order set the case down for trial on another day in the same or following week of the term, or place the cause on a Friday call calendar. In a cause upon a day calendar for trial, where it shall appear to the court by affidavit that counsel who is to try the same is to argue a cause upon a day calendar of the Supreme Court of the United States, or upon the day calendar of the Court of Appeals of the State of New York, or upon the day calendar of any Appellate Division of the Supreme Court, or is actually engaged in the trial of a cause in a court of record in the counties of New York or Kings, the cause shall be passed for the day, or until such argument or trial is concluded, unless the trial in which the counsel is engaged, is a protracted one. In no other event shall a cause upon the day calendar be passed for the day.

RULE VIII.

In no event shall a cause on the day calendar be passed from day to day, on account of the engagement of counsel, for more than three days.

Not more than two causes shall be held ready on the day calendar for one counsel in addition to the cause in which he is engaged, and in all causes the counsel who is to try the same must be designated, if required by the court, on the call of the day calendar.

RULE IX.

An order directing a delinquent juror to show cause why the payment of a fine should not be enforced must be granted by, and made returnable before, the justice by whom said fine was imposed. Such order must be made returnable at the Trial Term to which

said justice is assigned upon such day of the term and at such time of the day as the justice shall designate. Such proceedings shall be conducted before, and heard and decided by said justice at said time and place.

Where a justice by whom a fine was imposed has ceased to be a member of the court, or has been designated as a member of the Appellate Division, or has been assigned to hold Special Term, or is absent or unable for any reason to hear such proceedings the order directing the delinquent juror to show cause why the payment of the fine should not be enforced must be granted by and made returnable before the justice assigned to hold Trial Term, Part 8, upon such day of the term and at such time of the day as he shall designate. Said proceedings shall be taken before and heard and decided by said justice at said time and place.

RULES FOR THE REGULATION OF THE SPECIAL TERMS OF THE SUPREME COURT IN THE FIRST JUDICIAL DISTRICT AND ESTABLISHING THE CALENDAR PRACTICE THEREIN.

RULE I.

There shall be a Special Term of the Supreme Court for the hearing of litigated motions to commence on the first Monday of each month and to continue until the Friday preceding the first Monday of the succeeding month, which term shall be held every day except Saturdays, Sundays and legal holidays. The court shall open at half-past ten in the morning and shall continue until all business before the court has been disposed of. This Special Term shall be known as Special Term, Part 1.

RULE II.

Motions may be noticed for any day during the term. The clerk of Special term, Part 1, shall make up a calendar for each day. Notes of issue must be filed with the clerk two days before the day on which a motion is noticed to be heard, except where an order to show cause is granted, returnable in less than two days, when the clerk shall place the motion upon the calendar at any time before the day for hearing, upon the exhibition to him of

the order to show cause and the filing of a note of issue, or the justice assigned to said part of the court may place the motion on the calendar on the day upon which the order to show cause is returnable. This calendar will be called at the opening of the court and no motion will be heard that is not upon the calendar. On the hearing of a motion upon such calendar, but one counsel on each side will be heard, and not more than fifteen minutes will be allowed to each counsel, unless the court shall otherwise order. Application for final judgment, where an interlocutory judgment has been entered and an account has been taken, or other proceeding had before a referee or for a final judgment in an action for divorce under section 1774 of the Code of Civil Procedure, motions for a new trial on the ground of surprise or newly discovered evidence, motions to confirm a referee's report and for final judgment in any action or proceeding in which an issue of fact has been tried by a jury or by a referee, where application to the court for final judgment or final order is necessary, applications for the appointment of commissioners or for a final order or judgment in a proceeding to condemn real estate for public use, may be noticed for, and made at, Part 1 of the Special Term, for the hearing of litigated motions, upon any day of the July, August and September terms when Part 3 of the Special Term is not in session. The justice assigned to Part 1 of the Special Term, if he does not deem it important that such application should be heard during the time when Part 3 is not in session, may adjourn the time to the next term of Special Term, Part 3.

RULE III.

In all actions or proceedings in which the accounts of an assignee for the benefit of creditors or of a receiver appointed in an action or in a proceeding for the dissolution of a corporation are presented for settlement or to be passed upon by the court, a notice or a copy of an advertisement requiring the creditors to present their claims to a referee, must be mailed to each creditor whose name appears on the books of the assignor or corporation, with the postage thereon prepaid at least twenty days before the day specified in such notice or advertisement. Proofs of such mailing shall be required on the application for a final decree passing the accounts of the assignee or receiver unless proof is

furnished that personal service of such notice or copy of advertisement has been made upon the creditor.

RULE IV.

There shall be a Special Term of the Supreme Court for the transaction of *ex parte* business, to be held on the first Monday of each month and to continue to and including the Saturday prior to the first Monday of the following month. The court shall open at 10:30 o'clock in the morning, and shall continue in session until 4 o'clock in the afternoon, except Saturdays, upon which day the court may be adjourned at 12 o'clock noon, and shall be open every day in the year, except Sundays and legal holidays. This Special Term shall be known as Special Term, Part 2. The justice assigned to Part 2 shall also attend to the drawing of jurors for the Trial Term of the Supreme Court.

RULE V.

Application for all court orders, *ex parte* or by consent, or where notice is not required or has been waived, must be made to Special Term, Part 2. Any *ex parte* court order granted by any justice of the court other than the one assigned to hold Part 2 of the Special Term, shall not be entered by the clerk. All applications for judgment in actions where the defendant has failed to appear, or has waived notice of motion for judgment or has consented thereto, except in actions for divorce, all proceedings under the Domestic Relations Law for the adoption of children, and all proceedings under the Insanity Law for the commitment of a person alleged to be insane, shall be made to said Special Term, Part 2, and shall not be made to any other court or justice. All orders for the examination of parties or witnesses in supplementary proceedings, or to perpetuate testimony, or for the examination of parties before trial, or for the examination of witnesses under letters rogatory, or foreign commissions, or in aid of an attachment, or for any other purpose, or in any proceeding (except an order to show cause or a warrant issued under section 2269 of the Code of Civil Procedure, which must be made returnable before Part 1 of the Special Term), shall be made returnable before the justice assigned to hold said Special Term, Part 2,

unless made returnable before a referee or commissioner under express statutory authority, and all writs of *habeas corpus* or other writs that are required by law to be returnable at a Special Term of the Supreme Court, or before a justice thereof, must be made returnable at the said Special Term, Part 2, or before the justice assigned to hold the same. Any writ or order before mentioned returnable elsewhere shall, upon its return, be transferred to said Special Term, Part 2, for hearing and decision. If not so transferred, the writ or order shall be disregarded. In actions for absolute divorce or to annul a marriage, where no answer is interposed, a reference to take proof will not be granted. In such cases the application for judgment must be made at the Special Term, Part 3, and the case placed upon the preferred calendar as hereinbefore provided. Whenever the justice assigned to either Part 1, Part 2 or Part 3 of the Special Term is disqualified from hearing any application or motion that shall be brought on before him, he may send such application to such other Part of the Special Term as he shall select, to be heard and disposed of.

Proceedings under section 511 of the Consolidation Act, and all other proceedings authorized by title 5 of said act, to be had before a justice holding the Chambers of the Court, must be heard in the said Special Term, Part 2.

If a jury is demanded, the justice holding such term may continue such proceedings before the justice holding one of the Trial Terms, where a jury shall be forthwith empaneled and the question determined and the proceeding finally disposed of as required by said act. In case neither of the Trial Terms is in session the justice assigned to the said Special Term, Part 2, may empanel a jury and dispose of the proceeding as required by the said act. In case of an appeal from an order of commitment under section 63 of the Insanity Law, the justice assigned to Part 2 of the Special Term may send the question of the insanity of such alleged lunatic to either part of the Trial Terms for trial before a jury as required by said section. The justice trying such proceeding before a jury shall certify the verdict to the justice assigned to Part 2 of the Special Term, who shall make the order as required by such section.

In an application for a commitment under section 60 of the Insanity Law (chapter 545 of the Laws of 1896) it must be shown

by the petition or by an accompanying affidavit whether or not the person alleged to be insane is confined on a criminal charge or on bail pending the determination of a criminal charge, or in official custody for the purpose of ascertaining his condition after a criminal charge has been made against him. If a criminal charge is pending against the person thus alleged to be insane, two days' notice of the time and place of presenting the application to the Court or a justice thereof must be given to the district attorney.

RULE VI.

The following regulations will apply to all the insolvent assignments for the benefit of creditors and applications to the court thereunder:

Subdivision 1. Duties of the Clerk.— The clerk, in addition to the books now kept by him, shall provide a register and docket.

In the register shall be entered in full every decree and final order made in the proceedings according to date, and the docket shall contain a brief memorandum of each day's proceedings according to their respective titles.

The register and docket shall be, at all times during court hours, open for public inspection.

Subd. 2. Each petition or order or decree filed shall be indorsed with the day and date of such filing, and the papers in each case shall be kept in a file by themselves.

Subd. 3. No paper shall be permitted to be taken off the files of the court for any purpose, except on an order of the court.

Subd. 4. Every paper filed shall have a brief memorandum indorsed on the outside cover, showing the nature thereof.

Subd. 5. Copies of any and all papers in these proceedings shall be furnished to any person applying for same upon the payment of the legal fees.

Subd. 6. Process.—All process, citations, summons and subpœnas shall issue out of the court under the seal thereof and be tested by the clerk.

Subd. 7. Appearances.—Any party may appear in these proceedings, either in person or by attorney — if by attorney the name of such attorney, with his place of business and residence, shall be indorsed on each and every paper filed by him, and his name shall be entered in the docket.

Subd. 8. Schedules.— The schedule of liabilities and assets required to be filed by the assignor or assignee shall fully and fairly state the nominal and actual value of the assets, and the cause for the difference, and a separate affidavit will be required which shall fully explain the cause of such difference. If required the affidavits of disinterested experts as to such value must be furnished.

Subd. 9. Signing of.— Where there may be more than one sheet of paper necessary to contain the schedules, each page shall be signed by the person or persons verifying the same. The sheets of paper on which the schedules are written shall be securely fastened before the filing thereof, and shall be indorsed with the full name of the assignor and assignee, and when filed by an attorney shall also be indorsed with his name and business address.

Subd. 10. Filing by Assignee.— Should the schedules be filed by the assignee there must be a full affidavit made by such assignee and some disinterested expert, showing the nature and value of the property assigned.

Subd. 11. Name and Residence.— The name, residence, occupation and place of business of the assignor, and name and place of residence of the assignee, may be incorporated in the affidavit or annexed to the schedules.

Subd. 12. Recapitulation.— There shall be a recapitulation at the end of the schedules as follows:

Debts and liabilities amount to $; assets nominally worth $; assets actually worth $.

Subd. 13. Contingent.— Contingent liabilities shall appear on a separate sheet of paper.

Subd. 14. Amendments of.—Application to amend the schedules shall be made by verified petition, in which the amendments sought to be made shall appear in full and such amendments shall be verified in the same manner as the original schedules were verified.

Subd. 15. Bonds of Assignee.— The bond shall be joint and several in form and must be accompanied by the affidavit prescribed by section 812 of the Code of Civil Procedure, and also by the affidavit of each surety, setting forth his business and where it is carried on, the amount of his debts and liabilities, and the description and value of property, real or personal, owned by him,

so that it may appear that he is worth the amount in which he is required to justify over and above his debts and liabilities.

Subd. 16. Justification of Sureties.— The court may in its discretion require any surety to appear and justify.

Subd. 17. At least one of such sureties shall be a freeholder. If the penalty of the bond be $20,000 or over, it may be executed by two sureties justifying each in that sum, or by more than two sureties, the amount of whose justification united is double the penalty of the bond.

Subd. 18. Provisional.— The affidavit upon which application is made for leave to file a provisional bond, must show fully and fairly the nature and extent of the property assigned, and good and sufficient reasons must be shown why the schedules cannot be filed, and it must appear satisfactorily to the Court that a necessity exists for the filing of such provisional bond, and for the purposes of this act the affidavit so filed shall be deemed a schedule of the assigned property until such time as the regular schedule shall be filed.

Upon the filing of the schedules the amount of the bond will be determined finally, and should the provisional bond already filed be deemed sufficient, an order will be granted making such bond as approved the final bond.

Subd. 19. Assignee.— Every assignee shall keep full, exact and regular books of account of all receipts, payments and expenditures of money by him, which said books shall always, during business hours, be open to the inspection of any person interested in the trust estate.

Subd. 20. In making sales at auction of personal property, the assignee shall give at least ten days' notice of the time and place of the sale and of the articles to be sold by advertisement in one or more newspapers, and he shall give notice of the sale at auction of any real estate at least twenty days before such sale. Upon such sales the assignee shall sell by printed catalogue, in parcels, and shall file a copy of such catalogue, with the prices obtained for the goods sold, with his final account.

Subd. 21. When any notice is served on the creditors of the insolvent, pursuant to the provisions of the statute, or these rules, by mail, every envelope containing such notice shall have upon it a

direction to the postmaster, at the place to which it is sent, to return the same to the sender within ten days unless called for. Upon every application made to the court upon such service, an affidavit shall be presented showing whether any such notices have been returned.

Subd. 22. Upon an application made for a general citation, the assignee shall file with his petition his account, with the voucher.

Subd. 23. The assignee must file an account in all cases, which shall be referred for examination.

Discharge.— No discharge shall be granted an assignee who has not advertised for claims pursuant to section 4 of the statute and the 30th subdivision of this rule.

No discharge can be granted an assignee and his sureties in any case, whether the creditors have been paid, or have released, or have entered into composition or not, except in a regular proceeding for an accounting, under section 20 of the act, commenced by petition for citation and citation thereon to all persons interested in the estate.

Subd. 24. Substituted Assignee.—Whenever an assignee shall have been removed either on his own petition or on the petition of any person interested in the estate, and another person appointed as assignee in his place and stead, a certified copy of the order made on such petition shall be filed and recorded in the clerk's office of the county wherein the original assignment was recorded, and the clerk of the county shall make such suitable entry on the margin of the record of the original assignment as will show the appointment of such substituted assignee, and the said certified copy of the order shall be attached to the original assignment.

Subd. 25. Account of Assignee.— The account of the assignee shall be in the nature of a debit and credit statement; he shall debit himself with the assets as shown in the schedules as filed, and credit himself with any decrease as well as expenses.

Subd. 26.— The statement of expenditures shall be full and complete, and the vouchers for all payments shall be attached to the account.

Subd. 27. The affirmative on the accounting shall be with the assignee, and objections to the account may be presented to the referee in writing, or be brought out on a cross-examination, and

in the latter case they must be specifically taken and entered in the minutes.

Subd. 28. The testimony taken shall be signed by the several witnesses, and attached to and filed with a report of the referee.

Subd. 29. Report of Referee.— The report of the referee shall show all the jurisdictional facts necessary to confer power on the Court, such as the proper execution and acknowledgment of the assignment, the recording of the same, the filing of the schedules and bond, the advertising for creditors, the issuing of the citation, the presenting of the account, and when any items may be disallowed in the account of the assignee, the same shall be fully set out in the report.

Subd. 30. Notice to Present Claims.—A copy of the notice of advertisement requiring creditors to present their claims must be mailed to each creditor whose name appears on the books of the assignor, with the postage thereon prepaid, at least thirty days before the days specified in such advertisement, and proof of such mailing must be required on the application for a final decree, unless personal service thereof is made upon such creditors.

Subd. 31. The decision of the referee after the trial of a disputed claim under section 26 of the General Assignment Act, shall be filed with the clerk of the court, and a copy served on the defeated party. The court shall, on application of either party, confirm the said report, and the decision of the referee shall be reviewed only by appeal from the order confirming the report to the Appellate Division.

RULE VII.

There shall be six Special Terms of the Supreme Court for the trial of issues of law and issues of fact triable by the Court, and for the hearing and decision of all other matters and special proceedings not otherwise provided for, to be known respectively as Parts 3, 4, 5, 6, 7 and 8. Each term shall commence on the first Monday of each month, and shall continue until the fourth Friday succeeding the first Monday.

RULE VIII.

A general calendar of all issues of fact triable by the court without a jury in the county of New York shall be made from

time to time as shall be ordered by the Appellate Division of the Supreme Court in the First Department. Such calendar shall continue to be the general calendar for every successive Special Term until a new general calendar is ordered as aforesaid. New cases as they are noticed for trial, shall be placed at the foot of this general calendar, upon filing a note of issue as required by the Code of Civil Procedure. A motion to correct this general calendar, or to add to it any cases which had theretofore been upon the calendar of the Special Term of the Supreme Court, or upon the calendar of the Superior Court or Court of Common Pleas, may be made on two days' notice to the opposing party, at Part 3 of the Special Term, on the call of any Friday calendar. There shall also be made up a special calendar, upon which shall be placed all actions against the New York Elevated Railroad Company, the Metropolitan Elevated Railroad Company and the Manhattan Elevated Railway Company, to enjoin the use of public streets in the city of New York, which are now pending or which shall hereafter be brought for that purpose, which special calendar shall be called and disposed of in Part 6 of the Special Term. There shall also be made up a special calendar upon which shall be placed all issues of law now at issue, and upon which shall be placed, at the foot thereof, new issues of law hereafter noticed for trial. There shall also be made up a special calendar, which shall be known as the preferred calendar, upon which shall be placed all undefended actions for divorce; or for annulment of marriage; or for a separation; all actions entitled under the Code, or the General or Special Rules of Practice to a preference; all applications for judgment in actions where issues have been framed and sent to a jury for trial; all applications for final judgment where an interlocutory judgment has been entered and an account has been taken or other proceedings had before a referee; all motions for a new trial upon exceptions or on the ground of surprise or newly discovered evidence; and exceptions to and motions to confirm a referee's report in special proceedings, including surplus money proceedings, and in actions in which an issue of fact has been tried by a referee where application to the court for final judgment or a final order is necessary; all applications for the appointment of commissioners; for a final order or final judgment in proceedings to condemn real estate for public use; and all appli-

cations for final order in certiorari proceedings or in proceedings where an alternative writ of mandamus has been issued. The special preferred calendar, and the special calendar of issues of law, herein provided for shall be called and disposed of in Part 3 of the Special Term; provided, however, that the justice assigned to Part 3 may, from time to time, assign preferred cases and issues of law from such calendars to the parts of the Special Term other than Part 6, except as provided in Rule 9, for hearing and decision. Applications for final judgment in actions to annul a marriage, or for a divorce, shall be made at Special Term, Part 3, upon the judgment-roll, a certificate of the county clerk that no order has been entered in the action since the entry of the interlocutory judgment, or if any such order or orders have been entered, that copies thereof are annexed to his certificate and proof by affidavits that no application has been made for an order to the knowledge of the party making application, or his attorney, except where an order has been granted, and a certified copy of such order is annexed to the certificate of the county clerk. Where, in such an action, a party other than the party making the application has appeared in the action, five days' notice of such application, with the papers upon which the same was made and a copy of the proposed final judgment, shall be served upon the attorney who has appeared in the action.

In a proceeding for the revocation of a liquor tax certificate, when the issue has been joined, the proceeding shall be placed upon the preferred calendar called in Special Term, Part 3, and disposed of as other cases upon the said calendar. In case, however, that issue is joined in such a proceeding too late to place it on the calendar of the June Special Term in any year, it may be brought on by either party during July, August and September, at Special Term, Part 2, and there heard and determined. In case a proceeding is not so brought on in Part 2 as hereinbefore provided before the first Monday in October, it shall be placed upon the preferred calendar to be called at Special Term, Part 3, for the October term.

RULE IX.

The clerk of Part 3 of the Special Term, with the assistance of the special deputy clerk assigned to such part, and of the clerk of Part 4, shall each week make up a calendar of cases from the

general calendar for trial at Special Term, which calendar shall be published at least two days before the same is called. This calendar shall be called by the justice assigned to the Special Term, Part 3, on Friday, of each week, at two o'clock P. M., unless another day is specially fixed by him to call such calendar. Causes on such calendar may be set down for trial on any day in the week following. In case it should appear, upon the call of the calendar on Friday, that the number of causes set down for trial on the following week will not be sufficient to occupy the available time of all the Special Terms of the court assigned to the trial of equity causes, the justice of the Supreme Court, assigned to the Special Term, Part 3, shall order a calendar of causes from the general calendar to be made up and to be called upon Wednesday morning following at ten o'clock.

Upon the call of such calendar, causes may be set down for any day of the week in which the calendar is so called, or for the succeeding week.

The said clerks shall make up a day calendar for each day from the general Special Term calendar of the court, upon which shall be placed all the causes set down for that day or remaining undisposed of from previous days, which day calendar shall be called in Part 3 of the Special Term, at 10:15 A. M. of each day, and causes therefrom shall be assigned to the several parts of the Special Term (except Part 6), for trial. In case Part 6 shall not have business enough to occupy it during court hours, cases from Part 3 shall be sent to it for trial.

When a cause thus set down on the call of the calendar on any Friday or Wednesday for trial appears upon the day calendar, it must be tried or go to the foot of the general calendar, unless it appears by affidavit to the satisfaction of the court calling the day calendar that, in consequence of the happening of any event since the cause was so set down for trial, the trial cannot with justice to one of the parties proceed. The court may then by order set the cause down for trial on another day in the term, or place the cause on the Friday calendar. In a cause upon the day calendar for trial where it shall appear to the court by affidavit that counsel who is to try the cause is to argue upon the day calendar of the Supreme Court of the United States or upon the day calendar of the Court of Appeals of the State of New York, or

upon the day calendar of any Appellate Division of the Supreme Court, or is actually engaged in the trial of a cause in a court of record in the counties of New York or Kings, the cause shall be passed for the day or until such argument or trial is concluded, unless the trial in which the counsel is engaged is a protracted one. In no other event shall a cause upon the day calendar be passed for the day.

RULE X.

In no event shall a cause on the day calendar be passed from day to day on account of the engagement of counsel for more than three days.

Not more than two causes shall be held ready on the day calendar for one counsel in addition to the cause in which he is engaged, and in all causes the counsel who is to try the same must be designated, if required by the court, on the call of the day calendar.

RULE XI.

In all actions brought for the foreclosure of a mortgage or for the foreclosure of mechanics' liens, either party may apply to the Special Term, Part 3, upon notice of two days to the adverse party to have the case placed upon the preferred calendar, to be called in Part 3 of the Special Term, and if it shall appear to the court upon such application that the trial will not be a protracted one, or that for any special reason the case should be promptly disposed of, it shall be placed upon the preferred calendar for trial.

RULE XII.

In all actions in which a preference is given by express provision of law, or by the General Rules of Practice or by special rules, the party entitled to such preference may, upon two days' notice, apply to Special Term, Part 3, for an order placing the cause upon the preferred calendar. In case such preference is granted, the case shall be placed upon the preferred calendar as of the date when the motion was made, and shall be called in its order.

RULE XIII.

No Special Term shall be continued beyond the Friday preceding the commencement of a new term, except for the purpose

of completing a trial already commenced during the term, in which case immediately upon the completion of the trial, the court shall adjourn for the term.

RULE XIV.

Regulating the Procedure Upon Applications for Naturalization in the First Judicial District.

All applications of aliens to be admitted to become citizens of the United States must be heard and final action had thereon at Part 2 of the Special Term. Such hearings shall be had only upon Mondays, Wednesdays and Thursdays of each week during the year, which are hereby designated as the stated days for such applications. The application which is required by chapter 927 of the Laws of 1895 to be filed with the clerk of the court shall be so filed with the assistant clerk of such Special Term assigned to that branch of the business. Such application shall specify the stated day (more than fourten days thereafter) when such applications will be brought on for hearing and final action.

The assistant clerk assigned to naturalization business shall make up a calendar of such applications for each of said stated days, upon which he will place all such applications in the order of filing, for the days specified in the application. The calendar will be called at two o'clock in the afternoon upon each stated day. The hearing upon such applications shall be had upon the call of the calendar and the testimony of the applicant and his witnesses shall be thereupon taken in open court. Such testimony shall be taken down by the stenographer assigned to that branch of the court, and shall be written out and filed with the application.

If the applicant fail to appear upon the call of the calendar, the application will be dismissed without prejudice to a fresh application.

The special deputy to the clerk of the city and county of New York, in Part 8 of the Special Term, is hereby directed, at all times until a justice is assigned to hold said part, to act as an additional assistant to the clerk assigned to naturalization business, and to devote his entire time to the duties of what is known as the Naturalization Bureau; under the general direction of the special deputy in Part 2 of the Special Term and of the assistants to such deputy in said Naturalization Bureau.

RULE XV.

All sales of real estate, or interest or estate therein made in pursuance of any judgment, decree or order, or by an officer of the court under its direction must be made as directed by section 1678 of the Code, and notice of such sale must be given as prescribed in that section.

The referee or officer making such sale shall cause to be published with the notice of sale a diagram of the property to be sold or of which an interest therein is to be sold, showing the street or avenue upon which such property is located, its street or avenue number, if any, and specifying the number of feet to the nearest cross street or avenue. Where such sale is made to satisfy any lien or charge upon the real property sold, the approximate amount of such lien or charge shall be stated in a note annexed to such notice of sale, and where there are taxes, assessments or other liens upon the said property, which are to be allowed to the purchaser out of the purchase money, or which are to be paid by the referee, the referee or officer making such sale shall also state in a note annexed to such notice of sale the approximate amount of such charge or lien. An unintentional error, however, in such diagram, or in the amount of the lien or charge for which the property shall be sold, or the amount of such taxes or other lien to be allowed to the purchaser upon the sale, shall not invalidate the sale, nor authorize the court to relieve the purchaser, or order a new sale.

RULES TO REGULATE THE ATTENDANCE AND PRESCRIBE THE DUTIES OF THE CLERKS, ASSISTANT CLERKS, CRIERS, INTERPRETERS, STENOGRAPHERS, LIBRARIANS AND ATTENDANTS OF THE SUPREME COURT.

RULE I.

The special deputy to the clerk of the city and county of New York, assigned to each Special and Trial Term of the Supreme Court shall attend on each day that the court is in session and remain in attendance while the court is in session. The special deputy clerk assigned to Part 2 of the Trial Terms shall have charge of the general and special calendars of the Trial Terms. The assistants to such special deputy clerk shall, in turn, as re-

quired by him, attend in Part 2 of the Court. All orders relating to the calendar, and all notes of issue of cases to be placed upon the calendar, shall be filed with the clerk of Part 2 of the Trial Term. He shall attend each Friday or Wednesday call of the calendar, shall make up the general and special calendars of such Trial Terms, and shall make up a day calendar for each day of the term when the court is in session. The clerk assigned to the other Trial Terms of the Supreme Court shall render him assistance when he requires it, when they are not actually engaged in their branch of the court.

The special deputy to the county clerk assigned to Part 3 of the Special Term of the Supreme Court shall have charge of the general and special calendars of the Special Term, and all notes of issue of cases to be placed upon the Special Term calendar and orders relating to the calendar shall be filed with him.

There shall be two assistant clerks to Part 3 of the Special Term, who shall in turn, as directed by such special deputy clerk, attend the sitting of that part, and who shall assist the clerk thereof in preparing the calendar. Special deputy clerks assigned to the other Special Terms shall render the special deputy of Part 3 such assistance as he shall require when the courts to which they are respectively assigned are not in session.

The special deputy clerk assigned to each Trial and Special Term of the Court shall, subject to the supervision of the justice assigned thereto, be responsible for the proper condition of the court room, for the supply of stationery and for the attendance of the officers or attendants assigned to such Special and Trial Terms, and for the performance by such officers or attendants of their respective duties. He shall keep a book in which shall be entered the time at which the officers or attendants assigned to that part of the court shall appear and remain in court, and shall transmit at the end of each month, to the Appellate Division of the Supreme Court, a copy of such record.

The special deputy clerk assigned to the Special Term for the hearing of motions shall make up a day calendar of motions to be heard each day (not later than three o'clock for the succeeding day) and shall cause the same to be published in the "Law Journal." He shall attend at the call of the calendar and render such assistance as the justice assigned to that term of the court

shall require. The two assistant clerks assigned to that part of the court shall attend each day from 10 o'clock in the morning until 4 o'clock in the afternoon, or as much later as may be necessary and shall perform such duties as the deputy clerk assigned to that part of the court shall require. The deputy clerk assigned to the Special Term for the transaction of *ex parte* business shall attend from 10 o'clock in the morning until 4 o'clock in the afternoon or as much later as the justice assigned to that branch of the court shall require, and shall render to the justice such assistance as he shall require. The two assistant clerks assigned to that part of the court shall keep the records of the court and shall perform such additional duties as are required by the clerk. There shall be three additional assistants to such clerk (to be assigned to this part of the Special Term) who shall have charge of the records of naturalization heretofore kept in the offices of the clerk of the city and county of New York, the clerk of the Superior Court of the City of New York, and the clerk of the Court of Common Pleas for the city and county of New York, who shall attend to applications for naturalization and keep the books and records relating thereto, and who shall perform such additional duties as said special deputy clerk shall require. There shall be two other additional assistants to such special deputy clerk (to be assigned to this branch of the court), who shall have charge of the records relating to assignments for the benefit of creditors and who shall perform all the clerical duties relating thereto. They shall also perform generally such duties as may be required of them by the justice assigned to this branch of the court by the clerk thereof. The assistants to this branch of the Special Term shall attend the office provided for them in the County Court House, in the city of New York, at 10 o'clock in the morning and shall remain until 4 o'clock in the afternoon, and so much later as shall be necessary. The clerk assigned to the term for the hearing of appeals from the City Court and District Courts in the city of New York shall attend the sitting of the Appellate Term while in session, shall keep the records of such court and perform such duties in addition as shall be required of him by the justices assigned to hold such term. When the court is not in session he shall attend each day from 10 in the morning until 4 o'clock in the afternoon, and when not occupied with the business of such

appellate branch he shall assist the special deputy clerks of Part 2 of the Trial Term, and of Part 3 of the Special Term, and preform such other duties as may be required of him by any justice of the Supreme Court.

RULE II.

There shall be a stenographer attached to each Special and Trial Term of the Supreme Court, whose duty it shall be to attend at the session of the Court to which he is assigned. In case his services are not needed in the Court to which he is assigned, it shall be his duty to attend any other term of the Court at which his services shall be required, either by the justice presiding at such other term or by the special deputy clerk attached thereto. The stenographers assigned to the Special or Trial Terms of the Supreme Court must attend in the Court House each day at ten o'clock in the morning, and remain as long as he is required to remain by the justice presiding at the part to which he is assigned. They shall also render such asistance to any justice of the court as he shall require. In case of the absence of any stenographer from the part to which he is assigned, owing to illness, or when owing to an accumulation of work, any such stenographer shall be permitted by the justice presiding in such part to absent himself for a definite period from the daily sittings of the court, for the purpose of enabling him to write out the testimony taken by him, such stenographer may, subject to the approval of such justice, select another stenographer to take his place during such temporary absence.

Such temporary stenographer shall, before acting, take the oath of office. He shall be paid by the official stenographer whose place he takes, and his services shall not be a charge upon the city or county of New York.

RULE III.

It shall be the duty of the librarian to take charge of the library of the Appellate Division of the Supreme Court, to attend in the room of such library each day during the session of the court when the court is in session; and when not in session from 10 o'clock in the morning until 4 o'clock in the afternoon, or as much longer as he shall be required by either of the justices of the Appellate

Division, and to perform generally such duties in relation to such library as either of the said justices shall require. He shall be responsible for all the books in the library, and shall see to it that all books removed from the library to the court room, or elsewhere, are returned to the library, and shall be responsible generally for the safe-keeping and proper condition of the books and furniture in the library room. The assistant to the librarian shall have charge of the library for the use of the justices of the Supreme Court. He shall attend at the County Court House from 10 o'clock in the morning, until 4 o'clock in the afternoon, and as much longer as any justice of the Supreme Court shall require, and he shall be responsible for the safety and condition of the books in the library and of the furniture in the library room, and for the return of all books taken to the court rooms or elsewhere. No books appertaining to that library shall, under any circumstances, be removed from the County Court House, and the assistant librarian shall enforce all orders in regard to the safe-keeping and preservation of such books as shall be made from time to time by a justice of the Supreme Court.

RULE IV.

The justices of the Appellate Division of the Supreme Court in the First Department will detail one of the interpreters to act as chief interpreter, whose duty it will be to attend at the Court House on each day, except on Sundays and legal holidays, from 10 o'clock in the morning until 4 o'clock in the afternoon and until each Trial and Special Term of the court shall have adjourned. He shall keep a record, in a book to be provided for the purpose, of the time on each day at which each interpreter of the court shall report for duty and the time at which each interpreter leaves the Court House. He shall assign each interpreter to duty in the particular branch of the court at which his services are required, and shall make a monthly report to the presiding justice of the Supreme Court in the First Department as to the attendance of interpreters, specifying the days and portions of days that each interpreter shall have been absent and the manner in which each of the interpreters has performed his duties, and with such other recommendations as he shall consider proper. He shall at all times obey the directions of any of the justices of the

Supreme Court as to the performance of his duties and furnish interpreters for the several parts of the court when called upon to do so. The other interpreters shall attend on each day, except on Sundays and legal holidays, from ten o'clock in the morning until four o'clock in the afternoon, and as much later as any branch of the court is in session. They shall be under the general direction of the chief interpreter and shall attend at each branch of the court as required either by him or by a justice of the Supreme Court. Each interpreter shall also render any service required by any justice of the Supreme Court, whether in court or out of court. They shall report to the chief interpreter their arrival at and departure from the Court House and generally shall obey his instructions in regard to the performance of their duties. When not actually engaged at a term of the court the interpreters will be in attendance at a room to be provided for that purpose, so as to be always available when their services are required.

RULE V.

The crier of the Appellate Division of the Supreme Court shall assign the attendants to the Appellate Division and to the various Special and Trial Terms of the Supreme Court. He shall have general charge of all the attendants and it shall be his duty to see that they properly perform their duties. He shall report to the Appellate Division of the Supreme Court any one of such attendants who fails to attend and perform the duties required of him, or who in any way misconducts himself. He shall attend at each session of the Appellate Division of the Supreme Court and shall open and adjourn said court except when his attendance is dispensed with by the presiding justice. He shall make a report each month to the Appellate Division of any violation of any of the rules of the court of which he is cognizant, and shall perform such other duties as the presiding justice or the Appellate Division shall require.

The assistant to the said crier shall attend at the County Court House in the city of New York, on each day from ten o'clock in the morning until four o'clock in the afternoon, and as much longer as his attendance shall be required by any of the justices of the court, or while any branch of the court is in session. In the absence of the crier, he shall perform all the duties of the

crier, and shall perform such other duties as any justice of the Supreme Court, or the crier, shall require. The assistant crier shall wear while in court, or in the discharge of his duties, a uniform such as is now established for the crier of the Supreme Court.

RULE VI.

The attendants shall each day attend the various branches or terms of the court to which they are assigned by the crier from ten o'clock in the morning until four o'clock in the afternoon, or so much longer as the court is in session or as a justice of the Supreme Court requires them to attend. They shall report to the clerk of the parts to which they are assigned the hour of their arrival and before they leave. They shall wear the uniform now prescribed for the attendants of the Supreme Court. In addition to their ordinary duties in court they shall perform such other duties as may be required of them by a Justice of the Supreme Court, by the special deputy clerk of the part to which they are assigned, or by the crier or assistant to the crier.

RULE VII.

The special deputy clerk assigned to each of the Trial Terms of the court shall, within five days after the discharge from service of each of the panels of the trial jurors, make a full and complete return to the commissioners of jurors and to the special deputy clerk of Part 4 of the Trial Term, showing:

1. The name and residence of each juror who attended and served; the number of days the juror attended for the purpose of serving, and the number of days he actually served.

2. The name and residence of each juror who was excused or discharged, with the reason therefor.

3. The name and residence of each juror notified who did not attend or serve.

4. The name and residence of each person fined, and the date and amount of his fine, and the part of the court at which the fine was imposed, and the name of the justice who held the same (unless the fine has been remitted).

The special deputy clerk of Part 4 shall keep a record showing all the above facts in reference to all the jurors notified to at-

tend at any of the Trial Terms of said court, and shall, within ten days after the discharge from service of each of the panels of trial jurors, make a return to the counsel to the corporation of all fines imposed, which return shall give the name of each person fined, his address, the amount of the fine, the date when imposed, the part of the court at which the fine was imposed, and the name of the justice who held the same.

Appellate Division Rules.

FIRST DEPARTMENT.

(Amended to July 1, 1910.)

RULE I.

The court will open at one o'clock and continue until five o'clock in the afternoon, unless sooner adjourned, except that on the first and third Fridays of each term the court will open at half past ten in the forenoon.

RULE II.

The first and third Fridays of each term and such days as shall be designated for hearing appeals from orders in the months of July, August or September shall be motion days.

The clerk will make up a calendar for each motion day of all motions noticed to be heard on that day. A note of issue stating the nature of the motion and the day for which it has been noticed must be filed with the clerk before twelve o'clock noon on the Thursday preceding the Friday for which the motion is noticed.

No motion not upon such calendar will be heard.

All *ex parte* applications must be made upon motion days, except by special permission of the court.

RULE III.

Appeals from orders will be heard only upon motion days, the calendar of which will be taken up immediately after the disposition of the motion calendar. On the argument of such appeals not more than fifteen minutes will be allowed to each side,

except when the court otherwise orders. Appeals from orders which have been placed upon the calendar may be submitted by the parties, with the approbation of the court, at any time during the term, upon delivering to and leaving with the clerk the requisite number of printed copies of the points.

RULE IV.

Appeals from orders may be noticed for argument on any motion day. The appellant or moving party must file with the clerk of the Appellate Division, at least eight days before the day upon which such appeal shall have been noticed, a note of issue, which shall state the day upon which the notice of appeal shall have been served, and sixteen copies of the papers upon which the appeal is to be heard, printed as required by Rule 41 of the General Rules of Practice, with an affidavit showing the service of three copies thereof upon the attorney for the respondent, together with a notice of argument of the appeal with admission or proof of service; and the Clerk shall thereupon place the appeal upon the calendar for the day upon which such appeal shall have been noticed. If an appeal shall have been noticed for argument by the respondent, and the appellant or other party whose duty it is to file sixteen copies of the papers upon which the appeal is to be heard, printed as required by the General Rules of Practice shall fail to file the same at least eight days before the day for which such appeal is noticed the opposite party may move upon affidavit and upon four days notice of motion that the appeal be dismissed or that judgment be rendered in his favor.

At any time before three o'clock of the day preceding the day upon which a nonenumerated case shall have been noticed for argument, or to which the hearing thereof shall have been adjourned, the respective counsel may file a written consent with the clerk that the case may be set down for a subsequent motion day; and cases set down will be added to the calendar of that day at the foot of the cases remaining thereon undisposed of without further notice.

RULE V.

The clerk will make up a calendar of enumerated cases for each term of the court, which shall consist of the enumerated cases

upon the calendar of the preceding term undisposed of, and which shall not have been passed twice upon any of the previous calendars of the court, to which shall be added new cases which shall have been noticed as hereafter provided. The appellant or moving party must file with the clerk of the Appellate Division, at least fifteen days before the commencement of the term for which the case has been noticed for argument, a note of issue, which shall state the day upon which the notice of appeal has been served, and sixteen copies of the papers upon which the case is to be heard, printed as required by the General Rules of Practice, with an affidavit showing the service of three printed copies thereof upon the attorney for the respondent, together with the notice of argument of the case or notice with admission or proof of service.

If an appeal shall have been noticed for argument by the respondent, and the appellant or other party whose duty it is to file sixteen copies of the papers upon which the appeal is to be heard, printed as required by the General Rules of Practice, or sixteen copies of the points to be relied on by him, shall fail to file the same at least fifteen days before the day for which such appeal is noticed, the opposite party may move, upon affidavit and upon four days' notice of motion, that the appeal be dismissed or that judgment be rendered in his favor.

Cases entitled by law to a preference, when such preference is claimed in the note of issue, shall be placed at the head of the calendar.

RULE VI.

At least fifteen days before the commencement of the term for which an enumerated case has been noticed for argument the appellant, the plaintiff in a controversy submitted to the court under section 1279 of the Code of Civil Procedure, the relator in a writ of certiorari, or the moving party in any case to be heard as an enumerated case, shall file with the clerk sixteen printed copies and shall serve on the attorney for the respondents three printed copies of the points to be relied upon by him, with a reference to the authorities to be cited. Within ten days after such service the respondent shall file with the clerk sixteen printed copies and serve on the attorney for the appellant three printed copies of the points to be relied upon by him, with a reference to the au-

thorities to be cited. If the appellant desires to present points or authorities in reply he shall file with the clerk sixteen printed copies and serve three printed copies thereof on the attorney for the respondent within five days after the receipt of the respondent's points, and no subsequent points will be received from either side unless specially requested by the court. No points will be received by the court on the argument or submission of the appeal unless they shall have been filed and served as above provided. At four o'clock on each day the clerk will make up a calendar of fifteen enumerated cases for the next day. A case on such day calendar will not be reserved or postponed except by order of the court upon special cause shown. At any time after the filing of a note of issue in an enumerated cause and before it shall have been placed on the day calendar a written consent, signed by the attorneys or counsel who are to argue the case, that the appeal be set down for any future day of the term prior to the third Thursday thereof may be filed with the clerk, and such case shall be placed on the day calendar for such day at the end of the cases remaining thereon undisposed of in the order upon which they have been set down, provided that no more than fifteen cases shall be placed on any day calendar, and provided that such cases would have been reached on the General Calendar if not so set down. If a respondent is in default in the filing and serving of the points, as hereinbefore provided, he will not be heard, except by special leave of the court.

RULE VII.

In any case in which the printed copies of the papers upon which an appeal is to be heard shall have been filed with the clerk of the Appellate Division, as required by Rule 41 of the General Rules of Practice and the printed copies of the points filed with the clerk, as required by Rule 6 of the Rules of the Appellate Division for the First Department, either party may, by a written stipulation filed with the clerk, submit the appeal upon the printed papers and points filed as aforesaid.

RULE VIII.

Motions for reargument must be noticed for the term succeeding that upon which the appeal was decided. Such motions will only be

heard on notice to the adverse party, stating briefly the grounds upon which a reargument is asked; and such motion must be submitted on printed briefs stating concisely the points supposed to have been overlooked or misapprehended by the court, and with proper reference to the particular portion of the case and the authorities relied upon, and a printed copy of the opinion, and counsel will not be heard orally.

RULE IX.

No brief or memorandum of authorities will be received by the court after the argument of a motion or an appeal, unless permission be given by the court for its submission after notice to opposing counsel of the application for such permission.

In the event of counsel having cases upon the day calendars of the Appellate Divisions of the First and Second Departments on the same day, such counsel shall attend the court in that department in which his case stands nearest the head of such day calendar; and his case upon the calendar of the other department will be held until the argument of the case is finished in the department in which he is first required to attend. In the event of counsel having cases upon each of the day calendars of the said departments upon the same day, which stands equally distant from the heads of the respective day calendars, such counsel shall attend court in the First Department.

RULE X.

(Adopted October 11, 1904.)

Applications "to a justice of the Appellate Division of the First Judicial Department," under section 1344 of the Code of Civil Procedure, for the allowance of an appeal to be taken to such Appellate Division from the determination of the justices designated to hear appeals from the City Court of the city of New York and the Municipal Courts of the boroughs of Manhattan and the Bronx, may be made upon any motion day prior to the expiration of the second term of the Appellate Division, after such determination; and must be upon notice of two days to the opposite party or parties, and a note of issue filed, and the same put upon the calendar of motions in the manner pro-

vided by Rule 2 of the Appellate Division Rules relating to the hearing of motions.

The papers upon which such application is made must contain a copy of the opinion of the justices below, if any, a concise statement of the grounds of alleged error, and proof of due service of the papers upon which the application is founded. Upon the calling of the motion calendar, such application must be submitted without argument.

Such applications will not be entertained unless an application for leave to appeal has first been made to the justices by whom such determination was made, in the manner provided by Rule 7 for the regulation of the hearing of appeals from the City Court of the city of New York and the Municipal Courts of the boroughs of Manhattan and the Bronx, and has been denied.

RULE XI.

Every application for admission to practice as an attorney and counselor-at-law made by a person who has been admitted to practice and has practiced three years as an attorney and counselor-at-law in the highest court of law of another State, under Rule II of the Rules of the Court of Appeals for the admission of attorneys and counselors-at-law, shall be referred to the Committee on Character, who shall report to the court upon the character of the applicant and his qualifications to be admitted to practice in the courts of this State, and no person will be admitted to practice on such application until after the Committee on Character shall have made its report.

APPELLATE DIVISION — SUPREME COURT — ELECTION CASES.

The justices of the Appellate Division of the Supreme Court in the First Judicial Department do hereby make and establish the following rules to promote the efficient administration of justice in relation to the hearing and determination of any questions arising under the Election Law (chapter 909 of the Laws of 1896, and the amendments thereto).

RULE 1. All applications to the Supreme Court or a justice thereof to review the determination and acts of the election offi-

cers under section 56 of the Election Law (chapter 909 of the Laws of 1896, as amended); all applications for a writ of mandamus under section 114 of the said Election Law, and all other applications to the Supreme Court or a justice thereof under any of the other provisions of the said Election Law, shall be made to Special Term, Part 1 of the Supreme Court of the First Judicial District. The justice assigned to such term may hear and determine any such proceeding or may assign any such proceeding to the other parts of the Special Term for hearing and decision, and such application shall have precedence over all other business at any part of the Special Term. The final order determining such special proceeding should in each case state the facts found by the Special Term upon which the determination is made and the determination of the court upon the facts thus stated.

RULE 2. Appeal from any final order entered in a proceeding specified in Rule 1 shall be brought on for hearing at such time on such day as the Appellate Division shall designate by an order which will be granted on the application of any party to such a special proceeding.

Rules of the Appellate Division of the Supreme Court.

(SECOND JUDICIAL DEPARTMENT.)

Relating to the Calendar, Admission of Attorneys, Naturalization and Appeals from the Municipal Court.

ENUMERATED CALENDAR.

Sixteen (16) copies of the cases must be delivered to the clerk before the commencement of the argument.

At least ten days before a cause is placed on the day calendar the appellant shall file with the clerk sixteen printed copies and serve on the attorney for the respondent three printed copies of his brief and points. Within five days after such service the respondent shall file with the clerk sixteen printed copies and serve on the attorney for the appellant three printed copies of his brief and points. If the appellant desires to present brief or points in reply, he shall file with the clerk sixteen printed copies thereof and serve three printed copies on the attorney for the respondent within three days after the receipt of the respondent's points.

When according to this rule, an appellant is in default, the appeal may, without previous notice, be dismissed on motion, when the case is reached for argument, and when a respondent is in default, he will not be heard except by leave of the court.

This rule shall not apply to appeals from orders, or appeals from the Municipal Court of the city of New York.

NON-ENUMERATED CALENDAR.

Sixteen (16) copies of the appeal papers and points must be delivered to the clerk before the commencement of the argument.

(Attention is called to General Rule 41.) — If this rule is not strictly complied with, such causes as are therein referred to, cannot be placed upon the calendar.

RULE 41.

General Rules.

In all cases to be heard in the Appellate Division, except appeal from nonenumerated motions, the papers shall be furnished by the appellant or the moving party, and cases agreed upon, under section 1279 of the Code, by the plaintiff. The party whose duty it is to furnish the papers, shall cause a printed copy of the requisite papers to be filed in the office of the clerk of the Appellate Division, within twenty days after an appeal has been taken, or the order made for the hearing of a cause therein, or the agreed case filed in the clerk's office, pursuant to section 1279 of the Code; but if it shall be necessary to make a case, or case and exceptions, after the appeal shall have been taken, or the order made for the hearing in the Appellate Division, the papers shall be filed within twenty days after the settlement and filing of the case; and shall serve upon his adversary three printed copies of such papers. Such papers shall consist of a notice of appeal, if an appeal has been taken, a copy of the judgment-roll or the decree in the court below, and the papers upon which it was entered; if no judgment was entered, the pleadings, minutes of trial, and the order sending the case to the Appellate Division or the order appealed from, or the papers required by section 1280 of the Code of Civil Procedure. To these papers shall be

attached the case, or case and exceptions, if it is to be used in the Appellate Division. All the foregoing papers shall be certified by the proper clerk, or be stipulated by the parties to be true copies of the original. There shall be prefixed to these papers a statement showing the time of the beginning of the action or special proceeding and of the service of the respective pleadings; the names of the original parties in full; and any change in the parties if such has taken place. There shall be added to them the opinion of the court below or an affidavit that no opinion was given, or, if given, that copy could not be procured. The foregoing papers shall constitute the record in the Appellate Division. If the papers shall not be filed and served as herein provided by the party whose duty it is to do so, his opponent may move the court on three days' notice, on any motion day, for an order dismissing the appeal, or for a judgment in his favor, as the case may be.

The papers in all appeals from nonenumerated motions shall consist of printed copies of the papers which were used in the court below, and are specified in the order, certified by the proper clerk or stipulated by the parties to be true copies of the original, and of the whole thereof. There shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured. They shall be filed with the clerk within fifteen days after the appeal is taken and at the same time the appellant shall serve upon his adversary three printed copies thereof.

If the appellant fails to file and serve the papers as aforesaid, the respondent may move, on any motion day, upon three days' notice, to dismiss the appeal.

(Attention is called to section 1353, Code of Civil Procedure.)

Section 1353. Upon what papers appeal to be heard.— An appeal from a final judgment, taken as prescribed in this title, must be heard upon a certified copy of the notice of appeal, of the judgment-roll, and of the case or notice of exceptions, if any, filed, as prescribed by law, or the general rules of practice after the entry of the judgment and either before or after the appeal is taken. An appeal from an interlocutory judgment, or from an order, taken as prescribed in this title, must be heard upon a

certified copy of the notice of appeal and of the papers used before the court, judge or justice, upon the hearing of the demurrer, application for judgment, or motion as the case requires. Unless the Appellate Division shall in a special case otherwise direct, before an appeal shall be placed upon the calendar, the appellant shall file with the clerk of the Appellate Division the case and exceptions or the other papers, upon which the appeal shall be heard, printed as required by the rules of practice; in case the appeal is from a judgment, the printed case and exceptions must be ordered filed by the justice or referee before whom the case was tried. (Amended by ch. 946 of 1895.)

In the event of counsel having cases upon the day calendars of the Appellate Divisions of the First and Second Departments on the same day, such counsel shall attend the court in that department in which his case stands nearest the head of such day calendar; and his case upon the calendar of the other department will be held until the argument of the case is finished in the department in which he is first required to attend. In the event of counsel having cases upon each of the day calendars of said departments upon the same day, which stand equally distant from the heads of the respective day calendars, such counsel shall attend court in the First Department.

CALENDAR PRACTICE.

RULE I.

Appeals from orders, heard as nonenumerated motions, will be placed upon a separate calendar and called upon the first day of the term.

RULE II.

A new calendar will be made up for the January Term. Calendars for subsequent terms during the year will be made up by adding to the calendar of the previous term all new appeals to be placed in regular order, according to the date of appeal on compliance with the requirements hereinbefore prescribed. An appeal passed during any term may be brought on for argument on any day during a subsequent term upon stipulation, or upon four days' notice to the opposing party and on filing with the

clerk such stipulation or proof of service of such notice, the clerk will cause the appeal to be placed on the day calendar of the day named in such notice or stipulation.

RULE III.

Appeal from orders will also be heard on the third Monday of each term, and notices of argument may be given for such day, and the calendar for such day will consist of causes not called on the first Monday, and other causes in which the appeal papers and affidavit of service thereof have been filed with the clerk, as required by section 1353 of the Code of Civil Procedure and the General Rules of Practice.

RULE IV.

Nonenumerated causes will be placed upon the day calendar for the first and third Mondays of the term, and the hearing of such causes will continue from day to day until completed. The calendar for other days will consist of as many causes as shall be placed thereon from the general calendar in their numerical order.

RULE V.

Causes can be reserved by consent for a day subsequent to the time when they would be reached in their order only when a stipulation to that effect is filed with the clerk before the day calendar is made up (1 o'clock P. M.).

RULE VI.

Motions, other than appeals from orders, will be heard on the first and third Mondays of the term, and notes of issue therefor must be filed with the clerk at least two days before the day for which they are noticed.

RULE VII.

Notes of issue in appeals from orders.— No appeal from an order will be heard unless it is placed on the nonenumerated calendar. The attorney or party intending to move such an appeal for argument shall, at least eight days before the time of the

making up of the calendar, filed with the clerk a note of issue, specifying the date of the service of the notice or appeal and stating that the cause is to be put on the nonenumerated calendar. No cause shall be put on the enumerated or nonenumerated calendar until the papers required by General Rule 41 shall have been filed with the clerk.

RULE VIII.

Notes of issue in preferred causes.—A party who desires to have a cause heard as a preferred cause, must, in his note of issue, state his claim for preference, as provided in section 793 of the Code; or if an order giving the cause a preference has been made under that section, the note of issue must be accompanied with a copy of such order. The clerk, in making up the calendar, shall place such preferred causes at the head of the general calendar, indicating that they are preferred, and that class to which they belong.

RULE IX.

Criminal causes may be put upon the calendar at any time.—Appeals in criminal causes, brought after making up the calendar, or too late to be placed upon the calendar, may be put upon the calendar at any time, and brought on for hearing as preferred causes, upon a notice of ten days to the adverse party, as provided in section 535 of the Criminal Code. A note of issue must be filed with the clerk at least five days before the day on which the cause is to be heard, and he shall put the same upon the calendar for the day on which it shall be noticed, or upon which it shall be ordered by the court, or stipulated by the parties to be heard.

RULE X.

Indorsement on brief.— In order to facilitate the work of the reporter the counsel who argues the cause orally shall indorse his name on upper right-hand corner of first page of brief.

RULE XI.

Motions for reargument.— Motions for reargument will be heard only on notice to the adverse party, stating briefly the

ground upon which a reargument is asked, and such motions must be submitted upon printed briefs, stating concisely the points supposed to have been overlooked or misapprehended by the court with proper reference to the particular portion of the case and the authorities relied on; and a copy of the opinion delivered by the court in deciding the cause; and counsel will not be heard orally.

RULE XII.

When a statute is cited, so much thereof as may be deemed necessary to the decision of the case should be printed at length on the brief.

RULE XIII.

The general rule will prevail of imposing costs on the decision of motions.

Attention is called to section 1355, Code of Civil Procedure.

Section 1355. An appeal taken to the Appellate Division of the Supreme Court, as prescribed in this title, must be heard in the department embracing the county in which the judgment or order appealed from is entered; unless an order is made, as prescribed in section 231 of this act, directing that it be heard in another department, or unless appeals pending in one department are transferred for hearing and determination to another, pursuant to article 6, section 1, of the Constitution. The order made upon the the appeal must be entered in the office of the clerk of the Appellate Division, and a certified copy thereof, with the original case or papers upon which the appeal was heard, filed as provided in section 1353, must be transmitted by the clerk, upon the payment of his fees, to the clerk of the county where the judgment or order appealed from was entered, and upon such certified copy of the order and the case or papers upon which the appeal was heard, the county clerk shall enter the judgment in his office.

Remittitur.—The remittitur to be transmitted pursuant to section 1355 of the Code shall contain a copy of the judgment order of this court, and the record which has been filed with the clerk, and shall be sealed with the seal and signed by the clerk of this court.

RULES RELATING TO THE ADMISSION OF ATTORNEYS IN THE SECOND DEPARTMENT.

Notice of the time of application for admission as attorneys by those who have passed the examination prescribed by the rules of the Court of Appeals, will be published in the "Law Journal," at which time applicants must file with the clerk the papers enumerated in Rule 1 of the General Rules of Practice, and appear personally before the Committee on Character to furnish such information as the committee may desire from them.

RULES REGULATING THE PROCEDURE UPON APPLICATIONS FOR NATURALIZATION IN THE SUPREME COURT IN THE SECOND DEPARTMENT.

All applications of aliens to become citizens of the United States must be heard in Kings county at the Special Term of the Supreme Court for the hearing of motions, and in any other county in the department at any Special Term (whether held at the same time as a Trial Term or not) at which issues are triable. Such hearings shall be had in Kings county on Monday of each week during the year, except when Monday is a legal holiday, in which event they may be had on the day following. In the other counties of the department such hearing shall be had on the day of the opening of the court. The days aforesaid are hereby designated as the stated days for such applications.

The application, which is required by chapter 927 of the Laws of 1895 to be filed with the clerk of the court, shall specify the stated day (more than fourteen days thereafter) when such application will be brought on for hearing and final action.

If the applicant fail to appear at the time and place specified in such application, the application will be dismissed without prejudice to a fresh application.

If he appear and for any reason the hearing is not completed upon the stated day aforesaid, the court may complete such hearing and take final action upon any day in the same term to which the matter shall be publicly adjourned by the direction of the justice presiding.

Appeals from the Municipal Court.

All appeals from judgment rendered in the Municipal Court of the city of New York, in districts embraced within the Second

Judicial Department, will be heard by the Appellate Division of the Supreme Court for said department. No Special Calendar of such appeals will hereafter be made up, but they will be placed upon the General Calendar of enumerated cases, according to the date of the appeal, and will be treated in all respects, not herein specially provided for, like other appeals to the Appellate Division from courts other than the Supreme Court. Either party may bring such an appeal on for hearing by a notice of argument, served at least eight days prior to the beginning of the term. Upon the return day of said notice the respondent may, upon the default of his adversary, take a judgment of affirmance or an order dismissing the appeal as the justice of the case may require; and it shall not be necessary to make a special motion for the dismissal of an appeal, except for failure to file the return. In case of a failure of any justice of the Municipal Court to make return to this court, as required by section 317 of chapter 580, Laws of 1902, it shall be the duty of the appellant forthwith to apply to this court, under the provisions of sections 3055 and 3056, to compel such return.

The appeal shall be heard upon the original return or a certified copy thereof, and each party shall file five copies of any brief or points which he may desire to submit at least one day before the argument.

RULE RELATING TO THE FORM OF BOND OF APPLICANTS FOR LICENSE TO PRACTICE AS OFFICIAL EXAMINERS OF TITLE.

It is ordered that the following special rule, relating to the form of bonds of applicants for license to practice as official Examiners of Title, be and the same is hereby prescribed to take effect forthwith:

RULE I.

All bonds executed by individual sureties in accordance with the provisions of section 9 of chapter 444 of the Laws of 1908, and the rules of the Court of Appeals adopted pursuant thereto, must contain a statement of the place of residence of each surety, giving the street and the number thereof, if such residence is so known and designated, and in addition to the facts required by the Rules of the Court of Appeals to be stated in the affidavit of

justification, each surety must specifically state what property is owned by him, giving a brief description thereof, and also state the value of the same and what, if any, liens or encumbrances there are on such property, with a brief description of the nature and amount of such lien.

Kings County, March 4, 1909.

ALMET F. JENKS,
JOHN WOODWARD,
WILLIAM J. GAYNOR,
JOSEPH A. BURR,
ADELBERT P. RICH,
Justices of the Appellate Division of the Supreme Court in the Second Judicial Department.

TO ATTORNEYS.

A printed copy of the appeal papers shall be filed in the office of the Clerk of the Appellate Division within twenty days after an appeal has been taken, etc. The copy so filed shall be certified by the proper clerk, or be stipulated by the parties to be true copies of the original. (Rule 41, General Rules of Practice.)

This shall be done before an appeal shall be placed upon the calendar. (Sec. 1353, Code Civ. Pro.)

Attorneys should also notice that Rule 41 requires three copies of the appeal papers to be served within the same time upon the opposite party.

Notes of issue shall be filed in the clerk's office eight days before the commencement of the court at which the cause may be noticed. (Rule 39, General Rules of Practice.)

Except that appeals from orders, to be heard as nonenumerated motions, may, after papers have been filed and served in compliance with General Rule 41, be added to the nonenumerated calendar upon filing a note of issue with the clerk, five days before argument, and be noticed for argument for any motion day, upon the usual notice of eight days.

Notes of issue shall specify whether the appeal is to be placed upon the nonenumerated or general calendar, and where a preference is desired, the note of issue must state the claim for prefer-

ence as provided in section 793 of the Code, and indicate the class to which it belongs. (Rules 1 and 3, Third Dept.)

Attention is also called to Special Rule 6 of this department, requiring notice to the clerk if a party desires the case put upon the day calendar when reached in its order upon the general calendar.

Thirteen (13) copies of the appeal papers and points must be delivered to the clerk before the commencement of the argument.

Motion days.— The first day of each term, and every Friday thereof, are motion days.

Hours of Court.— From 10 o'clock a. m. to 2 o'clock p. m. except Mondays. Mondays, from 2 o'clock p. m. to 6 o'clock p. m. No court on Saturdays.

Telephones.— Hudson River, Number 483; Home, Number 483.

Third Department.

RULE I.

Appeals from orders to be heard as nonenumerated motions, may, after papers have been filed and served in compliance with General Rule 41, be noticed for argument for any motion day, and be placed upon the nonenumerated calendar, upon the attorney or party intending to move such appeal for argument filing with the clerk a note of issue, specifying the date of the service of the notice of appeal, and stating that the case is to be put upon the nonenumerated calendar. Such appeals, and also motions, will be heard at the opening of the court or upon any succeeding Tuesday during the term.

RULE II.

If all nonenumerated motions and appeals from orders which are ready for hearing on the first day of the term shall not be heard upon that day, the hearing of them will be continued from day to day until they shall all be disposed of before the general calendar shall be taken up, unless otherwise ordered by the court.

RULE III.

A party who desires to have a cause heard as a preferred cause must in his note of issue state his claim for preference as provided in section 793 of the Code, or if an order giving the cause a preference has been made under that section, the note of issue must be accompanied with a copy of such order. The clerk, in making up the calendar, shall place such preferred causes at the head of the general calendar, indicating that they are preferred, and the class to which they belong.

RULE IV.

Appeals in criminal cases, brought after making up the calendar, or too late to be placed thereon, may be put upon the calendar at any time and brought to a hearing as preferred cases upon a notice of ten days to the adverse party, as provided by section 535 of the Criminal Code. A note of issue, with a statement of the day on which the cause is noticed to be heard, must be filed with the clerk at least five days before such date. The clerk shall place such causes on the calendar for the day for which they are so noticed, or upon which the cause shall be ordered by the court, or stipulated by the parties to be heard.

RULE V.

The clerk shall prepare at 1 o'clock p. m. of each day for the next day a calendar of such number of causes as the court shall direct, including those undisposed of on the then day calendar, taken from the general calendar in their order thereon, subject to the provisions of Rule VI. Causes not disposed of on any day shall be placed at the head of the calendar for the next day until disposed of.

RULE VI.

Excepting the first twenty causes on the general calendar, no cause shall be placed on the day calendar, unless written notice is served on the clerk, by the attorney on one side or the other, that such cause is intended to be moved when called in its regular order, or unless it has been reserved for that day, by stipulation filed with the clerk. None of the first twenty causes on the gen-

eral calendar shall be reserved by stipulation without consent of the court, upon application made on the first day of the term, and any cause not placed on the day calendar in its order on the general calendar, will be regarded as passed for the term, unless put over, or reserved as above provided.

RULE VII.

Causes must be argued when reached on the calendar. No exchange of cases will be allowed unless both cases are ready for argument, and counsel intend to argue them at the same term at which the exchange be made, and when causes are exchanged, each shall occupy the proper position of the other in date, on the same and every other subsequent calendar until heard. A preferred cause exchanged for one not preferred, or set down for a particular day, shall lose its preference, and no case will be called more than once during the same term, unless it shall have been reserved or postponed with the consent of the court.

RULE VIII.

If both parties desire to submit, they may do so at any time during the term by delivering to the clerk the cases and points required by General Rule 43, and either party may submit his points when the case is called, if the other party desires to argue orally on his part.

RULE IX.

The appellant, in addition to the statement required by Rule 41, shall prefix to his points a brief statement, showing in what court or before what officer or tribunal the action or proceeding was instituted, the relief sought, the defense or ground of opposition thereto, the result in the court or before the officer or tribunal in which the action or proceeding was commenced, and how the cause was brought into this court. If any opinion written in the case has been previously reported, he shall also state where it was so reported. If any opinion has been written which has not been reported, the party whose duty it is to furnish the papers shall submit a printed copy of such opinion to the court either in the record or with his brief.

RULE X.

The counsel who argue a case shall indorse on the papers delivered to the justices their names and places of residence.

Every cause shall be deemed to be submitted to any justice, qualified to sit therein, who may be absent at the time of the argument, unless objection to such submission by counsel arguing such cause be then made.

RULE XI.

Motions for reargument will only be heard on notice to the adverse party, stating briefly the ground upon which a reargument is asked, and such motion must be submitted on printed briefs stating concisely the points supposed to have been overlooked or misapprehended by the court with proper reference to the particular portion of the case, and the authorities relied upon.

RULE XII.

If a cause is passed without being reserved, or put over by consent of the court, it shall be entered on all subsequent calendars as of the date when passed, and the party placing it on the calendar for a subsequent term, must state in his note of issue the date when it was passed. If he omits to do so, whereby the cause retains its priority on the calendar, the court, on the application of the adverse party, or on its own motion, may strike the cause from the calendar.

RULE XIII.

Whenever a Trial Term or Special Term of the Supreme Court, in this department, shall be designated to be held or opened on a day which is provided by law to be observed as a legal holiday, such court shall be opened and held on the next succeeding secular day.

RULE XIV.

At least twenty days before a term of the Appellate Division at which a cause may be noticed for argument the appellant, or relator, shall serve upon the attorney for the respondent three printed copies of his brief upon which he intends to rely upon the argument, with a reference to all the authorities which he

intends to cite to the court. At least eight days before said term, the respondent shall serve upon the attorney for the appellant or relator, three printed copies of his brief with a reference to all the authorities which he intends to cite to the court. If the appellant, or relator, desires to present a brief in reply he may serve the same upon the attorney for the respondent at least three days before said term. Service under this rule may be made either personally or by mail, but service by mail shall not extend the time within which the answering brief may be served. This rule shall not apply to appeals from orders upon nonenumerated motions, nor to causes in which the time to file papers on appeal, shall under General Rule 41, expire within twenty days of the commencement of a term.

RULE XV.

Candidates for admission to the bar may be sworn in at the opening of the court on any Thursday of the term, providing the necessary papers therefor shall have been filed with the clerk of the court on or before the Tuesday preceding.

Fourth Department.

TO ATTORNEYS.

A printed copy of the appeal papers shall be filed in the office of the clerk of the Appellate Division within twenty days after an appeal has been taken, etc. The copy so filed shall be certified by the proper clerk, or be stipulated by the parties to be true copies of the original. (Rule 41, General Rules of Practice.)

This shall be done before an appeal shall be placed upon the calendar. (Sec. 1353, Code Civ. Pro.)

Attorneys should also notice that Rule 41 requires three copies of the appeal papers to be served within the same time upon the opposite party.

Notes of issue shall be filed in the clerk's office eight days before the commencement of the court at which the cause may be noticed. (Rule 39, General Rules of Practice.)

Except that appeals from orders, to be heard as nonenumerated motions, may, after papers have been filed and served in compliance with General Rule 41, be added to the nonenumerated calendar upon filing a note of issue with the clerk five days before argument, and be noticed for argument for any motion day, upon the usual notice of eight days.

Notes of issue shall specify whether the appeal is to be placed upon the nonenumerated or general calendar, and where a preference is desired, the note of issue must state the claim for preference as provided in section 793 of the Code, and indicate the class to which it belongs. (Rules 1 and 3, Third Dept.)

Attention is also called to Special Rule 6, of this department, requiring notice to the clerk if a party desires the case put upon the day calendar when reached in its order upon the general calendar.

Thirteen copies of the appeal papers and points must be delivered to the clerk before the commencement of the argument.

CALENDAR RULES.

RULE I.

Notes of Issue in Appeals from Orders.

No appeal from an order will be heard unless it is placed on the nonenumerated calendar. The attorney or party intending to move such an appeal for argument shall, at least eight days before the time of the making up of the calendar, file with the clerk a note of issue, specifying the date of the service of the notice of appeal, and stating that the case is to be put on the nonenumerated calendar. No case shall be put upon the enumerated or nonenumerated calendar until the papers required by General Rule 41 shall have been filed with the clerk.

RULE II.

Notes of Issue in Preferred Cases.

A party who desires to have a case heard as a preferred case, must, in his note of issue, state his claim for preference, as provided in section 793 of the Code; or if an order giving the case a preference has been made under that section, the note of issue must be accompanied with a copy of such order. The clerk in making up the calendar shall place such preferred cases at the

head of the general calendar, indicating that they are preferred, and the class to which they belong.

RULE III.

New Calendar, When to Be Made. Passed Cases.

When a new calendar is ordered by the court, the clerk shall place thereon all cases which remain undisposed of on the former calendar, and all other cases in which notes of issue have been filed in his office. If a case shall have been passed, it shall go upon the calendar as of the time when it was passed, and the fact that it was passed shall be stated upon the calendar.

RULE IV.

Criminal Cases May be put upon the Calendar at any Time.

Appeals in criminal cases, brought after making up the calendar, or too late to be placel upon the calendar, may be put upon the calendar at any time, and brought on for hearing as preferred cases, upon a notice of ten days to the adverse party, as provided in section 535 of the Criminal Code. A note of issue must be filed with the clerk at least five days before the day on which the case is to be heard, and he shall put the same on the calendar for the day on which it shall be noticed, or upon which it shall be ordered by the court, or stipulated by the parties to be heard.

RULE V.

Day Calendar to be Made by Clerk.

The clerk shall prepare at 3 o'clock, p. m., of each day a day calendar for the next day, to consist of ten cases or such other number as the court shall direct, including those undisposed of on the then day calendar. They shall be taken from the general calendar in their order thereon, subject to the provisions of Rule VI. Cases not disposed of on any day shall be placed at the head of the calendar for the next day, until disposed of.

RULE VI.

Notice to Clerk no Longer Necessary, etc.

It shall not be necessary to notice cases for the day calendar. Any case on the general calendar may, by stipulation of the parties, filed with the clerk at any time before the case is placed upon

the day calendar, be reserved for a day certain, except that no stipulation shall be made or filed reserving any of the first fifty cases on the general calendar beyond the first week. Cases so reserved for a day certain shall not be placed upon the day calendar for any day prior to that to which they have been so reserved. No case shall be put upon the day calendar unless the papers and points have been delivered to and filed with the clerk. Cases which cannot be placed upon the day calendar in their regular order or at the time to which they have been reserved by reason of nonfiling of the papers and points, will be regarded as passed for the term.

RULE VII.

Clerk to Telegraph Day Calendar.

The clerk shall, on each day during the term, immediately on making up the day calendar, telegraph the numbers of the cases upon it to the county clerks at Buffalo, Syracuse, Utica, Oswego, Lockport, Auburn, and Watertown, and the county clerks receiving said telegrams are directed to post or bulletin the same in such manner as shall be most convenient for attorneys and others desiring to see the same, and also to procure the publication of such telegrams in the newspapers of their respective cities.

RULE VIII.

Reservations and Submissions.

Cases will not be received upon submission until reached in the regular call of the calendar. No reservation will be made of any of the first eight cases upon the general calendar, unless on account of sickness, or an engagement of counsel elsewhere, in the actual trial or argument of another case in a court of record, commenced before the term of this court, or other inevitable necessity to be shown by affidavit. Other cases may be reserved upon reasonable cause shown; or by stipulation of parties, filed with the clerk, but no case shall be so reserved by stipulation after the same has been placed upon the day calendar.

Cases reserved for a day certain by stipulation, when in order to be called, have priority among each other according to their number on the calendar, and shall follow next in order the undisposed of cases of the calendar for the day previous. Default may

be taken in them, and they will, if passed, be put upon future calendars as if passed in the regular call. Every cause shall be deemed to be submitted to such justice as may be absent from the court at the time of the argument unless objection to such submission by counsel arguing the cause be then made.

RULE IX.

Papers to be Filed with the Clerk and Exchange of Briefs.

Within fifteen days after the service of the printed papers required to be served by General Rule 41 in enumerated motions, the party whose duty it is to furnish those papers shall file with the clerk sixteen printed copies of the papers and sixteen printed copies of his brief and the points upon which he intends to rely upon the argument, with a reference to all the authorities which he intends to cite to the court; and shall, at the same time, serve on the attorney or counsel for the other party three copies thereof. Within seven days thereafter the other party shall file with the clerk sixteen printed copies of his brief and points, with a reference to all his authorities, and serve on the attorney or counsel for the moving party, three printed copies thereof. If either party shall fail to serve and file his brief and points, as herein required, he shall not be heard upon the argument, and judgment may be entered against him, as upon default, on application to the court on any motion day upon three days' notice.

If the moving party desires to serve an answering brief, he shall file with the clerk sixteen printed copies thereof, and serve upon his opponent three printed copies, within five days after the receipt of his opponent's brief. He shall not include in his answering brief, any matter which is not in the nature of an answer to the brief to which it purports to reply. No supplemental briefs will be allowed unless requested by the court. This rule shall not apply to appeals from nonenumerated motions. It shall apply to all cases which shall be put upon the day calendar upon and after the first day of March, 1896. Upon the argument of all cases before that time, the moving party shall furnish to the clerk sixteen copies of the case, and each party shall furnish to the clerk sixteen copies of his brief. The clerk shall distribute the cases and briefs as prescribed in General Rule 43, and he shall, in addition, deliver one copy of each to the Librarian

of the Law Library in Buffalo, Rochester and Syracuse, to be bound and indexed for reference.

RULE X.

Information, Attorneys shall Prefix in Brief.

The moving party, in addition to the statement required in General Rule 41, shall prefix to his points a brief statement, showing when and in what court or before what officer or tribunal the action or proceeding was instituted, the relief sought, the defense or grounds of opposition thereto, the result in the court or before the officer or tribunal in which the action or proceeding was commenced, the proceedings subsequent to the first decision, and how the case was brought into this court. If any opinion written in the case has been previously reported, he shall also state where it was so reported. If any opinion has been written which has not been reported, the party whose duty it is to furnish the papers shall submit a printed copy of such opinion to the court, either in the record or with his brief.

RULE XI.

Indorsement on Brief.

The counsel who argues the case shall indorse on his brief, delivered to the judges, his name and place of residence.

RULE XII.

Exchange of Cases.

No exchange of cases will be allowed unless both cases are ready for argument, and counsel intend to argue them at the same term at which the exchange is made; and when cases are exchanged, each shall occupy the proper position of the other in date, on the same and every subsequent calendar, until heard. A preferred case exchanged for one not preferred, or set down for a particular day, shall lose its preference, and no case will be called more than once during the same term, unless it shall have been reserved or postponed with the consent of the court.

RULE XIII.

Hearing of Nonenumerated Motions and Appeals from Orders.

Argument of nonenumerated motions and appeals from orders will be heard only upon the first day or the third Friday of a term. No stipulation reserving the argument of such appeals to the third Friday will be honored unless such stipulation be filed with the clerk not later than Friday preceding the opening day of the term. If all nonenumerated motions and appeals from orders which are ready for hearing on the first day of the term or on the third Friday shall not be heard upon such day, the hearing will be continued from day to day until they shall all be disposed of, before the general calendar shall be taken up, unless otherwise ordered by the court. Original motions in this court may be noticed for the first day of the term, or for the Friday in any subsequent week of the term.

RULE XIV.

Motions for Reargument.

Motions for reargument will be heard only on notice to the adverse party, stating briefly the ground upon which a reargument is asked, and such motions must be submitted upon printed briefs, stating concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case and the authorities relied on; and a copy of the opinion delivered by the court in deciding the case; and counsel will not be heard orally.

RULE XV.

Remittitur.

The remittitur to be transmitted pursuant to section 1355 of the Code shall contain a copy of the judgment or order of this court, and the record which has been filed with the clerk, and shall be sealed with the seal and signed by the clerk of this court.

RULE XVI.

Official Examiners of Title.

An official examiner of title, before he is licensed and admitted to practice as such, must file the bond required by Rule 3 of the

Court of Appeals, relating to applications to practice as official examiners of title, approved by the presiding justice of the Appellate Division of the Supreme Court in this department. In case of the death or insolvency, of either of the sureties, an official examiner of title must forthwith file a new bond, with new sureties, fully complying with said rule. Each applicant for a license as an official examiner of title must also produce such evidence of character and as to his standing in regard to financial transactions as the Appellate Division of this department may require. (Adopted May 27, 1909.)

New York Surrogate's Rules.

RULE I.

A special motion calendar will be called on each Tuesday and Friday at 10.30 o'clock, A. M., except during the month of August. No calendar will be called during that month.

RULE II.

To entitle a motion or proceeding to be entered upon the motion calendar, proof of service of all orders, citations, summons and other papers on which the motion or application shall be made, must be furnished to the clerk of this court at or before 1 o'clock on the day preceding the motion day. No motion shall be adjourned without showing to the satisfaction of the surrogate legal grounds therefor, except upon the return day thereof, when it may be adjourned for a week on filing with the clerk the written consent of the parties.

RULE III.

No mandate issued out of this court shall be deemed duly served unless copies of the petition or other paper or papers upon which it shall be issued, and upon which relief is sought, shall be served with it, except the following:

1. Citation to attend probate.
2. Citation to revoke probate.

3. Citation on application for administration.
4. Citation for intermediate account.
5. Citation to attend judicial settlement of account.
6. Citation to temporary administrator to account.
7. Citation to principal in a bond to give new sureties in place of sureties who apply to be released.
8. Order to temporary administrator to make deposit.
9. Order to executor to appear and qualify.
10. Order requiring the executor or administrator to file inventory.
11. Why an account should not be made on surrogate's motion.

RULE IV.

A party seeking to contest the probate of a last will and testament must file a written appearance with the clerk of this court, together with a written and verified answer, containing a concise statement of the grounds of his objection to such probate, and any facts he may allege tending to establish a want of jurisdiction of the court to hear such probate. In case such jurisdiction shall be denied or the right of any objecting party to appear and contest shall be questioned, the court will first hear and pass upon the question of jurisdiction, or the status of the contestant, unless, for the convenience of the parties or the court, it shall be ordered otherwise. When a contestant files with the surrogate the notice provided for by section 2618 of the Code of Civil Procedure, requiring the examination of all the subscribing witnesses to a will, or any other material witness, he must present with such notice an affidavit showing the materiality of the testimony of the witnesses or witness sought to be examined, and an order requiring the production by the proponent of such witnesses or witness. A copy of such order, if the same shall be signed, must be immediately served upon the proponent or his attorney.

In all cases of contests in probate proceedings, the proponents shall, within five days after objections to the probate are filed, present a verified petition for and procure and enter an order directing notice of the time and place of hearing of such objections to be given, and prescribing the manner of giving such notice, to all persons in being who would take any interest in any

property under the provisions of the will, and to the executor or executors, trustee or trustees named therein, if any, who have not appeared in the proceeding, as required by section 2617 of the Code, and such petition shall contain the names and addresses of such parties, and state whether any, and which of them, are infants or of unsound mind. In case the proponents shall not present such petition and enter such order within the time aforesaid, such petition may be presented and order entered by or on behalf of any party or parties interested in the estate.

Proofs of service of such notices must be filed with the probate clerk at least four days before the date named therein for such hearing.

In probate proceedings, when all parties in interest have waived the service of citation, notice of at least two days must be given to the probate clerk before the testimony of the subscribing witnesses will be taken.

The will should be filed with petition for probate, unless upon good cause shown by affidavit the surrogate dispenses therewith, in which case it must be filed at least two days before the return day of the citation.

In all cases a copy of the will must be filed with the petition.

RULE V.

Wherever a party shall put in issue on probate the validity, construction, or the effect of any disposition of personal property under section 2624 of the Code, if it shall appear that all persons interested in such construction are not before the Court, the determination of such question shall be suspended until such persons shall be made parties; and the executor named in the will shall not be held to represent the legatees therein for the purpose of such construction.

RULE VI.

Whenever any person shall appear in support of the will propounded under section 2617 of the Code, such person shall not thereby become entitled to recover any costs on the probate of said will unless it shall appear to the satisfaction of the court that the interest of such person was not sufficiently represented and prosecuted by the executor named in the will and his counsel.

RULE VII.

On an accounting by an executor, administrator, guardian or trustee, which may be contested, any party interested, or a creditor desiring to contest the account, shall file specific objections thereto in writing, and serve a copy thereof upon the accounting party, or upon his attorney in case he shall have appeared by attorney, within eight days after the filing of the account in the office of the clerk of the court, where the accounting is a compulsory one, and within eight days after the return of the citation, where the accounting is a voluntary one, or within such further or other time in either case as shall be allowed by the surrogate; and the contest of such account shall be confined to the items or matter so objected to. If it shall appear to the satisfaction of the court, by affidavit or petition, that an examination of the accounting party will be necessary to enable the contesting party to interpose his objections, such examination may be ordered by the court for that purpose.

RULE VIII.

When a referee's report shall be filed, together with the testimony taken before him, said report shall be confirmed as of course, unless exceptions thereto shall be filed by any party interested in the accounting or proceeding within eight days after a written notice of such filing and a copy of such report shall have been served upon the opposing party; and in case exceptions shall be so filed, any party may bring on the hearing of said exceptions on eight days' notice on any stated motion day of said surrogate's court.

RULE IX.

All orders and decrees to be entered in litigated motions, unless settled by consent, must be noticed for settlement, and a copy of the proposed order served at least one day before the same shall be presented for settlement at the surrogate's chambers, and all decrees to be entered in contested probate or accounting proceedings shall be settled at chambers, on two days' notice, and the service of a copy of the proposed decree; and no such order or decree will be signed in the absence of the opposing attorney, unless proof or admission of such service shall be presented on such settlement.

RULE X.

No special guardian to represent the interests of an infant in any proceeding in said surrogate's court will be appointed on the nomination of a proponent or the accounting party, or his attorney, or upon the application of a person having an interest adverse to that of the infant. To authorize the appointment of a person as a special guardian on the application of an infant or otherwise in a proceeding in this court, or to entitle a general guardian of such infant to appear for him in such proceeding, it must appear that such person or such general guardian, is competent to protect the rights of the infant, and that he has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of or any party to the proceeding. Where the application for the appointment of a special guardian is made by another than the infant, or where the general guardian appears in behalf of the infant, it must appear that such applicant or general guardian has no interest adverse to that of the infant. No party to a proceeding will be appointed special guardian of any other party thereto. If such applicant or general guardian is entitled to share in the distribution of the estate or fund in which the infant is interested, the nature of the interest of such applicant or general guardian must be disclosed. The application for the appointment of a special guardian as well as the appearance filed by a general guardian of a minor must, in every instance, disclose the name and residence and relationship to the infant of the person with whom the infant is residing, whether or not he has a parent living, and if a parent is living, whether or not such parent has knowledge of and approves such application or appearance; and such knowledge and approval must be shown by the affidavit of such parent. If the infant has no parent living, like knowledge and approval of such application or appearance by the person with whom the infant resides must be shown in like manner. Where such application is made by an infant over the age of 14 years, his petition must show and be accompanied by the affidavit of the parent (in case the latter has an interest adverse to that of the infant), showing, in addition to such knowledge aforesaid, that such parent has not influenced the infant in the choice of the guardian.

RULE XI.

In any proceeding for a judicial settlement of the account, wherein a special guardian shall be appointed or a general guardian shall appear to protect the interests of an infant party to such accounting, no decree will be entered as upon default against such infant, but such decree shall be so entered only on the written report of the guardian appearing for such infant that he has carefully examined the account and finds it correct, and upon two days' notice to the guardian of the settlement thereof.

RULE XII.

Whenever an infant interested in any proceeding in said surrogate's court has a general guardian no decree will be entered without appointing a special guardian to represent said infant's interest therein, unless such general guardian shall file his appearance in writing and his affidavit of no adverse interest, as required by Rule 10, with the clerk of said surrogate's court.

RULE XIII.

No costs will be allowed to the petitioner who takes proceedings to compel the filing of an inventory by an executor or administrator, unless such executor or administrator shall have unreasonably delayed to make and file such inventory after having been duly requested to do so by or in behalf of the petitioner.

RULE XIV.

All petitions and answers in this court, except as otherwise expressly prescribed by statute, shall be in writing and contain a plain and concise statement of the facts constituting the claim, objection or defense, and a demand of the decree, order or other relief to which the party supposes himself to be entitled, which petition and answer are required to be verified.

RULE XV.

The deposit of securities for the payment of money belonging to an estate or fund, as provided in section 2595 of the Code of Civil Procedure, for the purpose of reducing the bond of an

executor, administrator or other trustee, shall be made under the order of the surrogate in the United States Trust Company, of the New York Life Insurance and Trust Company, Farmers' Loan and Trust Company, the Union Trust Company, the Mercantile Trust Company, the Central Trust Company of New York, State Trust Company and Knickerbocker Trust Company, subject to the order of the trustee, to be countersigned by the surrogate, or the special order of the surrogate, and not otherwise.

RULE XVI.

The respondent on any appeal from a decree or order of this court may, within ten days after the filing of the undertaking required on such appeal, serve upon the attorney for the appellant a written notice that he excepts to the sufficiency of the sureties therein; whereupon and within ten days thereafter such sureties, or other sureties in a new undertaking to the same effect, must justify before the surrogate or the chief clerk on five days' notice of such justification, to be served upon the respondent's attorney, by each surety appearing in person before said surrogate or chief clerk and submitting to an examination, on oath, on the part of the appellant, touching his sufficiency. If such sureties shall be found sufficient, said surrogate or chief clerk will indorse an allowance thereof upon the undertaking or a copy thereof, and a notice of such allowance shall be served upon the attorney for the exceptant; and the effect of any failure to so justify and procure such allowance shall be to avoid the undertaking.

RULE XVII.

Wherever a bond with sureties shall be executed by an executor, administrator, guardian, or other trustee, any person interested in the estate or in behalf of such guardian may apply to the surrogate for an order requiring the sureties in said bond to appear before him, or his chief clerk, and submit to an examination under oath as to their sufficiency as such sureties. If it shall appear to the satisfaction of the surrogate that such examination is necessary, he will make an order, prescribing the time and place where such examination shall take place, a copy of which order shall be served upon such executor, administrator, guardian or trustee, at least five days before the time fixed for such examination. If on

such examination the surrogate shall be satisfied of the sufficiency of such surety he will indorse his approval upon the bond, or a copy thereof; and in case such surety on such examination shall not, in the opinion of the surrogate, be sufficient, the surrogate will make an order requiring the substitution of new sureties, within five days after the service of a copy of said order upon the executor, administrator, guardian or other trustee, or his attorney, if he shall have appeared by attorney on such examination.

RULE XVIII.

No document, petition, affidavit or paper will be considered on the determination of any motion by the surrogate, except such as shall bear the regular file mark of the surrogate, his chief clerk, or the clerk to the Surrogate's Court, except such as shall form part of the testimony or documentary evidence, or exhibits before a referee, and then they must bear the mark as an exhibit of the referee. No paper will be received for consideration by the surrogate, or for filing in his office, unless it is of the weight prescribed by Rule 19 of the General Rules of Practice, and conforms in all other respects, as far as practicable, to the requirements of said rule. And no paper will be received by the clerk of the court after argument or submission of a matter subsequent to the day fixed by the surrogate for the receipt of the same.

RULE XIX.

A proposed order or decree must not be attached to any other paper. Upon the back of every such order or decree, and upon every set or collection of papers attached together, and upon all single papers separately presented, there must conspicuously appear the name of the decedent or of the infant to whose estate the proceeding relates, the nature of each order, decree, or other paper, or set of papers, and the name and address of the attorney presenting the same.

RULE XX.

No record or paper on file in this court will be intrusted to the custody of the attorneys or parties, except for the purpose of proper examination, in the office where they are deposited; and if any such document or paper shall be needed before any referee

appointed by this court, the same shall be intrusted to a clerk or messenger of this court and delivered to the referee, who shall execute a receipt therefor, and for its redelivery.

RULE XXI.

The surrogate, on the written certificate of the person appointed under section 2844 of the Code, to examine the inventory and accounts of guardians filed in said surrogate's office, that a general guardian has omitted to file such inventory or account, or the affidavit required by section 2843, or that the interest of the ward requires that the guardian should render a more satisfactory inventory or account, will make an order requiring the guardian to supply the deficiency. Whenever it shall appear by the certificate of said person that the guardian has failed to comply with such order within three months after its due service upon him, or that there is reason to believe that sufficient cause exists for the guardian's removal, the surrogate will appoint a special guardian of the ward for the purpose of filing a petition in his behalf and prosecuting the necessary proceedings for the removal of such guardian.

RULE XXII.

Whenever a party to a decree shall deem himself entitled to costs, the same will be considered and determined by the surrogate on two days' notice of adjustment, to be served upon the opposing party, with the items of costs and disbursements to which the party may deem himself entitled at the time of the settlement of the decree, which disbursements shall be duly verified, both as to their amount and necessity, the disbursements for referee and stenographer's fees being sustained by their affidavits or detailed proof; and at the same time, and on like notice, the surrogate will pass upon any additional allowance to be made to an executor, administrator, guardian or testamentary trustee, upon a judicial settlement of his account; which notice of adjustment and allowance shall be accompanied by an affidavit setting forth the number of days necessarily occupied in the hearing or trial, the number necessarily occupied in preparing the account for settlement, and in the preparation for the trial, the time occupied on each day in the rendition of the services, and their nature and extent in detail.

In case such trial shall have been had before a referee, the time necessarily occupied in such trial before him may be shown by a certificate of such referee. The affidavit as to disbursements, time engaged in trial, and in preparing the account and for trial, may be controverted by affidavit.

RULE XXIII.

All motions for reargument must be submitted on papers, showing clearly that some question decisive of the case, and which was presented by counsel upon the argument, has been overlooked by the court; or that the decision is inconsistent with some statute, or with a controlling decision to which, through the neglect or inadvertence of counsel, the attention of the court was not drawn.

RULE XXIV.

1. Every proposed decree must be accompanied by a copy of the will in the case of an accounting of an executor or trustee, and in every case by an affidavit of regularity, setting forth the necessary jurisdictional facts. A copy of the form of the affidavit required will be furnished by the clerk of the court.

2. Every consent, notice of settlement or admission of service, must be upon a separate sheet of paper annexed to the order or decree to which it relates, and not upon the body or cover thereof.

3. When a petition for a voluntary accounting is presented, the account to which it relates must be filed therewith.

4. Upon an accounting, wherein there is no general or special guardian, no decree will be entered until the account has been audited by a referee appointed for that purpose, except upon the consent of all the parties.

RULE XXV.

1. Upon the filing of the appraiser's report in a transfer tax proceeding the surrogate will immediately enter the order determining the value of the property and the amount of tax. The matter will not appear on the calendar at this stage, nor will the court then consider objections to the report.

2. A party having objections to the report, or order entered thereupon, may, within sixty days, file a notice of appeal. Said notice to be served upon all parties appearing before the ap-

praiser, and proof of service to be filed with the clerk, with the notice of appeal. Thereupon the proceeding will be placed upon the calendar for the next regular motion day. This notice must specify the grounds of objection.

3. A special guardian will be appointed to protect the interests of infants upon the return of the appraiser's notice, if it appears that their rights are involved and they are not otherwise adequately represented.

KINGS COUNTY — SUPREME COURT.

Calendar Rules of Trial Term.

RULE I.

Any cause may be set down for a day by stipulation filed with the calendar clerk before it appears on the day calendar, except that it may not be advanced out of its order in that way. Causes marked "off" on the call of the day calendar may be set down for a day of any subsequent term only, by a stipulation or a five days' notice filed with the said clerk.

RULE II.

Causes will not be set down for days upon the call of the day calendar. The answer must be "ready" or "off."

RULE III.

The first day a cause is on the day calendar it will be held for that day if marked "ready."

RULE IV.

The court will take notice of engagements of counsel in Kings county upon an oral statement.

RULE V.

The court will pay no regard to engagements of counsel elsewhere unless a signed written statement thereof (which need not to be sworn to) be submitted, giving the title of the cause in which the engagement is, in what court and part and before what judge such cause is on trial, and when the trial commenced and

how long it is likely to continue. Engagements in an appellate court will not be regarded unless stated in the same way and with equal precision.

RULE VI.

All other excuses or motions for delay, or for holding or postponing causes, must be presented by affidavit on the call of the day calendar in order to be considered for any purpose, including a motion in the Special Term for motions to open a default.

RULE VII.

The court will not hear oral statements or arguments in respect of such engagements, excuses or motions, and will pass upon such written statements or affidavits thereof by indorsements thereon after the call of the day calendar, and file the same with the clerk.

RULE VIII.

Not more than two causes will be held ready on the day calendar for one counsel in addition to the one he may be engaged in trying in Kings county, or if he be engaged out of Kings county; and in all cases the counsel who is to try the cause must be designated on the call of the day calendar if required by the court.

RULE IX.

If a cause answered "Ready," by the plaintiff be afterwards answered "off" by the plaintiff, or made unduly obstructive by the unreadiness of the plaintiff, it may be stricken from or sent to the foot of the general calendar.

RULE X.

Any action on contract or for conversion or to recover a chattel, which is on the calendar (having a number) may be advanced to any day calendar by any party by filing, at least thirty days prior thereto, with the calendar clerk, an affidavit showing that some necessary party to the action was at the time of its commencement a resident of Kings county, and if the plaintiff is an assignee of the cause of action, that the assignor or some necessary defendant was then such resident, together with proof of notice of such advancement to all parties who have appeared, or in lieu thereof the

consent of all such parties. Causes so advanced must be tried when reached, or the preference and the right thereto under this rule is lost unless otherwise ordered by the court.

Equity Calendar.

The equity calendar rules are identical with those of the Trial Term, with the exception of Rule 10, which reads as follows:

RULE 10.

When time is given for the submission of briefs and papers, they must be handed to the clerk and not sent to the justice.

KINGS COUNTY — SUPREME COURT.

Equity Calendar.

RULE I.

Any cause may be set down for a day by a stipulation filed with the calendar clerk before it appears on the day calendar, except that it may not be advanced out of its order in that way. Causes marked "off" on the call of the day calendar may be set down for a day of any subsequent term only, by a stipulation or a five days' notice filed with the said clerk.

RULE II.

Causes will not be set down for days upon the call of the day calendar. The answer must be "ready" or "off."

RULE III.

The first day a cause is on the day calendar it will be held for that day if marked "ready."

RULE IV.

The court will take notice of engagements of counsel in Kings county upon an oral statement.

RULE V.

The court will pay no regard to engagements of counsel elsewhere unless a signed written statement thereof (which need not to be sworn to) be submitted, giving the title of the cause in which the engagement is, in what court and part and before what judge such cause is on trial, and when the trial commenced and how long it is likely to continue. Engagements in an appellate court will not be regarded unless stated in the same way and with equal precision.

RULE VI.

All other excuses or motions for delay, or for holding or postponing causes, must be presented by affidavit on the call of the day calendar in order to be considered for any purpose, including a motion in the special term for motions to open a default.

RULE VII.

The court will not hear oral statements or arguments in respect of such engagements, excuses or motions, and will pass upon such written statements or affidavits thereof by indorsements thereon after the call of the day calendar, and file the same with the clerk.

RULE VIII.

Not more than two causes will be held ready on the day calendar for one counsel in addition to the one he may be engaged in trying in Kings county, or if he be engaged out of Kings county; and in all cases the counsel who is to try the cause must be designated on the call of the day calendar if required by the court.

RULE IX.

If a cause answered "Ready," by the plaintiff be afterward answered "off" by the plaintiff, or made unduly obstructive by the unreadiness of the plaintiff, it may be stricken from or sent to the foot of the general calendar.

RULE X.

When time is given for the submission of briefs and papers, they must be handed to the clerk and not sent to the justice.

SPECIAL UNOFFICIAL RULE OF SPECIAL TERM FOR MOTIONS.

Undefended divorce cases shall be tried in the special term for motions of Kings county on the first and third Fridays of each term.

KINGS COUNTY — COUNTY COURT.

Any action upon a contract not occupying more than one hour to try, can upon motion be set down for a day for trial. If not tried in one hour will be sent to the foot of the calendar.

Cases will be placed upon the day calendar in their numerical order; ten causes will constitute the ready calendar and ten the reserved calendar.

When a cause is reached on a day calendar, it must be tried or go to the foot of the general calendar unless a good and valid reason can be given to adjourn the same.

When a cause appears upon the reserve calendar, if marked "ready," will be passed for the day, if marked "off" can upon notice or stipulation be restored to the foot of the reserved calendar for a day of a subsequent term.

Causes entitled to a preference, if application is granted, may be set down for a day certain for trial after causes marked "ready" the preceding day are disposed of; it not ready to proceed with the trial when reached shall be stricken from the day calendar retaining its position on the general calendar as if no preference had been ordered.

Contested foreclosures and actions triable by the court without a jury can be set down for trial any Friday of term noticed for, or any Friday hereafter, by filing with the calendar clerk a five days' notice or stipulation to that effect.

Causes heretofore marked off call calendars may be restored to reserved calendar by filing a five days' stipulation with the clerk.

Motion and ex parte applications may be made in Part II to the judge presiding on any day during the term.

Appeals from Magistrate's Courts will be placed on the calendar of this court for the term next succeeding the allowance thereof, in the order of their allowance.

A day calendar of such causes will be made up for the second Friday of each term.

Where bail is not allowed a preference will be given. Day calendar of appeals will be published.

Chambers will be held on Saturday of each week by the judges alternately.

Rules of Practice of the Surrogate's Court of Kings County.

RULE I.

The Surrogate's Court is open for the transaction of business from 9 a. m. to 4 p. m., except Saturdays when the office closes at noon; from July first to August thirty-first, inclusive, from 9 a. m. to 2 p. m.

Monday, Tuesday, Wednesday and Thursday are calendar days; the calendar will be called on those days at 10 o'clock a. m.

RULE II.

A party seeking to contest the probate of a will must file a notice of appearance with the clerk of the court, together with a verified answer.

RULE III.

In all probate proceedings a copy of a will must be filed with the petition; and on or before the return day of the citation the original will must be filed. The proofs of service should be returned before the office closes on the day preceding the return of the citation. Should no one appear on the call of the calendar the proceeding will be at once adjourned to the next calendar day.

RULE IV.

All orders to be entered on litigated motions, and all decrees in contested probate proceedings must be settled on two days' notice to all parties appearing.

RULE V.

All exemplified copies of foreign wills must be accompanied by a petition and order for recording the same.

RULE VI.

Principals and sureties in administration and guardianship appointments must appear and qualify at the same time before the

administration clerk. No bond for a sum less than fifty dollars will be approved, and no bond by a surety company where the penalty exceeds $5,000 will be approved unless a certificate of the company is attached to said bond showing joint control of the fund.

RULE VII.

No allowance will be made for infants for support or education under section 2846, C. C. P., unless the petition shows that an annual accounting has been properly filed or good cause is therein shown why it has not been filed. The petition must show also the terms of any previous order in the same estate, or, if none has been made, that fact must be stated. Except in exceptional cases, an allowance will be made for the period of one year only, and the order must so provide. Where the infant is over fourteen years of age, he must join in the petition; and when application is made by any person other than the guardian of the property it must be made on at least two days' notice to such guardian.

RULE VIII.

No letters of administration will be issued while another application for letters on the same estate is pending.

RULE IX.

All petitions, decrees, orders and other papers must be indorsed with the title of the proceeding, distinctly indicating the nature of the application, the title of estate and the name and post-office address of attorney. A proposed order should not be attached to any other paper.

RULE X.

In the absence of a petition by an infant over fourteen years of age for the appointment of a special guardian in any proceeding, the surrogate will appoint a special guardian upon his own motion. No special guardian to represent the interest of an infant in any proceeding will be appointed on the nomination of a proponent or the accounting party or his attorney, or upon the application of a person having an interest adverse to that of the infant. To authorize the appointment of a person as a special guardian on the application of an infant or otherwise in a pro-

ceeding in this court, or to entitle a general guardian of such infant to appear for him in such proceeding, it must appear that such person, or such general guardian, is competent to protect the right of the infant, and that he has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of any party to the proceeding.

RULE XI.

Before the making of a decree under chapter 18, title 5, Code of Civil Procedure, an affidavit of regularity must be filed by the attorney for the petitioner.

RULE XII.

When a petition for a voluntary accounting is presented, the account and vouchers to which it relates must be filed therewith.

RULE XIII.

Special guardians in accounting proceedings must file their reports within eight days from the time of their appointment, except where objections are filed, an adjournment had, or their time to file report is extended by the surrogate. The report or an accompanying affidavit must state in detail the work done and the number of days spent in its performance.

RULE XIV.

In all accounting proceedings where a notice of appearance and demand are filed, or special guardians are appointed, two days' notice of settlement of decree must be given unless all parties who have appeared consent to the entry of the decree.

RULE XV.

On an accounting by an executor, administrator, guardian, or trustee, which may be contested, any person interested, or a creditor desiring to contest the account, must file specific objections thereto in writing. Objections to items of receipts or disbursements must be verified. All vouchers and other papers must be so arranged as to be readily placed in the document file boxes in use in the office.

RULE XVI.

Referee's reports on contested accounts must conform to section 2545 of the Code of Civil Procedure.

RULE XVII.

On an accounting by an executor, testamentary trustee or administrator with the will annexed, a copy of the will must accompany the proposed decree.

RULE XVIII.

In contested matters, making partial proof and then adjourning to take further proof will not be permitted, but the hearing must proceed continuously until testimony is closed.

RULE XIX.

No allowance will be made to executors or administrators on the judicial settlement of their accounts unless the bill of costs contains a detailed statement of the days employed by them in connection with the account, showing the time occupied on each day in the rendition of the services, and their nature and extent in detail.

RULE XX.

No record or paper on file in this court will be intrusted to the custody of the attorneys or parties, except for the purpose of proper examination, in the office where they are deposited; and if any such document or paper shall be needed before any referee appointed by this court, the same shall be intrusted to a clerk or messenger of this court and delivered to the referee, who shall execute a receipt therefor, and for its redelivery.

RULE XXI.

In all cases where parties consent that the surrogate may hear and determine disputed claims against the estates of decedents upon the judicial settlement of the accounts of executors or administrators, as provided by section 1822 of the Code of Civil Procedure, the attention of the court must be directed to this fact on filing the petition for accounting in order that the matter may be placed upon the appropriate calendar.

RULE XXII.

In cases where parties to a contested matter fail to submit findings and decree in conformity with a decision duly made and rendered within thirty days after the making of such decision the surrogate will not award costs to any party.

RULE XXIII.

(Adopted September 9, 1909.)

Upon application for leave to compromise, the petitioner's attorney, if any, shall state whether or not he has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed and whether or not he has received or is to receive any compensation from such party.

Rules of the City Court of the City of New York.

(Adopted in Convention, March 21, 1907. In Effect, April 1, 1907.)

RULE I.

Trial Terms.

Each Trial Term shall begin on the first Monday of the month for which it is assigned, and may be continued until and including the Friday preceding the first Monday of the ensuing month. No Trial Term shall be held during the months of July, August and September, except as hereinafter prescribed. The justice assigned to the Special Term during the months of July, August and September, with a jury, or without where none is required by the parties, may try "marine cases," or any case in which the defendant may, by order of a justice of this court, be actually confined in jail and unable to furnish bail, and when the circumstances of the case are, in the judgment of said justice, such as to demand a speedy trial in furtherance of justice, and in such cases the justice assigned to the Special Term during those months may hold such trial in that branch of the court.

RULE II.

Special Calendar.

There shall be a special calendar to be called in Part IV only for the trial of actions placed thereon pursuant thereto.

In actions on contract, of replevin, or for conversion, where a note of issue has been filed and the cause noticed for trial, either party may apply to the Special Term on two days' notice to the adverse party for an order placing the cause on the special calendar. Upon such application, if it satisfactorily appear by affidavit and the pleadings that the trial of the action will not occupy more than two hours and that no good reason exists why the same should not be promptly tried, the court may, by order, place the cause on the special calendar for trial. The order shall specify the number of the cause on the general calendar and a copy thereof must be filed with the calendar clerk. If the trial shall actually occupy more than two hours, the court may, in its discretion, send the cause to the foot of the general calendar.

RULE III.

Application for a Preference — Where Made.

Application for a preference under section 791 of the Code of Civil Procedure must be made in Trial Term, Part I, and notice thereof served with the notice of trial, agreeably to section 793.

RULE IV.

Actions for Less Than $250 — When Not Advanced.

No action brought for the recovery of less than $250, which could have been brought in the Municipal Court of the city of New York, will be advanced to the special calendar.

RULE V.

Advanced Causes — Order of Trial.

All actions hereafter advanced to the special calendar shall be called and tried, or otherwise disposed of, in the order in which the same are placed thereon, unless postponed for legal cause, shown by affidavit.

RULE VI.

Actions Transferred from Other Courts.

In actions transferred to this court, by consent, from other courts of record, the party filing the order of transfer shall file with the clerk of this court engrossed copies of the summons and pleadings in such action; and the clerk shall not enter the cause on the trial calendar if the copies presented to him are not clearly and legibly written.

RULE VII.

Pleadings Furnished to Court — Duty of Attorney.

It shall be the duty of the attorney, by whom the copy of the pleadings shall be furnished for the use of the court on a trial, to plainly designate on each pleading the part or parts thereof which are claimed to be admitted or controverted by the succeeding pleading.

RULE VIII.

Cases in Which a New Trial is Ordered at Appellate Court.

In lieu of the pleadings in actions wherein a new trial is granted, the party moving the case for trial must furnish the justice with a printed copy of the appeal book, and a copy of the opinion of the Appellate Court on whose order the case is remanded for the new trial.

RULE IX.

Construction of Orders Granting Allowance.

Whenever an allowance shall be granted to the plaintiff, the order granting the same (unless expressing otherwise) shall be construed to intend an allowance upon the recovery had, and not upon any counterclaim pleaded by the defendant. If the allowance be granted to the defendant, the order granting the same (unless expressing otherwise) shall be construed to intend an allowance upon the demand claimed in the complaint, except when an affirmative judgment be given in favor of the defendant; in which case the allowance shall be computed upon such affirmative recovery, as well as upon the amount claimed in the complaint.

RULE X.

Marine Cases.

Marine cases must be commenced (under the Code) by summons, and if the plaintiff applies for an order of arrest to accompany the summons, it must be in the form and to the effect required by section 3178. The pleadings may be oral or in writing; if oral, the clerk must enter the substance thereof in the minutes. If a jury be demanded, the justice presiding at Special Term may, in his discretion, transfer the action to any one of the Trial Terms; or he may cause to be impaneled a jury for the purpose, and try the cause at Special Term; and said tribunal is hereby declared to be a Trial Term, for the special purpose of considering and determining such cases.

RULE XI.

Jurisdiction.

Torts committed on board a foreign ship, on the high seas, must be considered as having occurred within the territorial limits of the foreign nation to which the vessel belongs; and the parties having the ship's equipage, though actually here, are still deemed within the foreign jurisdiction. In such case, the court, having discretion to exercise the power, will decline jurisdiction, unless it is made to appear either: First, that the plaintiff or defendant has been regularly discharged from his ship by competent authority; or, second, that either of the parties is a resident or citizen of the United States. In the excepted cases only will process be allowed.

RULE XII.

Special Term.

The justice assigned to the Special Term shall also attend to the chambers business during the term to which he may be assigned. Demurrers shall be heard and determined at Special Term, and may be brought on for hearing upon the usual notice of argument, and the filing of the note of issue provided for in Rule 15.

RULE XIII.

No Ex Parte Order of Reference in Supplementary Proceedings.

No *ex parte* order of reference will be made in supplementary proceedings.

RULE XIV.

Extension of Time to Answer.

No extension of time to answer for more than two days will be granted, unless upon notice to plaintiff's attorney.

RULE XV.

Daily Motion Calendar.

The clerk assigned to Special Term and chambers shall prepare a motion calendar for each day of the term, other than Saturdays, and place thereon all causes in which notes of issue have been filed, not later than 4 P. M. of the day previous to the return day of the motion, and furnish a copy thereof to the New York Law Journal for publication. The justice presiding at Special Term may add to the calendar, on a day for which it is noticed, any motion not appearing thereon. Motions must be made returnable at 10.30 A. M., at which hour the calendar will be called and defaults noted.

RULE XVI.

Order in Supplementary Proceedings to Punish for Contempt; When Returnable.

Orders in supplementary proceedings, to punish a judgment debtor for contempt, shall not be made returnable in less than three days from the time of service thereof.

RULE XVII.

Calendar Practice.

The clerk shall each week make up a calendar of cases from the general calendar, which calendar or the numbers of the cases included thereon, shall be published at least two days before the same is called. This calendar shall be called by the justice assigned to Part III, Trial Term, on the Friday preceding the commencement of each term, at 4 p. m., unless another day is specially fixed by him to call such calendar in the Special Term room. Causes on such call calendar must be answered "ready" or "off." "Ready" will mean that the causes so answered are to be placed upon subsequent day calendars for trial, and if the causes are marked "off," causes so answered will not again appear upon the call calendar until the last number of said call which is marked "ready" shall have been reached upon the day calendar for trial.

Day Calendar.

The said clerk shall make up a day calendar for each day from the causes so marked "ready" upon the call calendar of the court, upon which shall be placed all such causes so marked "ready" at the previous call or remaining undisposed of from the calls theretofore had, which day calendar shall be called in the Trial Term room, Part III of this court, at 9.45 a. m. each day, and three causes therefrom shall be assigned to each of the several trial parts, except Part IV, for trial.

When a cause thus set down on the call calendar on any Friday as "ready" appears upon the day calendar, it must be tried or go to the foot of the general calendar, unless it appears by affidavit to the satisfaction of the justice calling the day calendar that the trial cannot with justice to one of the parties proceed. The court may then by order set the cause down for trial on another day in the term or place the cause on the call calendar for a subsequent call.

In a cause upon the day calendar for trial, where it shall appear to the court by affidavit that counsel who is to try the cause is to argue a cause on the day calendar of the Supreme Court of the United States, or upon the day calendar of the Court of Appeals of the State of New York, or upon the day calendar in the Appellate Division of the Supreme Court, or is actually engaged in the trial of a cause in a court of record of the counties of New York or Kings, the cause shall be passed for the day, or until such argument or trial is concluded, unless the trial in which counsel is engaged is a protracted one. In no other event shall a cause upon the day calendar be passed for the day.

In no event shall a cause on the day calendar be passed from day to day on account of the engagement of counsel for more than two days. Not more than two causes shall be held "ready" on the day calendar for one counsel, in addition to the cause in which he is engaged, and in all causes the counsel who is to try the same must be designated, if required by the court, on the call of the day calendar.

RULE XVIII.

Miscellaneous — Fees Paid to the Clerk not Returnable.

Fees paid upon filing notes of issue are, so soon as they reach the hands of the clerk, in the constructive possession of the city

of New York; and it is made the official duty of that clerk to pay them, with other lawful fees collected by virtue of this office, into the city treasury.

RULE XIX.

Equity Causes.

Equity causes will be placed upon the Friday call calendar on five days' notice of trial and will be called from said call calendar each term and must be answered "ready" or "off," as provided in Rule XVII. When such causes so marked "ready" appear upon the day calendar, pursuant to such rule, said causes shall be assigned to the several trial parts for trial by the justice calling the day calendar.

RULE XX.

Special Rules Concerning the Duties and Obligations of the Clerk of the City Court of the City of New York.

1. The clerk, on assuming office, shall make and file, in duplicate, his oath of office, one of which duplicates shall be filed in the office of the city clerk, the other in the clerk's office of this court, and give a bond as now prescribed by law.

2. The clerk, or, in his absence, the deputy, shall make statements in writing, duly verified by his oath, of all moneys received for fees or otherwise by him as said clerk, and shall pay into the finance department of the city of New York all such moneys so received by him for the use of or belonging to the city, as required by law; and these acts shall be done once in each and every month, and a duplicate of such statements in writing, also duly verified, shall be at the same time delivered to the chief justice of this court, or, in his absence, to the justice then presiding at the Special Term, accompanied by a voucher from the said finance department, showing that such money has been actually so paid over after the auditing and approval of the monthly statement by the department. All other money hereafter received or deposited in this court in any action or proceeding, and not belonging to the city of New York, shall, without delay, be specially deposited with the chamberlain of the city of New York; and the matter, to which each deposit relates, particularly indicated on the certificate of such deposit.

3. On the last Monday in each and every month, the clerk or, in his absence, the deputy clerk, shall make a full statement, in writing, duly verified by his oath, of all moneys paid into the court and received by him during the preceding month, by and within the scope of his official capacity, and which are not included in the said monthly statements made to the finance department. This shall show in detail in what action, or proceeding, the money has been received, what amount of the money has been paid over, and to whom, and when, and upon whose order, the same was paid over; and it shall show by voucher, that any of the money, yet retained in the custody of the court, is on deposit with the said chamberlain. Such statements shall be delivered to the chief justice, or, in his absence, to the justice presiding at the Special Term.

4. No money deposited in the custody of the court, in any action, or in any proceeding, shall be paid out, except on the written order of one of the justices, filed in the office of the clerk. Copies for service must be certified by the clerk and the seal of the court, and be countersigned by a justice.

RULE XXI.

Complaint Dismissed at Trial Term — Restoration.

Where a complaint is dismissed, or an inquest allowed, at a Trial Term, the cause will not be restored on consent of the parties; but the facts may be presented to the justice presiding in the part where the cause was disposed of, or at the Special Term, by motion for action thereon.

Former Rules Abrogated.

All rules heretofore in force and not contained herein, are hereby annulled.

City Court of the City of New York.

At least three days' notice of settlement of all orders upon remittiturs from the Appellate Term and Appellate Division, Supreme Court, shall be given before presenting the same for signature and entry.

Dated New York, January 21, 1909.

By order of the court.

Rules Adopted by the Justices of the Court of Special Sessions of the First Division of the City of New York.*

RULE I.

The Court of Special Sessions of the First Division of the city of New York shall be held in the building for criminal courts in the borough of Manhattan, in the city of New York.

RULE II.

A term of the court shall be held each month, and commence on the first Monday of each month, unless such day shall be a legal holiday, and then the term shall commence on the day following.

RULE III.

The court shall open at 10 o'clock in the forenoon, and shall be held upon each and every day of the year except upon Saturdays, Sundays and legal holidays, unless the court for sufficient reasons of a public nature otherwise directs.

RULE IV.

The clerk, deputy clerk and all the other officers and attendants of the court shall be present at the sessions of the court, unless absent by consent or direction of the court, or for good and sufficient reasons satisfactory to the court.

RULE V.

The duties of the clerk and deputy clerk shall be the same as those now performed by the clerk and deputy clerk of the Court of General Sessions, in the county of New York, as near as may be, in addition to those enjoined upon them by law.

RULE VI.

The stenographer and interpreter shall perform the duties usually performed by such officers in courts of law. The assistant clerk shall perform such duties of a clerical nature as he may, by

* Rules I to XI inclusive, also adopted by the Second Division of the Court.

the clerk or deputy clerk, be called upon to perform. All other officers and attendants of the court shall perform the duties appropriate to their respective positions as they may be from time to time directed by the court or its clerk or deputy clerk.

RULE VII.

Except when otherwise directed by the court, the clerk shall cause a calendar to be made up for each day the court is held. Upon such calendar a sufficient number of cases shall be entered to occupy the court for the day, and cases shall be entered under proper heads upon such calendar as follows:

First. Cases entitled to a preference under section 291, subdivision 7, of the Penal Code.

Second. Cases in which defendants have not yet pleaded.

Third. Cases for trial in which defendants are in actual custody.

Fourth. Cases for trial in which defendants have been admitted to bail.

Fifth. Upon such days as the court may direct, proceedings respecting bastards and disorderly person cases must be arranged as nearly as possible in the order of the numbers stamped upon the depositions in each case, and will be disposed of as they are reached upon the calendar.

Cases shall not be adjourned, except for legal cause. The court shall have at all times power to depart, for good and sufficient reasons of a public nature, from this rule and order its calendar and dispose of the cases thereon in its discretion.

RULE VIII.

The order of procedure in conducting the business of the court shall be as follows, to wit:

First. The disposition of cases which, under section 291, subdivision 7, of the Penal Code, are entitled to preference.

Second. Hearing of motions.

Third. Sentencing of defendants previously convicted.

Fourth. Arraignment of defendants for pleading; and, in cases where pleas of "guilty" are entered, the imposition of sentence, if the court desires then to impose it and the defendant waives delay.

Fifth. Disposition of cases entered upon the calendar for trial.

The court may, for reasons of a public nature, depart from this order of procedure.

RULE IX.

The justices shall meet on the first Mondays of January, April, July and October of each year to transact such business as they may as a body do. But a special meeting may be held at any time by consent of all the justices, or may be called by any two of the justices by five days' written notice indicating the nature of the business it is desired to transact, and signed by such justices. Each justice shall give the clerk of the court an address where matters may be sent to him by mail; and the mailing to him at such address of notice of a special meeting five days before the day for which such meeting is called, shall be due notice thereof.

RULE X.

The justices shall make, and may from time to time alter, assignments of justices for holding each term of the court, and such assignments shall be so ordered that as nearly as may be each justice shall be assigned to three consecutive terms. In making said assignments, the justice to preside at each term shall be indicated. The justice so selected to preside shall be known and described as the presiding justice, and the other two justices holding the term with him shall be known as and described as associate justices. Whenever, for any reason, the presiding justice assigned to hold any term of the court shall be absent, the court shall designate one of the justices holding court to act as presiding justice.

RULE XI.

The practice and procedure of the court shall in all cases not provided for by law or by the rules of this court be that of the Court of General Sessions of the city and county of New York.

RULE XII.

The foregoing rules shall not apply to the practice and procedure in the Children's Part of this court, but the procedure and practice in said Children's Court shall be regulated and controlled by the justice presiding in said court at his discretion, except that

the rules applicable to the clerks and other officers of this court shall apply to and control the actions of said clerks and other officers of said Children's Court.

RULE XIII.

When a case in the Children's Part of the Court of Special Sessions of the First Division of the city of New York is adjourned to be tried before three justices of the Court of Special Sessions, as provided in section 1419 of the Greater New York charter, as amended by section 3, subdivision 3, of chapter 590 of the Laws of 1902, such trial shall be had at the main courtroom of said Court of Special Sessions of the First Division of the city of New York, in the building for criminal courts.

Rules of the Municipal Court of the City of New York.

RULE I.

Calendar Practice.

(a) Court shall open at 9 o'clock a. m.

(b) The parts of the court in each district shall be numbered consecutively.

(c) In any district where more than one part is held, all process, orders to show cause and notices of motion shall be made returnable and called in Part I, and all calendars shall be called in that part. In any district where, in the judgment of the elected or appointed justices thereof, the volume of business is too great to be accommodated by the call of the entire calendar in Part I such justices may file with the secretary of the board of justices a written designation of Part II as the part of said court where the calendar of adjourned causes shall be called, and due notice of such designation shall be conspicuously posted in and about the court premises.

(d) The process of the court shall be returnable on any court day.

(e) All summonses, precepts, notices of motion and orders to show cause shall be made returnable at 9 o'clock a. m. Where more than one part of the court is in session, the justice calling

the calendar shall forthwith, upon a cause being marked ready for trial, assign it for trial to a disengaged part and so continue until all parts are engaged.

(f) The clerk of each district shall prepare a day calendar, containing return causes and adjourned causes, which shall be posted in the clerk's office before the opening of the court.

Causes shall be placed upon the trial calendar in the order in which they have been adjourned.

The clerk shall note upon the calendar the causes entitled to a preference under Rule XII.

(g) During the months of July and August, court shall be held on such two days during each week, as the presiding justice shall designate, and during said months no cause other than proceedings for the summary recovery of real property and actions brought to recover wages shall be tried, except by order of the presiding justice.

(h) There shall be in each district a reserved generally calendar, on which calendar the court may, of its own motion, place any cause which has been adjourned more than three times, and on this calendar any cause may likewise be placed by consent or upon stipulation of the parties or of counsel. Causes may be restored on three days' notice and placed on the calendar for trial for a day subsequent, or parties may at any time consent to take a cause from the reserved generally calendar and restore it to the day calendar, upon the approval of the court.

(i) There is hereby established what shall be designated as a special calendar, to which causes may be transferred for trial from any of the districts in the borough of Manhattan, by consent of attorneys. Such consent shall be in a form approved by the board of justices, and blanks may be obtained at the clerk's office in the several districts of the borough of Manhattan. Causes so transferred to this calendar shall not be set for trial for any particular day, but shall be placed upon such calendar in the order in which they shall be transferred thereto, and shall be numbered consecutively in the order of receipt by the clerk in charge of said special calendar. Such special calendar shall be called in one of the parts of the First District Court of the borough of Manhattan at 9 o'clock each court day, in a part other than that in which any other calendar is called. Cases on this calendar must be

tried when reached, except where legal cause is presented by affidavit or else marked to the foot of such special calendar. It shall be the duty of the clerk of the First District Court of the borough of Manhattan, or one of the assistant clerks who may be specially designated by the board of justices for the purpose of attending to this special calendar, and who, if so designated by the board of justices, shall be known as the special calendar clerk, to prepare a day calendar in accordance with this rule, placing thereon as many causes as in his judgment can be reached for trial on the day for which the calendar is prepared. Such calendar shall be posted in the clerk's office at least two days in advance, and shall be furnished by such clerk to the "New York Law Journal" for publication. It shall be the duty of such clerk to keep a record of the cases transferred to this special calendar, and to enter thereon the name of the cause and day of its receipt, and the district from which the same is received, immediately after the receipt of the papers in said cause; and it shall be the duty of the clerks in the respective districts in the borough of Manhattan to forward to the clerk of the First District Court, without delay, any cause which has been transferred to such special calendar. The causes so transferred to such special calendar shall, after such transfer, be considered as transferred for all purposes to the First District Court of the borough of Manhattan, and as pending therein, and all future records shall be made in such district.

RULE II.

Filing of Return and of Other Papers.

(a) All process, pleadings and writings filed with the clerk shall be appropriately indorsed, and the clerk shall, on such papers being filed, stamp the same "filed," with the date of filing, and write his name or initials of his name and the title of his office thereon. Unless properly indorsed the clerk shall not accept any papers for filing.

(b) To entitle a cause to be placed on the calendar, the summons or other process must be returned with proof of service thereof to the clerk's office, and the calendar fee paid at least two days before the return day. This rule shall not apply to precepts in summary proceedings where, by direction of the court, they are made returnable on the same day as issued.

(c) The summons, when returned to the clerk's office, shall be indorsed with the residence or post-office address of the plaintiff, and also the name and post-office address of the attorney, if any. The indorsement upon the summons of the address of the plaintiff shall be deemed his post-office address for the purpose of the service of papers in all cases where papers may be served upon the plaintiff.

(d) The indorsement of the name and address of the attorney on the summons, pleading or any other paper in an action or proceeding shall be deemed an appearance within the meaning of section 332 of the Municipal Court Act.

RULE III.

Entry of Order on Justice's Decision.

The indorsement of the justice upon any paper or process shall be the equivalent of the entry of a formal order, but either party desiring it may enter a formal order upon the decision of the justice.

RULE IV.

Time Within Which Bill of Particulars Shall be Filed.

When a bill of particulars is ordered, the same shall be filed in the clerk's office within three days after such order is made, unless other direction is made by the justice.

RULE V.

When Jury Trial is Demanded.

(a) When a jury is demanded, the jury shall be publicly drawn by the clerk from a panel under the supervision of the presiding judge.

(b) It shall be the duty of the clerk to deliver the venire to the marshal or other person designated to effect service upon jurors at least three days before the jurors are required to attend, and it shall be the duty of the party receiving the venire to effect service thereunder upon the jurors forthwith. This provision may be modified by the presiding justice in summary proceedings to recover possession of real property.

RULE VI.

Where Original Process is not Returned to the Court.

If the original summons or other process or mandate of the court is not returned to the office of the clerk, the court may indorse a dismissal of the action or proceeding upon the copy of such summons, process or mandate, or grant other appropriate relief and award costs in proper cases; and such copy of summons, process or mandate, with such indorsement thereon, shall thereupon be filed with the clerk, and shall have the same effect as if the original had been so indorsed or filed, provided proof of service is made, or written notice of appearance by attorney is filed.

RULE VII.

Stipulations Adjourning Trial.

All written stipulations adjourning trial must be approved by the justice presiding in the district in which the action is pending, and must be filed at least one day before the day for which the case is set for trial.

RULE VIII.

Adjournments for Cause.

Causes set down for trial shall be tried when reached, unless legal ground for adjournment is presented by affidavit.

RULE IX.

Motions.

(a) Motions may be brought on for hearing on not less than three days' notice, unless otherwise directed by the court.

(b) *Ex parte* applications may be made to any justice without regard to the district in which the action or proceeding is pending, or about to be commenced. Upon all such applications an affidavit shall be presented, which shall state whether any previous application has been made, and, if made, to what justice, and the reasons, if any, for a previous denial of the relief asked for.

RULE X.

An Undertaking to Secure Discharge of Levy on Attachment.

No approval of an undertaking given by the party or claimant to procure discharge of a levy under an attachment shall be

granted *ex parte*. A party or claimant applying for such approval shall give at least two days' notice of justification to the adverse party.

RULE XI.

Stipulations Extending the Court's Time to Decide.

A stipulation to extend the time of the court within which to render a judgment or make a decision must be in writing or noted upon the minutes of the trial.

RULE XII.

Preferred Causes.

The following causes shall have preference on the calendar in the order named:

(1) Actions to recover wages.

(2) Summary proceedings to recover possession of real property.

(3) Causes held ready on the preceding trial day and not reached at the hour of adjournment.

(4) Actions on a written instrument for the payment of money only.

RULE XIII.

Duties of Clerks and Other Officials.

(a) The conduct of the office of clerk in each of the districts shall rest with the clerk, who shall be clothed with the responsibility of keeping the proper records required by law, and of preserving the papers and records of the court. The duties of the deputy clerk and such assistant clerks and other court officials attached to the court, when not in conflict with any statutory provision, or anything contained in these rules, shall be designated by the clerk. Such duties shall be specified in writing by the clerk, and, when approved by the justice or a majority of the justices elected from the district, shall be filed with the secretary of the board of justices.

(b) The clerk, deputy clerk, assistant clerks, interpreters and attendants shall report for duty promptly at the places to which they are assigned at 8.45 o'clock A. M. each day, and shall be

in attendance until 4 o'clock, or until such later time as the court adjourns for the day.

(c) All court attendants shall, when on duty in and about the court, wear such uniforms and badges as may be prescribed by the board of justices.

The court interpreter shall wear an official badge during the session of the court.

(d) The stenographer shall be in attendance during the sessions of the court and at such other times and places as the justice appointing him may direct.

(e) It shall be the duty of the court attendants to maintain order in and about the court and the officers thereof, and perform such other duties in connection with the work of the court as the justice or justices of the district to which such court attendants may be assigned shall require.

(f) The clerk in each district, or in his absence, the deputy clerk, shall, on or before the third day of each month, make a statement in writing, duly verified by his oath, of money received for fees by him as such clerk during the preceding month, and on or before the day named pay into the finance department of the city of New York all such moneys received by him for the use, or on behalf, of the city, for the preceding month, as required by law. A summary thereof shall thereupon be filed with the secretary of the board of justices, together with a detailed statement of the business of the court for the previous month. The clerk, or, in his absence, the deputy clerk, of each court shall keep accurate accounts of the moneys received by him, and shall deposit in such bank as the comptroller of the city may designate all such moneys.

(g) The clerk shall take receipts for all moneys paid out by him.

(h) In the docket of summary proceedings which the clerk of the court is required to keep, pursuant to section 284 of the Municipal Court Act, he shall enter, in addition to the matters he is required to enter by the provisions of that section, the following: The particulars of the final order of the court, the date of the issuing of a warrant and to whom; the return and when made, and the particulars of such return.

RULE XIV.

Submission of Papers.

All papers shall be submitted to the clerk in the district in which the action is pending, and it shall be the duty of the clerk to forward such papers promptly to the justice to whom they are to be submitted. In forwarding records to other districts, the clerk shall in all cases obtain a receipt for the records delivered.

RULE XV.

Duty of the Secretary of the Board.

It shall be the duty of the secretary of the board of justices to safely keep in his possession, as a public record, any paper, document or record which he is required by law, or by the rules of the board of justices, to keep, which records shall be open for public inspection.

RULE XVI.

Return on Appeal.

The return on appeal shall be made up as follows:

1. The judgment-roll, which shall include the summons or other process, the pleadings, stipulations, orders and the judgment, which shall be fastened together.

2. All exhibits, which shall be inclosed in a separate cover, appropriately indorsed.

3. The stenographer's minutes, which shall be transcribed by the stenographer on suitable paper eight inches wide and ten and one-half inches long, with an index, inclosed in a suitable cover, and appropriately indorsed.

The clerk's return shall be annexed to the stenographer's minutes.

RULE XVII.

Stenographer's Fees.

The fees of the stenographer for a transcript of his minutes pursuant to section 353 of the Municipal Court Act shall be deposited with the clerk of the district where the action or proceeding is pending, who, upon the filing of the transcript, shall deliver the money deposited to the stenographer.

The Board of Justices of the Muncipal Court, city of New York, has adopted the following:

On and after Monday, January 4, 1909, the special calendar provided for by Rule 1, subdivision 1, of the Municipal Court of New York city will be called daily in Part IV of the Municipal Court for the borough of Manhattan at 9 o'clock a. m., at the Court House, Sixth avenue and Tenth street (Jefferson Market).

Cases not requiring jury trials may be transferred from any district in the borough of Manhattan to such calendar by consent of parties and order of the court, and numbers will be given to such causes when received by the clerk of the special calendar, and will be called upon the day calendar according to such numbers for trial or other disposition.

RULES RELATIVE TO CLERKS AND ATTENDANTS OF THE MUNICIPAL COURT.

RULE I.

The clerk, assistant clerk, interpreter and attendants of each court shall attend each day from 9 o'clock a. m. to 4 o'clock p. m., and at such other times as the justice may direct, except as otherwise provided by law. The stenographer shall be in attendance during the sessions of the court, and at such other times and places as the justice may direct.

RULE II.

The attendants shall maintain order in and about the court and the offices thereof.

RULE III.

The attendants and interpreter shall wear an official badge during the session of the court.

RULE IV.

During the session of the court the clerk thereof, or, in his absence, the assistant clerk, shall be in attendance therein, administer oaths, keep minutes and receive the verdict of a jury, and when not so employed the time of the clerk and assistant clerk shall be devoted to the business of the clerk's office.

RULE V.

The clerk of each court, or, in his absence, the assistant clerk, shall, on or before the third day of each month, make a statement in writing, duly verified by his oath, of moneys received for fees by him as such clerk, during the preceding month, and on or before the day named, pay in to the finance department of the city of New York all such moneys received by him for the use, or on behalf of the city, for the preceding month as required by law. A summary thereof shall thereupon be filed with the secretary of the board of justices, together with a detailed statement of the business of the court for the previous month.

RULE VI.

The clerks and assistant clerks shall keep and preserve full, correct and true records of the proceedings of the court, and of their office, properly file and preserve all process, pleadings, mandates or other papers, deposit in bank all moneys paid to them, keep accurate accounts thereof, and shall faithfully perform the duties imposed upon them by chapter 580 of the Laws of 1902.

RULE VII.

When moneys are paid to persons other than parties or their attorneys the clerks shall require and file in their offices a written request from the party or the attorney entitled to such moneys to authorize such payment, and a receipt therefor.

RULE XV.

Ex parte applications may be made to any justice without regard to the district in which the action or proceeding is pending or about to be commenced. The affidavit shall, however, state whether any previous application has been made, and if made, to what justice, and what order or decision was made thereon, and what new facts, in any, are claimed to be shown. It shall also state the residence of the parties. For failure to comply with this rule any order made on such application may be revoked or set aside. The denial of an *ex parte* application, with the reason therefor, may be indorsed thereon by the justice to whom the same is presented.

RULE XVI.

No approval of an undertaking given by a party or claimant to procure the discharge of a levy under an attachment shall be granted *ex parte*. The party or claimant applying for such approval shall give at least two days' notice of justification to the adverse party.

RULE XVII.

A stipulation to extend the time of the court within which to render a judgment or make a decision may be entered into between parties or their attorneys on the record in the minutes of a trial, or in a written stipulation signed to that effect.

RULE XVIII.

Affidavits of service of process must in all cases comply strictly with the provisions of Rule XVIII of the Supreme Court Rules.

RULE XIX.

Costs shall not be awarded to a defendant who appears by attorney when there are no verified pleadings, unless a written notice of appearance is filed.

RULE XX.

The phrase "case on appeal" in sections 317 and 318 of the Municipal Court Act shall be deemed to refer simply to the justices' return on appeal as the same has been heretofore known. The phrase "including the evidence" shall be deemed to include all exhibits admitted in evidence.

RULE XXI.

In cases where attorneys may be represented by clerks, the clerk or clerks so appearing shall be only those whose certificates of clerkship shall have been filed in the office of the clerk of the Court of Appeals.

RULE XXII.

When a cause has been adjourned more than three times, by consent or stipulation, the court may, on its own motion, place it upon the calendar of causes reserved generally. It may be restored on three days' notice, and placed upon the calendar for trial for a day subsequent. Parties may at any time consent to take a cause from a day calendar and place it upon the calendar for causes reserved generally.

Rules of the Court of General Sessions in and for the City and County of New York.

CALENDAR AND PRACTICE RULES.

RULE I.

The clerk shall enter in a book a record of all indictments pending in the Court of General Sessions on the 1st day of January, 1910, and of all indictments which shall be found thereafter in said court, or transferred thereto from the Supreme Court, upon which issue shall have been joined by a defendant's plea or demurrer. Said indictments shall be entered in said book according to the date of the joinder of issue. When two or more defendants are jointly indicted and issue has been joined on different dates, the date of issue shall be the date upon which issue was first joined by any defendant by plea.

RULE II.

The clerk shall make and keep two calendars, to be known, respectively; as, (1) "Calendar of Prison Actions," which shall contain a list of all actions wherein a defendant is imprisoned, and (2) "Calendar of Bail Actions," which shall contain a list of all actions wherein a defendant has been admitted to bail. Actions shall be placed by the clerk upon such calendars, respectively, in the order of the joinder of issue.

RULE III.

The clerk shall make up from the General Calendar of Prison Actions a calendar to be known as the Call Calendar of Prison Actions. Said calendar shall consist of indictments upon which issues shall have been joined by plea, in the order of the joinder of issue. Said calendar shall be called by the judge holding Part I on Monday, Wednesday and Friday of each week, at 2 p. m., unless the said judge shall otherwise direct. Upon such call, the judge shall assign said actions for trial, in rotation, to Parts I, II and III of the court, except as hereinafter provided.

RULE IV.

The clerk shall make up from the General Calendar of Bail Actions, a calendar to be known as the Call Calendar of Bail Actions. Said calendar shall consist of indictments upon which issue shall have been joined by plea, in the order of the joinder of issue. Said calendar shall be called, by the judge holding Part I, on Friday of each week, at 2 p. m., unless said judge shall otherwise direct. Upon such call, the judge shall assign said actions for trial to Part IV of the court, except as hereinafter provided.

RULE V.

Actions in which the defendants are charged with homicide, and all other actions wherein it shall appear to the satisfaction of the judge that the trial will necessarily occupy more than three days, whether the defendant is imprisoned or under bail, shall be assigned to Part V of the court for trial.

RULE VI.

If an extended term of the court be held, the judge calling the call calendar shall assign to it for trial either bail or prison actions, or both.

RULE VII.

A judge holding any part of the court may transfer an action from his part to another part, with the concurrence of the judge presiding over such other part.

RULE VIII.

When there are more indictments than one against the same defendant, upon which issue has been joined by plea, the actions, when assigned for trial, shall be assigned to the same part of the court.

RULE IX.

When there are codefendants in an action, and some, but not all, furnish bail, the action shall be deemed a prison action as against all the defendants.

RULE X.

Calendars for the Respective Parts of the Court.

Each part of the court shall have two calendars, to be known respectively; as (1) preferred calendar; and (2) regular calendar.

RULE XI.

The clerk shall make up calendars for the respective parts of the court for each day, from the actions assigned from the call calendars, in the order of the dates of the joinder of issue. He shall arrange the actions entitled to a preference under the title, "Preferred Calendar," and all other actions under the title, "Regular Calendar."

RULE XII.

Preferred Calendar.

When a defendant in an action is charged with the violation of any provision of sections 480 or 481 of the Penal Law, or when a defendant under the age of sixteen years is charged with an offense triable in this court, or when a defendant is charged with an offense against the person of a child under the age of sixteen years, the trial of any such action shall have preference over all other actions in the part of the court to which it is assigned; and the clerk shall place the action upon the calendar of said part under the title, "Preferred Calendar."

RULE XIII.

When a witness has given an undertaking, or is detained to appear against a defendant in an action, or when a material witness in an action is a nonresident, or is about to leave the State, the trial of any such action shall be placed upon the preferred calendar following the actions entitled to a preference under Rule XII.

RULE XIV.

The trial of an action may also be preferred, whether or not such action be on the call calendar, when it appears, by certificate of the district attorney, or by affidavit of the defendant, to the satisfaction of the judge presiding in Part I, that there should be a speedy trial. The action shall be assigned thereupon to a part

of the court, and shall be tried immediately, or upon the conclusion of any action on trial in such part. The motion to prefer shall be made on one day's notice.

RULE XV.

Upon the call of the call calendar, it shall be the duty of the district attorney, by certificate, or of the defendant, by affidavit, to inform the judge if an action be entitled to preference under Rules XII, XIII and XIV, or if a special disposition of the action be required under Rules V, VIII, IX and XVI.

RULE XVI.

If, upon the call of a call calendar, it be established by certificate of the district attorney or by affidavit of the defendant, to the satisfaction of the judge that an action should not then be assigned to a part for trial, the judge may direct that the action be placed upon a subsequent call calendar.

RULE XVII.

When an action appears upon the day calendar, it must be tried, unless it appears by certificate of the district attorney, or by affidavit of the defendant, to the satisfaction of the judge calling the day calendar that, in consequence of the happening of an event since the action was assigned for trial, the trial thereof cannot proceed with justice to either the people or the defendant, the judge may then set the action down for trial on another day in the term, or transfer the action to the call calendar.

RULE XVIII.

When an action is on the day calendar for trial, if it shall appear to the judge, by affidavit, that the counsel who is to try the action is to argue a cause on the day calendar of the Supreme Court of the United Stats, or on the day calendar of the Court of Appeals of the State of New York, or on the day calendar of any Appellate Division of the Supreme Court, or is actually engaged in the trial of a cause in a court of record in the State of New York, the trial of the action shall be passed for the day, or

until such argument or trial is concluded, unless the trial in which counsel is engaged is a protracted one. In no other event, except as provided in Rule XVII, shall the trial of the action upon the day calendar be passed for the day.

RULE XIX.

When a defendant gives bail after the action has been assigned to a part for the trial of prison actions, the action shall be disposed of in the part to which it was originally assigned; or, in the discretion of the judge presiding in such part, it may be transferred to Part IV for trial.

RULE XX.

If a defendant under bail be rearrested on the original charge and be thereupon committed, the action shall be placed on the calendar for prison actions, unless he be admitted again to bail.

RULE XXI.

When two or more defendants are jointly indicted, and one or more defendants have been tried before the judge holding the part to which the action was assigned, the trial of the remaining defendant or defendants shall proceed before the same judge, unless otherwise ordered by such judge, or, in his absence, by the judge presiding in Part I.

RULE XXII.

Withdrawal of Plea.

When an action is called upon the call calendar a defendant may apply to withdraw his plea of not guilty and interpose a plea of guilty. A defendant, at any time after his action has been assigned for trial to a part of the court, may apply also in such part, upon one day's notice to the district attorney, to withdraw his plea of not guilty and interpose a plea of guilty.

RULE XXIII.

When an action has been tried and the jury have disagreed, or, if there has been a mistrial, or a juror has been withdrawn, the action may be tried again in the same part of the court, or, in

the discretion of the judge, the action may be transferred to the next appropriate call calendar, and it shall appear at the head thereof.

RULE XXIV.

When a judgment of conviction is reversed and a new trial ordered, the action shall be restored to the appropriate call calendar within ten days, and it shall appear at the head thereof.

RULE XXV.

If a judgment of conviction in the Magistrate's Court be reversed and a new trial ordered, such new trial shall proceed before the judge who ordered the new trial, on a day to be fixed by said judge.

RULE XXVI.

No trial of a bail action shall be had during the months of July, August and September, except on action entitled to a preference under the rules.

RULE XXVII.

Order of Procedure.

The order of procedure shall be as follows:

Part I:

1. Judicial direction of the grand jury.
2. Call of the Day Calendar 10:30 a. m.
3. Motions and appeals.
4. Pleadings.
5. Sentences.
6. Pleas of guilty to indictments from Day Calendar.
7. Trials.
8. Call Calendar — Monday, Wednesday and Friday, 2 p. m.

Parts II, III, IV and V:

1. Call of the Day Calendar 10:30 a. m.
2. Sentences.
3. Pleas of guilty to indictments.
4. Trials.

A judge may, in his discretion, depart from this order of procedure.

RULE XXVIII.

Ex parte applications to issue a bench warrant, or to fix or increase bail, in an action which has been assigned to a part for trial, shall be made to the judge of such part, or, in his absence, to any judge of the court.

All other *ex parte* applications and all other motions, except those incidental to the trial of an action, shall be made in Part I.

RULE XXIX.

Motions to be made in Part I may be noticed for any court day during the term. They must be noticed for 10:30 a. m. Two days' notice of motion shall be given, unless an order to show cause returnable in less time be granted. Each side shall be allowed fifteen minutes on the argument of a motion, or of an appeal, unless the court shall otherwise order.

Notes of issue for motions and appeals must be filed with the clerk of the court at least one day before the day on which the motion or appeal is noticed to be heard, except where an order to show cause returnable in less time is granted, when the clerk shall place the motion upon the calendar at any time before the hearing, upon the exhibition of the order to show cause and the filing of a note of issue.

RULE XXX.

All cases on appeal to Appellate Division, First Department, must be submitted to the clerk of this court for certification at least five days before the time specified in Appellate Division Rule VI.

RULE XXXI.

Appearances of Attorneys.

Upon the application of an attorney duly authorized to practice in the courts of this State, the clerk shall enter, in a book to be kept for such purpose, and known as the "Appearance Book," the appearance of such attorney on behalf of a defendant charged with crime in an action pending in this court. The clerk shall not enter any subsequent appearance of another attorney for such defendant, without an order in writing made by a judge of this court.

Whenever the appearance is entered, as above specified, and the defendant in the action is imprisoned in the city prison, the clerk shall forthwith notify the warden of the city prison of the name of the attorney appearing, and the name of the prisoner for whom such attorney appears.

Upon the presentation of an order from any judge of the court, the clerk shall also issue a permit to the attorney named in such order, authorizing him to confer with the defendant or defendants named therein, and such attorney shall thereupon make an entry to that effect in the Appearance Book.

Pursuant to the provisions of chapter 542 of the Laws of 1909, the foregoing rules are adopted as the Calendar and Practice Rules of the Court of General Sessions in and for the city and county of New York, to be in force on and after January 1, 1910.

Dated, New York, December 14, 1909.

RULES GOVERNING THE MAGISTRATES' COURTS OF NEW YORK CITY (FIRST DIVISION).

RULE I.

Assignment and Rotation of Magistrates.

Assignments of magistrates to the several District Courts shall be made by the board of magistrates to cover a period of at least six months, which shall provide for a rotation of magistrates holding said courts.

RULE II.

Time at Which Courts Shall be Held.

The First, Second, Third, Fourth, Fifth and Seventh District Courts shall be opened each day at 9 o'clock in the morning, and shall not be closed for the day before 4 o'clock in the afternoon, except on Saturdays and legal holidays, when morning sessions only shall be necessary, and except also that on the day of general election every court shall remain open until closing of the polls. Except on Saturdays, Sundays and legal holidays, when morning sessions only shall be necessary, and on the day of general election, when it shall remain open until the closing of the polls, the Sixth and Eighth District Courts may be closed at

any hour in the afternoon of any day, whenever, in the opinion of the magistrate presiding therein, further continuance in session is not required by the business or for the convenience of the public of that district.

RULE III.

Who to be in Attendance.

There shall be in attendance at each of such courts, at the times specified in Rule II, all the clerks, clerks' assistants, the court stenographer (if there be any) and all proper court officers assigned thereto; and any violation of this rule may be reported to the board of magistrates by the magistrate presiding in the court where such violation occurs.

RULE IV.

Order of Business.

1. Disposition of precinct returns.
2. Hearing returns on warrants and summonses.
3. Examinations.
4. Hearing and disposing of complaints.

The presiding magistrate may vary the foregoing whenever in his judgment the public service may require it.

RULE V.

Manner of Keeping Records.

The police clerks shall keep, or cause to be kept, in each of the courts the following books:

1. The court record.
2. A bond book.
3. A fine book.
4. A warrant book.

RULE VI.

Collection and Disposition of Fines.

All fines, if the same shall be paid before full commitment, shall be collected by the police clerks in the district in which such fines were imposed, and shall be duly entered by him in

the record, and in the fine book kept for that purpose. Every police clerk shall, on or before the fifth day of every month, prepare or cause to be prepared a written statement which shall be verified under oath by said police clerk, and which shall contain a full, just and true account of all the money received by him as fines or penalties during the preceding month. It shall be the duty of every police clerk to present the aforesaid statement to the comptroller of the city of New York and to pay to said comptroller all the moneys so received and collected on or before the fifth day of every month as aforementioned. Police clerks shall take receipts for such payments, which shall be annexed to duplicates of said statements, and be retained by the police clerks as vouchers. The fine book kept by every police clerk shall be arranged so as to show in detail the amount of moneys collected by him for fines and penalties; the daily collections, the time and amount of deposit in bank of such moneys, and the time of payments and the amount paid to the comptroller. On or before the tenth day of every month the police clerks, and each of them, shall report to the president of the board of magistrates the payment to the comptroller by him of the moneys collected by him for and be retained by the police clerks as vouchers.

RULE VII.

Warrants.

Warrants shall be issued to peace officers only and, except in cases where the complaint is presented by the district attorney, the magistrate shall not intentionally issue a warrant save in the district in which the offense is charged to have been committed. Search warrants shall be issued only in the district in which the place to be searched is situated, except it be issued in aid of a prosecution duly instituted in some other district, when it may be issued by the magistrate presiding in the district where such prosecution is instituted.

RULE VIII.

Cases of Vagrancy.

In cases of vagrancy, and of cases where the order of the magistrate may deprive any person of his or her liberty, or impose a

fine, such person shall appear in open court and may be heard in his or her defense, and produce witnesses or any competent testimony in his or her behalf, and the magistrate shall decide each case from the evidence before him.

RULE IX.

Fixing Bail.

All bail bonds, recognizances and obligations demanded or received by any City Magistrate's Court shall be executed and acknowledged before a proper officer by the party intended to be bonded thereby, and when executed in the presence of the magistrate taking them, he shall attest the same by his official signature; and all sureties thereto, before being accepted as sufficient, shall severally subscribe and make oath to an affidavit, in each case naming his residence, which must be in the State of New York, and specifying and locating sufficient property owned by him, and that he is worth a sum at least twice the amount of the obligation assumed by him, over and above all debts and liabilities against him; and, if the magistrate has reasonable doubts about the sufficiency of the surety offered, he shall, in addition to such affidavit, make other inquiries or take additional proof as to the identity and responsibility of such surety, and shall, in all cases, reject any surety or sureties whom his judgment does not approve as sufficient.

RULE X.

Transferring Cases for Cause.

No charge, complaint or person brought before one magistrate shall be sent before another, except for adequate cause, to be fully and at once entered upon the record kept by the police clerk and signed by the magistrate.

RULE XI.

Recognizances to Keep the Peace.

Recognizances to keep the peace must be filed with the clerk of the Court of Special Sessions on or before the fifth day of every month.

RULE XII.

Consents to Discharge.

In all cases of the signing of a consent by a city magistrate to the discharge of a prisoner after conviction and final commitment, a record thereof shall be made in the record book.

RULE XIII.

Maintenance of Order.

In order that the business of the several City Magistrates' Courts may be conducted in an orderly, decorous and efficient manner, in the exercise of the power conferred on the Board of City Magistrates by section 6, chapter 601, of the Laws of 1895, loud talking or boisterous behavior in or about any of said City Magistrates' Courts or the offices appropriated to the use of the magistrates or the clerks or other officers of said courts, or the use of any contemptuous or other language, or the performance of any act or the indulgence in any contemptuous or other behavior within the precincts named herein, tending to interrupt the business of any of said courts or to prevent the transaction of its business in an orderly, decorous and efficient manner, is prohibited. As a further aid to the maintenance of order in and about said Magistrates' Courts, all persons are prohibited from accosting any visitor to any of said courts with a view to ascertaining the business or errand of said visitor in said courts, unless such inquiry be made by direction of the magistrate therein presiding.

RULE XIV.

Bond of Police Clerk.

Before any police clerk shall enter upon the performance of his duties, he shall give a bond in all respects complying with the provisions and requirements of section 1395 of the Greater New York charter as to police clerks; he shall be charged with all the duties and obligations, and shall possess like authority and control in such court as devolve by law or the rules of the court upon police clerks.

RULE XV.

Whenever two or more persons, some being under and some over sixteen years of age, are charged jointly with the commission of a crime, all of such prisoners shall be arraigned before, and the charge shall be heard and disposed of, by the magistrate presiding in the court of the district wherein the offense was committed. If, subsequent to the arraignment of any prisoner in the Children's Court, it shall be discovered that he or she is over sixteen years, such fact shall be disregarded and the magistrate shall proceed with and hear or try the case.

Applications for the commitment of children for destitution, want of proper guardianship, or for incorrigibility or depravity, may be made to any magistrate presiding in the district courts, but such magistrate shall not proceed in said court further than to sign an order for investigation. The report thereon shall be made to, and all subsequent proceedings shall be had in, the Children's Court.

The magistrate presiding in any district court may entertain complaints against children for any violation of law and issue a summons or warrant therefor, but the same shall be made returnable in the Children's Court. If the complaint in any such case shall be reduced to writing, the clerk of the court wherein it is taken shall send it and all papers in the case promptly to the clerk of the Children's Court.

RULE XVI.

Amendments.

These rules cannot be amended except at a regular meeting of the board, and by the consent of a majority of all its members.

Rules Governing the Board of City Magistrates of the City of New York (First Division).

RULE I.

The officers of this board shall consist of a president and a secretary to be chosen as prescribed by law.

RULE II.

The president shall preside at all meetings. He shall make all assignments and transfers of police clerks' assistants and other subordinates of the board except police clerks, and perform such other duties as the board may prescribe. In case the president shall not attend at the time appointed for the meeting of the board, the secretary shall call the board to order and a president *pro tem.* shall be chosen by the Board until the appearance of the president. The president shall decide all questions of order, subject to an appeal to the board, and may substitute any other member to preside in his place during the meeting, or any portion of it, at which the substitution shall be made.

RULE III.

The duties of the secretary of the board shall be to keep a full and fair set of minutes of each and every meeting of said board of city magistrates, to make, prepare and present to the said board such annual statements or reports of the business done by each of said city magistrates and of the Magistrates' Courts, as is prescribed by law; to make and serve the proper notices of the board for meetings, transfers, etc.; to act as stationer and storekeeper for the board, distributing all supplies of books, blanks and other stationery to the several courts as such supplies may be needed; to attend to the printing of all blank forms for use in said courts and by said board; to prepare the monthly payroll of the board and its subordinates, and such other duties as the board may direct.

RULE IV.

The officers of the board shall be chosen at the last regular meeting of the board in January of each year, and shall hold office

for one year, or until the selection of their successors. A majority of all the members of the board shall be necessary to a choice.

RULE V.

A majority of all the members of the board shall constitute a quorum for the transaction of all business, but a less number may adjourn from time to time until a quorum is secured.

RULE VI.

The regular meetings of the board shall be held on the last Monday of every month, excepting in the month of August, at 8 o'clock p. m., provided that when such last Monday in any month shall fall upon a legal holiday, such meeting shall be held upon the last Tuesday of such month.

RULE VII.

The president may, and upon the request in writing of three magistrates shall, call special meetings of the board, but notice for same shall be issued at least twenty-four hours before the time for which said meeting is called, and shall state the object of such meeting. No other business shall be transacted at such meeting except by the unanimous consent of the members present.

RULE VIII.

The order of business at the meetings of the board shall be as follows:

1. Reading of the minutes of the previous meeting.
2. Reports of committees.
3. Motions and resolutions.
4. Unfinished business.
5. Miscellaneous business.

RULE IX.

The minutes of the proceedings of the board shall at all times be opened for public inspection, under the care of the secretary.

RULE X.

Upon the question of the appointment of any police clerk or other subordinate by the board, the members shall vote as their names are called by the secretary, and the vote of each member shall be recorded in the minutes. A majority of the whole board voting together shall be required to appoint.

RULE XI.

Police clerks' assistants, stenographers, interpreters and attendants may be removed, for cause after hearing, by a majority of all the members of the board voting for such removal. No such removal may be made except at a regular meeting of the board, a previous notice in writing of five days having been given by the secretary to the accused subordinate, such notice specifying the cause of his proposed removal, notifying him of his opportunity for an explanation in the presence of the board. The cause of the removal of any such clerks' assistant or other subordinate shall be entered briefly in the minutes.

RULE XII.

All resolution shall be presented in writing, with the name of the mover, and when presented they shall be read, but not considered until seconded.

RULE XIII.

Every member who shall be present when a question is put shall vote for or against the same, unless excused by the board.

RULE XIV.

The rules of the Legislative Assembly of the State of New York shall govern the proceedings of this board, so far as the same are applicable and not inconsistent with any of the regular rules of the board.

RULE XV.

There shall be three standing committees, consisting of three magistrates, each to be appointed by the president, to be known as the Committee on Blanks and Forms, the Committee on Buildings and Repairs, the Committee on Rules and Discipline.

Blanks and Forms.

This committee, of which the president shall be a member, shall from time to time, as the occasion demands, draft and prepare all blanks and forms for use in the courts.

Buildings and Repairs.

This committee shall attend to all the court buildings, or parts thereof allotted to the city magistrates, the necessity for repairs or alterations therein and to procuring necessary work to be done. On or before the first day of August in each year this committee shall furnish the president with the estimated appropriation necessary to make repairs for the ensuing year, with the items thereof, so as to be included in the estimate to be furnished the Board of Estimate and Apportionment.

Rules and Discipline.

This committee shall consider all matters affecting a change in, or amendment of, the court rules or the board rules, and report any proposed changes or amendments to the board. It will likewise hear all complaints against subordinates of the board referred to it by the president. If such charges be of a nature warranting a dismissal from service the committee shall reduce the evidence to writing, which, with the findings thereon, shall be reported to the board at a meeting for which a previous notice of at least five days may be given to the accused as required by Rule XI, who at the time shall be cited by said committee to appear before the board.

RULE XVI.

In any case of prolonged physical disability of a magistrate the president of the board is empowered to make a schedule assigning magistrates off duty to proportionate parts of the term of the disabled magistrate, which schedule shall state the days each magistrate shall hold court for one so disabled, and a copy of such schedule, transmitted to the magistrates by the secretary, shall have the same force and effect as a regular assignment.

In order that there may be an equitable distribution of such work among all the magistrates the regular assignment may from time to time be rearranged by the president.

Amendments.

These rules cannot be amended except at a regular meeting of the board, and by the consent of a majority of all its members.

RULES OF THE MAGISTRATES' COURTS OF THE CITY OF NEW YORK (SECOND DIVISION).

RULE I.

Assignments to the several District Courts shall be made to cover a period of at least six months, and provision shall be made for a rotation of magistrates holding said courts.

RULE II.

Time at Which Courts Shall be Held.

The several District Courts shall be opened every day at 9 o'clock a. m., and shall remain open until 4 o'clock p. m., except on Saturdays, Sundays and legal holidays.

RULE III.

Who to be in Attendance.

There shall be in attendance at such courts, at such times as above specified, all the clerks and assistant clerks assigned thereto, and all proper court officers, the court interpreter and the stenographer, and any violations of the above rules shall be reported to the board by the magistrate presiding.

RULE IV.

Order of Business.

The business of said court shall be conducted in the following order:

1. Disposition of precinct returns.
2. Hearing returns on warrants and summonses.
3. Hearing and disposition of complaints.
4. Examination involving the commitment of children.
5. Examinations generally.

RULE V.

Manner of Keeping Records.

The police clerks shall keep, or cause to be kept, in each of the courts the following books:

1. The court record.
2. Examination book.
3. Bond book.
4. Book of fines.

RULE VI.

Whenever, in the opinion of a magistrate, he shall deem the same necessary in any complaint or proceeding before him, he shall apply (in writing, by telegraph, or telephone, through the captain of one of the precincts of his district) to the Board of Police Commissioners for some intelligent and experienced person connected with the police force to attend at the court to aid in bringing the facts in such case before such magistrate.

RULE VII.

Fines.

All fines, if the same be paid before full commitment, shall be collected by the police clerk in the district in which said fine was imposed, and by him duly entered on the record, and in a separate book kept in the court for that purpose. Such entry in the record shall contain the name of the defendant, offense, amount of fine, when imposed, when paid and amount of payment.

The said police clerks shall, each of them, on or before the fifth day of each month, prepare, or cause to be prepared, a written statement, which shall be verified under oath by said clerks, and shall contain a full, just and true account of all the moneys received by them as fines or penalties for the preceding month; and said clerks shall, on or before the day last aforesaid, present such statement to the comptroller of the city of New York, and shall pay over to him, in pursuance of section 17 of the Laws of 1873, chapter 538, all moneys so received by them as fines and penalties. Said police clerks shall also take receipts for said moneys, which receipts shall be annexed to a duplicate of said statement, and retained by said clerks as vouchers.

RULE VIII.

Warrants.

Warrants shall be issued to peace officers only and in the district in which the offense is charged to have been committed; search warrants, in the district in which the place to be searched is situated.

RULE IX.

The name of any prisoner discharged and the nature of every charge dismissed shall be entered on the records of the Magistrate's Court.

RULE X.

Duties of Assistant Clerks, etc.

The assistant clerks and other assistants at each Magistrate's Court shall obey the reasonable directions of the police clerk assigned to said court, subject, however, to the proper orders of the magistrate presiding therein and the Board of City Magistrates.

RULE XI.

The stenographers assigned for duty to the various courts in the Second Division of the city of New York by the board at the meeting held on the 1st day of February, 1898, may rotate with the magistrates to whom they were on said day assigned.

RULE XII.

Taking Bail.

All bail bonds, recognizances and other obligations demanded or received by any City Magistrate's Court shall be executed and acknowledged before a proper officer by the party intended to be bound thereby, and when executed in the presence of the magistrate taking them, he shall attest the same by his official signature, and all sureties thereto, before being accepted as sufficient, shall severally subscribe and make oath to an affidavit, in each case naming his residence, which must be within the State of New York, and specifying and locating sufficient property owned by him, and that he is worth a sum at least twice the amount of the obligation assumed by him, over and above all debts and liabilities

against him; and, if the magistrate has reasonable doubts about the sufficiency of the surety offered, he shall, in addition to such affidavit, make other inquiries or take additional proof as to the identity and responsibility of such surety, and shall in all cases reject any surety or sureties whom in his judgment does not approve as sufficient.

RULE XIII.

No charge, complaint or person brought before one magistrate shall be sent before another, except for adequate cause, to be fully and at once entered upon the record kept by the police clerk and signed by the magistrate.

RULE XIV.

Recognizances to Keep the Peace.

All recognizances to keep the peace must be filed with the clerk of the Court of Special Sessions on or before the fifth day of every month.

RULE XV.

Amendments.

These rules cannot be amended, except at a regular meeting of the board, and by the consent of a majority of all its members.

RULES OF THE BOARD OF CITY MAGISTRATES OF THE CITY OF NEW YORK (SECOND DIVISION).

RULE I.

The officers of this board shall consist of a president and a secretary.

RULE II.

It shall be the duty of the president to preside at all the meetings of the board.

RULE III.

The duties of the secretary of said board shall be to keep a full and fair set of minutes of each and every meeting of said Board of City Magistrates, and to make, prepare and present to the said board such annual statements or reports of the business done by each of said city magistrates, as is prescribed in section 14, chapter 538, of the Laws of 1873, and in section 1550, of chapter 410, of the Laws of 1882, and also to give the proper notices to the members of all meetings of the board, and such other duties as the board shall direct.

RULE IV.

A majority of all the members of the board shall constitute a quorum for the transaction of all business.

RULE V.

Special meetings of the board may be held upon the request, in writing, of three members, but the notice for the same shall be issued at least forty-eight hours before the time for which such meeting is called, and shall state the object of such meeting. No other business shall be transacted at such meeting except upon the unanimous consent of the members present.

RULE VI.

The officers of the board shall be elected at the last regular meeting of the board in December of each year, and shall hold office until the election of their successors. A majority of all the members of the board shall be necessary to a choice.

RULE VII.

The order of business at the meetings of the board shall be as follows:

1. Reading of the minutes of the previous meeting.
2. Reports of committees.
3. Motions and resolutions.
4. Unfinished business.
5. Miscellaneous business.

RULE VIII.

The minutes of the proceedings of the board shall at all times be opened for public inspection, under the care of the secretary.

RULE IX.

Upon the question of the appointment of any clerk or clerks' assistant, the members of the board shall vote as their names are called by the secretary, and the vote of each member shall be recorded in the minutes, and the majority of the whole board shall be required to appoint a police clerk, clerks' assistant, interpreter, stenographer, and other necessary attendants, and may remove the same, except police clerks, and the secretary shall record the vote of each member of the board so voting.

RULE X.

No assistant clerk, interpreter, or stenographer shall be removed except at a regular meeting of the board, and upon a previous notice of five days, in writing, given to him by the secretary, specifying the cause of his proposed removal, and an opportunity for an explanation by such assistant clerk, interpreter, stenographer, or attache of the court, in presence of the board. The cause of the removal of any such assistant clerk, interpreter, or stenographer shall be noted in the minutes.

RULE XI.

It shall be the duty of the president to preside at all meetings of the board, and in case he shall not attend at the time appointed for the meeting of the board, the secretary shall call the board to order, when a president *pro tem.* shall be appointed by the board until the appearance of the president. The president shall decide all questions of order, subject to an appeal to the board, and may substitute any other member to preside in his place during the meeting, or any portion of it, at which the substitution shall be made.

RULE XII.

The regular meetings of the board shall be held on the last Wednesday of every month, excepting August, at 4 o'clock p. m., provided that when such last Wednesday in any month shall fall upon a legal holiday such meeting shall be held upon the last Thursday of such month.

RULE XXIII.

All resolutions shall be presented in writing, with the name of the mover, and when presented they shall be read, but not considered until seconded.

RULE XIV.

Every member who shall be present when a question is put shall vote for or against the same, unless excused by the board. The ayes and nays shall be called and entered upon the minutes at the request of any member.

RULE XV.

The rules of the Legislative Assembly of the State of New York shall govern the proceedings of this board, so far as the same are applicable and not inconsistent with any of the regular rules of the board.

RULE XVI.

There shall be a standing committee, consisting of two magistrates, to be appointed by the president, to be known as the committee on blanks and forms, and who shall have charge of the preparation of such blanks and forms as may, from time to time, be necessary.

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3. Interpleader, consolidation and new parties.
4. Service of notice by mail.
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6. Discontinuance when counterclaim is pleaded.
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8. Size of paper used for claims and briefs.
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25. Statement in claim of particulars of damage.
26. Statement in claim as to former audit or determination.
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28. Statement of claim under special statute.
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30. Map and rough drawings to accompany claims.
31. Abstract of title to accompany claims in cases of permanent appropriations. Rescinded.
32. Subscription of claim.
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34. Printing claims.
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37. Filing copies of claim.
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40. Pleadings by State.
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86. Order upon remittitur.
87. Costs of appeal.

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90. Satisfaction of judgment.

GENERAL PROVISIONS.

1. *Application of rules and practice of Supreme Court.*— Except as otherwise provided in these rules or the Code of Civil Procedure the practice in this court shall be the same as in the Supreme Court. (Code of Civil Procedure, § 265.)

2. *Substitution of attorney.*— Written notice of substitution of attorney shall be filed with the clerk and notice thereof served on the Attorney-General.

3. *Interpleader, consolidation and new parties.*— For provisions relating to interpleader, consolidation and new parties, see Code of Civil Procedure, § 281.

4. *Service of notice by mail.*— Any notice required to be served by the rules may be served by mail. If upon the claimant

or his attorney, by directing the same to him at the post-office address indorsed upon the claim, filed.

5. *Extension of time.*— The time within which an act is required to be done, excepting the time to file claims or to appeal, may be extended by order of the court or a judge thereof.

6. *Discontinuance where counterclaim is pleaded.*— Where a counterclaim is pleaded, the claimant cannot discontinue except with the consent of the court.

7. *Settlement and compromise.*— For provisions relating to the settlement and compromising of canal claims, see Code of Civil Procedure, § 270.

8. *Size of paper used for claims and other papers.*— Where a claim or other paper in a case is typewritten the size of the paper used shall be substantially 8 inches by 13 inches and when printed substantially 8 inches by 10½ inches.

9. *Use of number of claim.*— The number given a claim by the clerk shall be used by the claimant or his attorney upon all papers in the case.

10. *Folioing motion papers.*— All motion papers exceeding two folios in length shall be folioed.

11. *Date of issue.*— The date of issue is the date of filing the claim, except that a claim passed on the call of the calendar shall take as its date of issue the date of its passage.

12. *Calendar.*— 1. Unless otherwise directed by the court, the clerk shall make a calendar of claims to be heard for each regular or special term. 2. The clerk shall place upon the calendar (1) claims that have been properly noticed and in which notes of issue have been filed; (2) claims which have been stipulated on the calendar; (3) claims which may have been ordered thereon by the court; and (4) those designated by the Attorney-General in a written notice filed with the clerk before the calendar is made up.

13. *Duties of the Clerk.*— 1. The clerk shall not receive or file any claim, counterclaim or reply unless the same is verified as prescribed in the rules. 2. The clerk shall not receive or file a claim for a permanent appropriation unless the claim contains a duplicate of the certified map containing description of appropriation served on claimant. 3. Each claim shall be numbered by the clerk in the order of its filing, and an amended or supple-

mental claim shall take the same number as the original claim. 4. The time when an amendment to a pleading is allowed shall be entered by the clerk upon the minutes. 5. The clerk shall deliver three copies of each claim to the Attorney-General or his deputy, and shall retain the remaining copies for the use of the court. 6. The clerk shall notify the claimant or his attorney of the date of filing a claim and of its number. 7. The clerk shall mail a copy of the calendar at least ten days before the beginning of the session, to each claimant whose claim appears thereon, or to his attorney. 8. The clerk shall keep on file in his office each judgment-roll. 9. The clerk shall not file a case on appeal or case and exceptions, unless the same is ordered filed as herein provided. 10. The clerk shall enter all substitutions of attorneys properly made. (As amended September 30, 1909.)

16. *Notice of intention to file claim.*— For provisions relating to notice of intention to file claim see Code Civil Procedure, § 264.

17. *Appointment of guardian ad litem.*—A guardian ad litem may be appointed by the court, or one of the judges thereof, as provided by the rules of practice of the Supreme Court.

PLEADINGS GENERALLY.

19. *Forms for pleading.*— The following forms are submitted as models for pleadings:

FORM A.

Claim for Damages for Negligence.

STATE OF NEW YORK — COURT OF CLAIMS.

John Doe

against

State of New York.

1. This claim is for negligence of the State in constructing and maintaining a bridge known as the Newport bridge over the old Erie canal in the village of Warners, N. Y., and particularly in failing to provide said bridge with suitable railings and to light the same.

2. On December 22, 1905, without any negligence on his part, claimant fell off the west side of said bridge about the middle thereof and received the following injuries: (State in detail injuries received.)

3. This claim has not been assigned and has not been submitted to any other tribunal or officer for audit or determination.

4. This claim was filed within two years and a notice of intention to file within six months after the claim accrued as required by law.

5. Attached is a small rough drawing of the place of the accident.

6. The particulars of claimant's damages are as follows:

Dr. Bell's bill for services	$50 00
Mary Smith's bill for nursing	40 00
St. Mary's Hospital expenses	50 00
Medicines	25 00
Personal suffering, etc	2,000 00
Total	$2,165 00

STATE OF NEW YORK,
County of Monroe, } *ss.:*
City of Rochester,

John Doe, being duly sworn, says: I am the claimant above named; I have read the foregoing claim and know its contents; the same is true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

JOHN DOE.

Sworn to before me, this
3d day of March, 1906.

JOHN SMITH,
Commissioner of Deeds (or other officer authorized to take affidavits).

FORM B.

Indorsement on Back of Claim.

STATE OF NEW YORK,
Court of Claims.

JOHN DOE
against
STATE OF NEW YORK.

CLAIM

RICHARD ROE,
Attorney for Claimant,
3 White Building,
Rochester, N. Y.

FORM C.

Claim for Permanent Appropriation.

STATE OF NEW YORK — COURT OF CLAIMS.

John Doe
against
State of New York.

1. This claim is for permanent appropriation of land by the State for the Barge canal pursuant to Laws of 1903, chapter 147, and a notice of such appropriation served on claimant, December 25, 1905.

2. The premises appropriated are described as follows:

(Here insert description in detail.)

3. Attached hereto as a part of the claim is a duplicate of the certified map containing description of appropriation served on claimant.

4. This claim has not been assigned and has not been submitted to any other tribunal or officer for audit or determination.

5. The claim is filed for damages arising within two years after the cause of action accrued.

6. The particulars of claimant's damages are as follows:

3 acres of land appropriated	$2,000
15 acres of remaining land damaged	1,000
Total	$3,000

(For form of verification see Form A, and for indorsement see Form B.)

FORM D.

Claim for Temporary Appropriation.

STATE OF NEW YORK — COURT OF CLAIMS.

John Doe
against
State of New York.

1. This claim is for the temporary appropriation from December 25, 1905, to December 25, 1906, of land by the State in connection with the construction of the Barge canal, by the placing of earth, stone and timber thereon.

2. The premises owned by claimant are situated in the town of Perinton, Monroe county, New York, consist of ten acres and the portion appropriated consists of two acres.

3. This claim has not been assigned and has not been submitted to any other tribunal or officer for audit or determination.

4. Attached hereto is a rough sketch of the premises owned by claimant and the portion appropriated.

5. The claim was filed within two years after the cause of action accrued.

6. The particulars of claimant's damages are as follows:

10 pear trees destroyed at $5 each	$50 00
60 rods of fence at $1 per rod	60 00
2 acres of land, use thereof	10 00
Total	$120 00

(For form of verification see Form A, and for indorsement see Form B.)

FORM E.

Claim for Damages for Leakage of Canal.

STATE OF NEW YORK — COURT OF CLAIMS.

John Doe
against
State of New York.

1. This claim is for the destruction of crops July 18, 1905, due to leakage from the Erie canal by reason of the negligent construction and maintenance of the banks thereof.

2. The premises owned by claimant are situated in the town of Perinton, Monroe county, New York, consist of fifty acres and the portion affected by the negligence of the State is about three acres lying adjacent to the canal.

3. This claim has not been assigned and has not been submitted to any other tribunal or officer for audit or determination.

4. Attached hereto is a small rough sketch of the premises owned by claimant and the portion damaged.

5. This claim was filed within two years and a notice of intention to file the claim was filed within six months after the claim accrued as required by law.

6. The particulars of claimant's damages are as follows:

20 acres of corn totally destroyed at $30 an acre	$600
10 acres of potatoes partially destroyed at $60 an acre	600
20 acres of meadow at $10 an acre	200
Total	$1,400

(For form of verification see Form A, and for indorsement see Form B.)

20. *Amendments of pleadings.*— Pleadings may be amended at any time upon the consent of the court.

21. *Filing amended pleadings.*— The rules regulating the filing of original pleadings shall apply to amended pleadings, except where the amendment is allowed during the course of the trial.

22. *Service of amended pleadings.*— The rules regulating the service of original pleadings shall apply to amended pleadings, except where the amendment is allowed during the course of the trial.

STATEMENT OF CLAIM.

24. *Statement of claim generally.*— The claim shall state concisely the facts constituting the cause of action.

25. *Statement in claim of particulars of damage.*— The claim shall state the particulars of claimant's damage showing in detail each item claimed and the amount of such item.

26. *Statement in claim as to former audit or determination.*— The claim shall state whether it has been submitted by law to any other tribunal or officer for audit or determination.

27. *Statement in claim as to assignments.*— The claim must state whether or not the claim has been assigned, and if assigned the name and residence of each person interested in the claim.

28. *Statement of claim under special statute.*— When a claim is filed under a special statute, the statute must be set out in full in the claim.

29. *Statement of claim in cases of appropriations.*—A claim for permanent or temporary appropriation must contain a specific description of the property, showing its location and quantity.

30. *Maps and rough drawings to accompany claims.*— In cases of permanent appropriation a duplicate of the certified map containing description of appropriation served on claimant must accompany the claim and copies of the claim and in all other cases a small rough sketch or drawing showing the location of the premises or place forming the basis of the claim.

31. Rescinded September 30, 1909.

32. *Subscription of claim.*— The claim must be signed by the claimant or his attorney giving his address.

33. *Verification of claim.*— The claim must be verified in the same manner as pleadings in the Supreme Court.

34. *Printing claims.*— The claim shall be printed except that where the amount claimed does not exceed $200, typewritten copies may be furnished.

35. *Folioing claims.*—All claims exceeding two folios in length must be folioed.

36. *Filing of claim.*— The filing of a claim consists in delivering the same, during office hours, to the clerk at his office in the Capitol at Albany, or in his absence to some person in charge of the office.

37. *Filing copies of claim.*— The claimant shall at the time of filing his claim, or within ten days thereafter, deliver to the clerk twelve copies of his claim.

38. *Dismissal of claim by Attorney-General.*— The Attorney-General may, upon ten days' notice, move to dismiss a claim on the ground that the facts stated in the claim do not constitute a cause of action, specifying the alleged defects in the claim.

PLEADINGS BY STATE.

40. *Pleadings by State.*— The State is not required to answer a claim but when a counterclaim is necessary must plead and file the counterclaim in conformity with the provisions relating to claims so far as applicable.

41. *Allegations in claim deemed denied by State without pleading.*—All allegations in a claim are treated on the trial as denied by the State.

42. *Verification of counterclaim by State.*—A counterclaim by the State must be verified by the Attorney-General, or one of his deputies.

43. *Service of counterclaim.*— Except by consent of the court a counterclaim must be served upon the claimant or his attorney at least ten days before the beginning of the term at which the case is to be tried.

44. *Printing counterclaim.*— The provisions relating to printing claims apply to a counterclaim.

45. *Filing counterclaim.*— Except by the consent of the court a counterclaim shall be filed at least ten days before the beginning of the term at which the case is to be tried. The provisions relating to filing copies of claims apply to a counterclaim.

46. *Folioing counterclaims.*—A counterclaim exceeding two folios in length must be folioed.

47. *Dismissal of counterclaim by claimant.*—A counterclaim may be dismissed on motion of the claimant for the like cause and upon like notice to the Attorney-General as provided with reference to the dismissal of claims.

CLAIMANT'S REPLY.

49. *Counterclaim admitted unless reply filed.*—A counterclaim is admitted unless a reply is filed and served as herein prescribed.

50. *Reply to counterclaim.*— Except by the consent of the court a reply to a counterclaim must be filed within twenty days after service thereof, but no reply need be made to a counterclaim served within ten days of the beginning of the term at which the claim is to be heard.

51. *Verification of reply.*—A reply must be verified in the same manner as pleadings in the Supreme Court.

52. *Printing and filing reply.*— The provisions relating to printing claims and filing copies apply to a reply.

53. *Folioing replies.*—A reply exceeding two folios in length must be folioed.

NOTICES OF TRIAL AND ISSUE.

55. *Notices of trial for regular terms.*— Twenty days' notice of trial must be given by mail to the Attorney-General for regular terms.

56. *Notes of issue for regular terms.*— Notes of issue for regular terms must be filed with the clerk thirty days before the opening of the term.

57. *Notice for special terms.*— Claims placed on the calendar for special terms by the court shall be deemed to have been noticed by both parties.

TRIALS.

61. *Subpœnas.*— In any claim pending before this court, either party may issue to and serve subpœnaes upon witnesses to appear and testify, and to produce books and papers, as the same are issued and served in actions in the Supreme Court.

62. *Attachment to compel obedience to subpœnas.*— Either party may apply for, and obtain from the court, an attachment to compel obedience to subpœnas.

63. *Punishment for contempt.*— Either party may apply to the court for punishment for contempt as in actions in the Supreme Court.

64. *Discovery.*—Either party to a pending claim may be compelled, sufficient ground being shown therefor, (1) To give an inspection of any book, document, map, plan or other paper in his possession or under his control relating to the merits of the case, or (2) To grant leave to make a copy thereof or (3) To make and deliver a copy thereof or (4) To produce the same in court.

65. *Hearing of claims generally.*—A claim may be brought to hearing at any regular term by the claimant, upon service of notice of trial and filing of note of issue as herein provided.

66. *Hearing of claims placed upon the calendar by Attorney-General.*— The Attorney-General may, without further notice, move the hearing of a claim designated by him to be placed upon the calendar as herein provided.

67. *Dismissal of claim.*— The Attorney-General may, without further notice, move the dismissal of a claim designated by him to be placed upon the calendar.

68. *Proofs.*—A claim may be submitted upon proofs or upon agreed facts.

69. *Referee to take proofs.*— The court may in any pending claim, upon stipulation, or upon sufficient cause shown, appoint a referee to take proofs and report to the court.

70. *Taking testimony out of court.*—The court or a judge thereof may upon due notice to interested parties and upon sufficient grounds at any time make an order for the examination out of court of any person in an action or prospective action. The proceedings subsequent to the making of such an order shall be the same as in the Supreme Court.

71. *Briefs.*— Five copies of briefs which must be printed unless otherwise directed by the court, must be filed with the clerk within the time allowed by the court.

72. *Form of requests to find.*— When requests to find are submitted the following form is recommended although not required.

FORM OF REQUESTS TO FIND.

COURT OF CLAIMS.

John Doe,
Claimant,
against
The State of New York.
No. 6359.

The claimant respectfully requests the court to find as follows:

FINDINGS OF FACT.

1st. In the years 1904 and 1905, the claimant was the owner in fee simple and in possession of a farm situate partly in the village of Springwater and wholly in the town of Springwater, Monroe county, N. Y., comprising 122.42 acres.

2d. The claimant continued to own and possess 101.58 acres thereof down to March 13, 1906, the time of the filing of claimant's claim.

3d. On the 21st day of March, 1906, pursuant to the authority of the Barge Canal Act, chapter 147 of the Laws of 1903, the State appropriated for purposes of said canal, out of claimant's farm, 20.838 acres, particularly described in his claim.

4th. Upon said land so appropriated were farm buildings, consisting of a farm dwelling-house, two barns, a shop, poultry-house, well and cistern.

5th. Of the land appropriated a portion fronted upon a public street in the village of Springwater, in which was installed the village light and water

system and in front of which the sidewalk was graded. Such frontage was about 950 feet upon the street, and was available and salable for building lots.

References:

Testimony of Eli Cochran, pp. 91, 96.

Testimony of Mr. Randolph, p. 110.

These lots are very desirable. Cochran, pp. 90, 91.

The vicinity was closely built up. Doe, p. 14; Randolph, pp. 109, 117–118.

Lots were readily salable. Randolph, pp. 117–118.

These lots should have been taken into account in appraising the property and yet none of the State's witnesses as to value took any account of them in arriving at their conclusions, but treated the whole 20.838 acres taken simply as farm land.

6th. Upon the land taken were deposits of moulding sand extending over an area of about twelve acres, and of an average depth of one and one-half feet.

References:

Testimony of Doe, pp. 27–8; 31–2; 35, 36.

Testimony of Cochran, p. 145.

7th. The moulding sand in the soil on the land, at the time of the appropriation, was reasonably worth thirty cents per cubic yard.

References:

Testimony of Doe, pp. 27, 28.

Testimony of Cochran, pp. 143–4.

It could be removed with practically no damage to the remaining land, except the use of a small area while it was being removed.

Testimony of Doe, pp. 29, 144.

Claimant had sold $1,024.30 worth of this sand in two years from one-half acre, just preceding the appropriation.

Testimony of Doe, p. 30.

The amount and value of this moulding sand upon the land taken is nowhere disputed by the State.

Mr. Sanford concedes it to be a valuable asset and readily salable (p. 190), yet he did not at all consider it in arriving at his estimate of the value of the premises, nor did any of the State's experts, but they estimated the land taken solely for ordinary farming purposes.

8th. The appropriation of the 20.838 acres left claimant's remaining land 101.582 acres, without buildings, water or access to any public highway, in any manner, and thereby depreciated the 101.582 acres in value to the amount of $10,052.

References:

The claimant's witnesses place this depreciation as follows:

Witness.	Value before taking.	Value after taking.	Depreciation.
Roach	$10,000	$5,000	$5,000
Tarbox	20,000	5,000	15,000
Doran	12,697 75	2,539 75	10,158

The State's witness, Filkins, placed the value of the remaining land after the appropriation at $10 per acre (p. 198).

Dobson put it at $25 per acre (p. 202).

Scott put it at $25 per acre (p. 156).

9th. The reasonable value of the 20.838 acres of claimant's land permanently appropriated by the State was $23,000.

References:

Testimony of Doe, p. 55.

Considering the various elements of value clearly established and practically undisputed by the State, viz.:

Buildings	$10,332
Building lots	3,000
Moulding sand	8,625
16½ acres garden	3,300
	$25,284

Mr. Doe's estimate is fairly established.

The fact that the farm cost Mr. Doe $24,575 (pp. 78, 85), and that he has been at such pains to improve it supports this view.

As to the general damage caused Mr. Doe by this appropriation, the following is a table of values given by all the witnesses:

Witness.	Value before appropriation.	Value after.	Damage.
Doe	$35,000	$5,000	$30,000
Cochran	15,302	2,500	12,802
Scott	13,250	2,500	10,750
Sanford	11,600	4,600	7,000
Truax	12,500	1,000	11,500
Dobson	12,000	2,500	9,500

CONCLUSIONS OF LAW.

The claimant is entitled to an award against the State by reason of the facts alleged in his claim, in the sum of $28,396, together with interest thereon from the 21st day of March, 1905.

SAMUEL WORTHINGTON,
Attorney for Claimant.

(Added September 30, 1909.)

JUDGMENT.

73. *Judgments generally.*— For provisions relating to judgments, see Code of Civil Procedure, § 269.

74. *Form of judgment.*— The judgment shall contain a recital of (1) the filing of the claim, (2) its date, (3) number (4), nature, (5) the amount claimed, (6) appearances and trial.

75. *Judgment of dismissal for want of prosecution.*— When a claim is called and no one appears for the claimant, the same may be dismissed for want of prosecution.

76. *Judgment-roll after hearing.*— The judgment-roll shall consist of (1) the original claim and all amendments or supplemental claims and other pleadings, (2) certified copies of all orders, (3) stipulations made in writing, (4) a certified copy of the final order or judgment, (5) when a claim is for a permanent appropriation, the map and description of such land furnished by the State Engineer and Surveyor and (6) where an appeal is taken, the notice of appeal and all papers required to be filed with or served upon the clerk, the final order or judgment of the appellate court, the papers in all proceedings thereafter in this court and a certified copy of the final judgment of this court.

77. *Costs, fees and disbursements.*— For provisions relating to costs, fees and disbursements generally, see Code of Civil Procedure, section 274. For provisions relating to expense of procuring testimony by commission, see Code of Civil Procedure, § 272.

APPEALS.

80. *Appeals generally.*— For provisions relating to appeals, see Code of Civil Procedure, §§ 275-278.

81. *Case on appeal by stipulation.*— The claimant, or his attorney and the Attorney-General, may agree upon the facts in a case and settle the case by stipulation, subject to the approval of the court.

82. *Settlement and filing case on appeal.*— Upon the settlement of a case, the court or a judge thereof shall attach thereto the statement "settled and ordered filed," and the case shall be

filed within ten days thereafter with the clerk unless the time is extended by stipulation or order.

83. *Abandonment of case on appeal.*— If a case is not filed as required it shall be deemed to have been abondoned.

84. *Proceedings upon abandonment of case on appeal.*— Upon proof that a case has not been filed as required, an order may be entered by the clerk declaring the appeal abandoned, whereupon the party may proceed as if no case and exceptions had been made.

85. *Remittitur on appeal.*— The remittitur on appeal shall be filed with the clerk.

86. *Order upon remittitur.*— Upon application of either party and upon the remittitur an order may be obtained making the order or judgment of the appellate court the order or judgment of this court.

87. *Costs on appeal.*— When costs on appeal are allowed, the same may be stipulated by the parties, and if not stipulated, shall be taxed by the clerk of this court in like manner as costs are taxed in actions in the Supreme Court.

SATISFACTION OF JUDGMENT.

90. *Satisfaction of judgment.*— For provisions relating to satisfaction of judgment, see Code of Civil Procedure, section 269.

THEODORE H. SWIFT,
Presiding Judge.

ADOLPH J. RODENBECK,
CHARLES H. MURRAY,
Associate Judges.

Rules of the State Board of Law Examiners.

OFFICE OF THE SECRETARY,
ROOMS 41 AND 42 BENSEN BUILDING,
ALBANY, N. Y.

The board has adopted the following rules:

RULE I.

Each applicant for examination must file with the secretary of the board, at least fifteen days before the day appointed for holding the examination at which he intends to apply, the preliminary proofs required by the "Rules for the admission of attorneys and counselors-at-law," as adopted by the Court of Appeals, December 20, 1906, and amended to take effect June 1, 1908, from which it must appear affirmatively and specifically that all the preliminary conditions prescribed by said rules have been fulfilled, and also proof of the residence of the applicant for six months prior to the date of the said examination, giving place, with street and number, if any, which must be made by his own affidavit. Said affidavit must also state that such residence is actual and not constructive. The board in its discretion may order additional proofs of residence to be filed, and may require an applicant to appear in person before it, or some member thereof, and be examined concerning his qualifications to be admitted to the examination. The examination fee of fifteen dollars must be paid to the treasurer at the time the application for examination is filed.

To entitle an applicant to a re-examination, he must notify the secretary by mail of his desire therefor, at least fifteen days before the examination at which he intends to appear and file with him, at the same time, his own affidavit stating that he is and has been for the six months prior to such examination an actual and not constructive resident of this State, giving the place of such residence, and street and number, if any.

RULE II.

Each applicant must be a citizen of the State, of full age; he may be examined in any department, whether a resident thereof or not, but the fact of his having passed the examination will be certified to the Appellate Division of the Judicial Department in which he has resided for the six months prior to his examination. He must, however, entitle his papers in the department in which he resides.

NOTE.— An applicant must appear for examination in the department in which he entitles his papers unless permission of the board otherwise be granted at least fifteen days before the day appointed for holding the examination.

RULE III.

In applying the provisions of Rules IV and V of the Rules of the Court of Appeals, "For the admission of attorneys and counselors-at-law," the board will require proof that the college or university of which the applicant claims to be a graduate, maintains a satisfactory standard in respect to the course of studies completed by him. In case the college or university is registered with the Board of Regents of the State of New York as maintaining such standard, the applicant must submit to the board, with his diploma or certificate of graduation, the certificate of the said Board of Regents to that effect, which will be accepted by this board as *prima facie* evidence of the fact. Such certificate need not be filed in cases where the Board of Regents, by a general certificate, has certified to this board that the said college or university maintains a satisfactory college standard leading to the degree with which the applicant graduated. In all other cases the applicant must submit with his diploma or certificate of graduation satisfactory proof of the course of study completed by him and of the character of the college or university of which he claims to be a graduate.

RULE IV.

The papers filed by each applicant must be attached together, and there must be indorsed upon them the name of the applicant. The papers must be entitled, "In the matter of the application of ——— ——— for admission to the Bar." Each applicant must state the beginning and the end of each term spent in a law

school, as well as the beginning and the end of each vacation that he has had.

RULE V.

An applicant who has been admitted as an attorney in the highest court of original jurisdiction of another State or country, and who has remained therein as a practicing attorney for at least one year, may prove the latter fact by his own affidavit, and must present also a certificate from a judge of the court in which he was admitted or from a county judge in said State, certifying that the applicant had remained in said State or country as a practicing attorney for said period of one year, after he had been admitted as an attorney therein. The signature of the judge must be certified to by the clerk of the court or by the county clerk under the seal of the court.

RULE VI.

The board will divide the subjects of examination in two groups, as follows: Group 1, pleading and practice and evidence; Group 2, substantive law. Each applicant will be required to obtain not only the requisite standard on his entire paper, but also in group 1 to entitle him to a certificate from the board. If he obtains the required standard on his entire paper but fails to obtain the same in group 1, he will receive a pass card for group 2 and will not be required to be re-examined therein. He will be re-examined in group 1 at any subsequent examination for which he gives notice as required by these rules.

WILLIAM P. GOODELLE,
President.

FRANK SULLIVAN SMITH,
FRANKLIN M. DANAHER,
Secretary and Treasurer State Board of Law Examiners.

Note.—Applicants should file their papers at the earliest possible moment; amendable defects may be discovered, which can be corrected if attended to promptly.

LOCAL RULES.

ALBANY COUNTY — SUPREME COURT.

Rule Adopted November Term, 1874.

Attorneys filing notes of issue are required to designate therein whether the cause is a cause for argument or trial, and the clerk of the court, in making up the calendar, is required to designate the same therein, and unless the notes state which are for argument and which for trial, the clerk will not enter the cause in the calendar.

Notes of issue not filed twelve days (exclusive of Sundays) previous to the sitting of the court, will not be placed in the calendar. The clerk's trial fee will invariably be charged to the party bringing on the suit.

Rules for Trial Terms Adopted by Albany Bar March 4, 1880, and Revised by Same December 15, 1897, and April 1, 1901.

RULE I.

On the first day of the Trial Term, after the grand and trial jurors shall have been sworn, and other preliminary business dispatched, the justice presiding shall call the preferred and general calendar of causes and mark the same in such manner as to the court may seem just and proper. No cause shall be peremptorily called for trial for the first day of the term, but the presiding justice shall make up a day calendar for the second day composed of the first six causes that shall be ready for trial in their order. Any cause in which both sides shall be ready for trial may be tried, with the consent of the presiding justice, on the first day of any Trial Term, irrespective of its place upon the calendar, except that if two such cases be ready, that case with the earlier date of issue shall have precedence. If the trial of any such case

begun upon the first day of the term shall not be completed upon that day, the day calendar prepared for the second day shall not be taken up until final disposition is made of such case so begun.

RULE II.

The Trial Term shall be convened on the first day thereof at 11 o'clock a. m.

RULE III.

Upon the entrance of the presiding justice, all persons in the courtroom shall arise and remain standing until he is seated.

RULE IV.

It shall be the duty of the clerk daily, immediately after the opening of court, to call the roll of all sheriff's officers assigned to attend court, and keep a record of the attendance or absence of all such officers.

RULE V.

It shall be the duty of the sheriff, under sheriff, or a deputy sheriff especially appointed for that purpose, to be present during all the sessions of the court, to direct all officers under him, and to see that they are properly posted for duty and remain at their posts, and execute all orders of the court. Each officer shall wear a badge in plain sight and shall occupy during the entire session of the court, unless otherwise assigned for duty, the post assigned him by the sheriff.

RULE VI.

Any officer absent from his post, without permission from the court or the chief officer having the direction of sub-officers, shall be discharged for the term.

RULE VII.

It shall be the duty of the court officers to exclude all persons from the bar of the court who are not either members of the bar, clerks in law offices, students at law, newspaper reporters, or parties in interest in a cause on actual trial; but clerks and students must not occupy seats within the bar to the exclusion of attorneys and counsel. This rule must be observed at all times, without exception.

RULE VIII.

It shall be the duty of the court officers to see that every one in court is seated and to reserve the seats assigned to jurors, reporters and witnesses exclusively for them.

RULE IX.

It shall be the duty of one of the court officers (to be specially designated by the court) to look after and regulate the heating and ventilation of the court-room; and such officer shall not be relieved from such special duty without the order of the court.

RULE X.

Causes on the general calendar marked for trial, if not responded to when called in the making up of the day calendar, shall be passed; when reserved, generally, they shall not be placed on the day calendar for trial except upon notice of twenty-four hours in writing, and shall then be put upon the day calendar, at such place as the court shall direct.

RULE XI.

A cause upon the day calendar when reached must be tried or go to the foot of the general calendar for the term, unless cause be shown for a different disposition.

RULE XII.

At the opening of the court on each day the day calendar shall be called through. Upon such call any cause not responded to by either party shall be passed for the term, unless the case has been specially marked by the court on the day calendar as one to be retained thereon. If, on such call, a cause be responded to by the plaintiff only, he may take judgment in default of the defendant. If, upon such call, a cause be responded to by the defendant only, he may take a dismissal.

RULE XIII.

At 12:30 p. m. on each day, except the first day of the term, the day calendar for the succeeding court day shall be made, to consist of not more than six causes. The calendar shall consist of all the causes in the order in which they stand on the day

calendar not disposed of, and after them, of such causes as shall be added, taken in the order in which they stand on the general calendar.

RULE XIV.

In actions on contract, where the trial will not probably occupy more than one hour, either party may apply on the first day of the term, on a notice of four days, and on affidavits served, to set down the issue as a short cause, and the same may be so ordered in the discretion of the court.

RULE XV.

Short causes shall be called on Friday of each week. If the trial shall occupy more than one hour, it may be suspended in the discretion of the court, and the cause placed at the foot of the general calendar.

RULE XVI.

The justice holding the May Trial Term, 1906, and each January and May Term thereafter, will make an order at the opening of the term directing the clerk to mail to each attorney whose name appears as attorney in a cause on the calendar, which has been at issue for more than two years, an order to show cause, returnable at the opening of the court, on the second Monday of the term, why such cause should not be stricken from the calendar, and such justice shall on that day call the calendar and strike therefrom all such causes where no reason is shown for their continuance thereon.

ALLEGANY COUNTY.

Rules of the Supreme Court, Eighth Judicial District.

The following rules are hereby established for the Supreme Court in Allegany, Cattaraugus, Chautauqua, Genesee, Niagara, Orleans and Wyoming counties:

RULE I.

Order of Business.

At the opening of the term, the order of business, unless otherwise directed by the presiding justice, shall be:

1. Impaneling and charging the grand jury.

2. Impaneling the trial jury.
3. *Ex parte* motions.
4. Contested motions.
5. General call of calendar.
6. Trial of jury causes.
7. Trial of equity causes.

RULE II.

General Call of Calendar.

A general call of the calendar shall be made by the presiding justice on the first day of the term.

Causes shall be marked "over the term" under the following circumstances, viz.:

1. Where a written stipulation to that effect is filed with the clerk.
2. Upon oral stipulation of counsel in open court when the cause is reached on the call.
3. When neither side moves the case when reached on the call.
4. The justice may so order for good cause shown.

Causes may be "reserved" for a future day under these circumstances, viz.:

1. Upon written stipulation to that effect filed with the clerk.
2. Upon oral stipulation of counsel in open court when the cause is reached on the call.
3. Upon order of the justice for good cause shown.

Causes reserved for a future day shall obtain no preference over earlier issues.

All reservations are made subject to the adjournment of the term at an earlier date for lack of business, or other reason.

RULE III.

First Day Calendar.

The day calendar for the first day of the term shall consist of not more than ten jury causes, to be selected from causes where the note of issue filed contains this indorsement in substance:

"To the Clerk: Take notice that I shall be prepared and ready to try the within-entitled cause upon the first day of the term, or as soon thereafter as counsel can be heard."

Such selection shall be made to the clerk as follows, to wit:

(1) He shall select ten causes in the order of their date of issue where the attorneys upon both sides shall have duly filed notes of issue indorsed as above, and

(2) If there not be ten of such causes, the clerk shall complete the number of ten, if possible, by selecting in like manner from causes wherein one side shall duly file a note of issue indorsed as above. Such causes so selected for the first day calendar shall have preference over all other causes on the general calendar, so long as it remains on said day calendar.

No reservation or delay of any of said causes shall be allowed except for reasons occurring or coming to the knowledge of the attorney seeking the delay subsequent to the filing of the note of issue by him.

Eight days before the opening of the term the clerk shall mail the attorneys of record in the causes on such day calendar a copy of said day calendar.

Upon the general call of the calendar on the first day of the term the presiding justice may add to the day calendar for that day such causes as shall then appear ready for trial.

RULE IV.

Subsequent Day Calendars.

At 2 o'clock p. m. of each day after the first day of the term the clerk shall make a day calendar of eight causes for the next day, which shall consist of the cases then on the day calendar and additional causes taken in regular order from the general calendar, but no cause "reserved" for a future day shall be placed on the day calendar until the day for which it is reserved. No motion to place a cause on such day calendar shall be necessary.

RULE V.

Trial of Causes on Day Calendar.

Causes on the day calendar shall be tried when reached unless it appears to the satisfaction of the presiding justice that something has happened since the case was placed on the day calendar which prevents either party from proceeding with the trial, in which event the justice may hold the case on the day calendar, restore it

to the general calendar and reserve it for a future day, or put it over the term.

If, however, when a cause is reached on the day calendar, neither party is ready for trial, and no satisfactory reason is given for the failure, the case shall be passed and shall be placed on calendars for subsequent terms as of the date when passed.

RULE VI.

Passing of Causes.

No cause shall be "passed" except as provided in Rule V.

RULE VII.

Posting Day Calendars.

The clerk shall post the day calendar for each day in a conspicuous place in the court room. In Cattaraugus county the clerk shall post the day calendar for each day in the post-office at Salamanca, and in the post-office at Olean. In Chautauqua county the clerk shall post the day calendar for each day in the post-office at Jamestown, and in the post-office at Dunkirk. In Niagara county the clerk shall post the day calendar of each day in the post-office at Niagara Falls, and shall telegraph or telephone each day calendar to the Erie county clerk at Buffalo, to the Buffalo Express and to the Buffalo Courier.

RULE VIII.

Printing Calendars.

When a term is held solely for the trial of equity causes, such causes only shall be placed on the calendar. Otherwise both jury and equity causes shall appear on the calendar.

RULE IX.

Naturalization.

All applications of aliens to become citizens of the United States shall be heard and final action had thereon on the first day of the term at 2 o'clock p. m., and upon such other day or days in the term as shall be designated by the presiding justice and at such terms as may be specially designated for hearing applications for the naturalization of aliens in any county.

These rules shall be printed in the calendar of each term, and all former rules are hereby abrogated.

Miscellaneous Rules.

Rule XX.— It shall be the duty of attorney by whom the copy pleadings shall be furnished for the use of the court on trial, plainly to designate on each pleading the part or parts thereof claimed to be admitted or controverted by the succeeding pleading.

Rule XXXVI.— Every cause placed on the calendar of a General Term, Circuit or Special Term, for the trial of equity cases, shall be moved for argument or trial when reached in its order and shall not be reserved or put over, except by consent of the court; and if passed without being so reserved or put over it shall be entered on all subsequent calendars as [of] the date when passed; and no term fee shall be taxed therein for any subsequent term.

The clerk is directed to enter in his minutes the title of every case passed, and to keep in his office a list of passed causes, and whenever a passed cause is placed upon the calendar, the word "passed," followed by the date when passed shall be entered under the date of issue.

If two or more causes are passed upon the same date the right of priority as between them on subsequent calendars, shall be determined by the date of issue.

Should the day appointed for opening any court fall upon any public holiday, the court so appointed will be opened at the same hour on the next succeeding day.

BROOME COUNTY — SUPREME COURT.

Special Terms for hearing of *ex parte* applications and motions on consent will be held at Supreme Court Chambers at Binghamton, Oneonta, Canastota and Elmira on Saturday of every week, when the resident justice is not otherwise engaged, except in July and August.

No motions will be heard at Special Terms held with the Trial Terms except in cases triable in the county where the Special Term is held, or triable in an adjoining county not within the dis-

trict; or upon order to show cause granted by one of the justices of the Supreme Court residing in the sixth judicial district.

The calendars for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury. Notes of issue filed shall state whether the action be triable with or without a jury. Those cases triable with a jury shall be first placed upon the calendar, and those triable without a jury shall follow. The call of the calendar in all counties will be governed by the day calendar rules, which follow.

Day Calendar Rules.

RULE I.

The first ten causes upon the calendar, in addition to such causes as shall be moved to the head of the calendar as preferred causes, shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of causes from those not disposed of on the day calendar, and cases from the general calendar in which a request to place upon the day calendar, stating the number of the cause upon the general calendar shall be filed with the clerk before 4 o'clock p. m. the previous day, by an attorney who has noticed the cause for trial and such causes shall be placed on the day calendar according to their priority upon the general calendar.

RULE II.

Causes upon the day calendar including those upon the first day calendar, not disposed of shall remain upon and retain their priority on the day calendar until finally disposed of.

RULE III.

The clerk shall make up the day calendar at 4 o'clock each day.

RULE IV.

Causes placed on the calendar must be disposed of when reached and will not be reserved except for special reasons arising after they have been placed upon such day calendar and satisfactory to the court. And after a case has been put upon the day calendar no motion will be entertained to put the case over the term except for causes arising after the cause is placed upon such day calendar.

RULE V.

All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar unless reserved by the court, or as hereinafter provided.

RULE VI.

Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar and only upon notice filed with the clerk before 4 o'clock of the preceding day, by a party who has noticed said cause for trial.

RULE VII.

The number of causes for the day calendar shall always be under the direction of the presiding justice, and nothing in this order contained is to interfere with the moving of preferred causes, or the taking of inquests.

BROOME COUNTY — COUNTY COURT.

RULE I.

In all cases noticed and upon the calendar for argument, each party at the time of the argument, or submission of the case, shall deliver to the court a copy of his points, in writing, containing a reference to the authorities cited by him, and accompanied by a concise statement of the facts of the case which he deems established.

RULE II.

Causes upon the calendar for argument at jury terms of the court will be heard at any time when both parties are ready, and the court is not otherwise engaged; but no default will be allowed to be taken in such cases until after the petit jury has been discharged.

RULE III.

At any time after the justice's return on appeal has been made and filed in the office of the county clerk, either party may give notice in writing of such filing to the adverse party, and any application to the court for an amended or further return shall be made within thirty days thereafter. In case no notice of the filing of the justice's return in the clerk's office shall be given by either party to the adverse party, the application to the court for an amended or further return shall be made within ninety days after the filing of the return. This rule shall take effect ten days after its date, and in respect to appeals in which the returns have already been filed shall have the same effect as though such returns were filed this day.

CATTARAUGUS COUNTY — SUPREME COURT.

[For Supreme Court Rules applicable to Cattaraugus county, see under Allegany county.]

Miscellaneous Rules.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court. Unless this rule is observed causes cannot be entered on the calendar.

The trial fee of one dollar is payable by the party bringing the same on, and must be paid to the clerk when the case is called and before the proceeding to trial.

CAYUGA COUNTY.

Order Establishing Day Calendar.

At a special term of the Supreme Court, held at the court house in the city of Auburn, N. Y., on the 15th day of December, 1906.

Present — Hon. Adelbert P. Rich, justice presiding.

In the matter of a rule to provide for a day calendar for trial terms to be held in and for the county of Cayuga.

Ordered, That hereafter and until otherwise directed the day calendar of the first day of the term shall consist of ten causes, to be selected as follows:

Attorneys may indorse upon their notes of issue, in substance, as follows:

"To the clerk: Take notice, that I (or we) shall be prepared and ready to move the within-entitled cause upon the first day of the term, or as soon thereafter as counsel can be heard.

"....."

Every subsequent day calendar shall consist of ten causes placed thereon in the order of their priority on the general calendar, and shall be made up from causes a memorandum of which shall be left with the clerk by 2:30 p. m. of the preceding day and not disposed of, shall retain their priority on the day calendar until finally disposed of.

Causes placed on the day calendar must be disposed of when reached and will not be reserved except for special reasons satisfactory to the court.

All causes not placed on the day calendar after the first day will be considered as passed, down to the last cause, which will be regularly placed upon the day calendar, and shall be placed on subsequent day calendars as of the date of issue when so passed, unless reserved by the court or postponed, as hereinafter provided.

Attorneys may arrange to postpone causes to a day certain, and then put them on the day calendar, by a day's prior notice to the clerk, but not to take precedence of other causes already appearing on the day calendar, or such as shall be duly notified to the clerk of earlier issues.

The number of causes for the day calendar shall always be under the direction of the presiding justice.

And it is further ordered, That the clerk hereafter, at least five days prior to the commencement of each Trial Term, make a list of the ten causes constituting the day calendar for the first day of the term, and mail a written or printed copy thereof to each member of the bar of said county.

And it is further ordered, That no equity or Special Term causes shall be placed on the Trial Term Calendar, or tried at a Trial Term, except by direction of the court.

And it is further ordered, That the clerk cause a copy of this order to be printed in all the Trial Term calendars hereafter prepared for said county.

Notice to Attorneys.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court. Unless this rule is observed, causes cannot be entered on the calendar.

CHAUTAUQUA COUNTY — SUPREME COURT.

[For Supreme Court Rules applicable to Chautauqua county, see under Allegany county.]

Miscellaneous Rules.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court. Unless this rule is observed causes cannot be entered on the calendar.

The calendar fees must accompany the notes of issue filed with the county clerk, without which notes of issue liable therefor cannot be placed upon the calendar.

The trial fee of one dollar is payable by the party bringing the same on, and must be paid to the clerk when the case is called and before proceeding to trial.

CHEMUNG COUNTY — SUPREME COURT.

Special terms for the hearing of *ex parte* motions and motions on consent will be held at Supreme Court chambers at Binghamton, Norwich and Oneida, on Saturday of every week, when the resident justice is not otherwise engaged.

No motions will be heard at Special Terms held with the Trial Terms, except in cases triable in the county where the Special Term is held, or triable in an adjoining county not within the district; or upon order to show cause granted by one of the justices of the Supreme Court residing in the sixth judicial district.

Day Calendar Rules.

In the Matter of Day Calendar.

Ordered that a day calendar be made up by the clerk, for Circuit Court, in this county, in the manner following:

First: The first ten causes upon the calendar, in addition to such causes as shall be moved to the head of the calendar as preferred causes, shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of causes from those not disposed of on the day calendar, and cases from the general calendar in which a request to place upon the day calendar, stating the number of the causes upon the general calendar shall be filed with the clerk before 4 o'clock p. m., the previous day, by an attorney who has noticed the cause for trial, and such causes shall be placed on the day calendar according to their priority upon the general calendar.

Second: Causes upon the day calendar, including those upon the first day calendar, not disposed of shall remain upon and retain their priority on the day calendar until finally disposed of.

Third: The clerk shall make up the day calendar at 4 o'clock each day.

Fourth: Causes placed on the calendar must be disposed of when reached, and will not be reserved except for special reasons arising after they have been placed upon such day calendar and satisfactory to the court. And after a case has been put upon the day calendar no motion will be entertained to put the case over the term except for causes arising after the cause is placed upon such day calendar.

Fifth: All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar unless reserved by the court, or as hereinafter provided.

Sixth: Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar and only upon notice filed with the clerk before 4 o'clock of the preceding day, by a party who has noticed said cause for trial.

Seventh: The number of causes for the day calendar shall always be under the direction of the presiding justice, and nothing in this order contained is to interfere with the moving of preferred causes, or the taking of inquests.

Ordered, That for the first day of each term of Supreme Court, held in and for this county, until otherwise ordered, the day calendar shall include the first fifteen causes upon the general calendar; and the day calendar for each subsequent day shall consist of fifteen causes placed thereon as provided in the order by Justice Walter Lloyd Smith, relating to day calendars (as above set forth).

CHENANGO COUNTY — SUPREME COURT.

RULE XX.

It shall be the duty of the attorney, by whom the copy pleading shall be furnished for the use of the court on trial to plainly designate, on each pleading, the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings.

Special Terms for the hearing of *ex parte* applications and motions on consent will be held at Supreme Court chambers at Binghamton, Walton, Canastota and Elmira, on Saturday of each week, when the resident justice is not otherwise engaged, except in July and August.

No motions will be heard at Special Terms held with the Trial Terms except in cases triable in the county where the Special Term is held, or triable in an adjoining county not within the district; or upon order to show cause granted by one of the justices of the Supreme Court residing in the Sixth Judicial District.

The calendars for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury. Notes of issue filed shall state whether the action be triable with or without a jury. Those cases triable with a jury shall be first placed upon the calendar, and those triable without a jury shall follow. The call of the calendar in all counties will be governed by the day calendar rules.

Day Calendar Rules.

First.— The first ten causes upon the calendar, in addition to such causes as shall be moved to the head of the calendar as preferred causes, shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of causes from those not disposed of on the day calendar, and cases from the general calendar in which a request to place upon the day calendar, stating the number of the cause upon the general calendar, shall be filed with the clerk before 4 o'clock p. m. the previous day, by an attorney who has noticed the cause for trial; and such causes shall be placed on the day calendar according to their priority upon the general calendar.

Second.— Causes upon the day calendar, including those upon the first day calendar not disposed of, shall remain upon and retain their priority on the day calendar until finally disposed of.

Third.— The clerk shall make up the day calendar at 4 o'clock each day.

Fourth.— Causes placed on the calendar must be disposed of when reached, and will not be reserved except for special reasons arising after they have been placed upon such day calendar, and satisfactory to the court. And after a case has been put upon the day calendar no motion will be entertained to put the case over the term, except for causes arising after the cause is placed upon such day calendar.

Fifth.— All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar unless reserved by the court, or as hereinafter provided.

Sixth.— Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar and only upon notice filed with the clerk before 4 o'clock of the preceding day, by a party who has noticed said cause for trial.

Seventh.— The number of causes for the day calendar shall always be under the direction of the presiding justice, and nothing in this order contained is to interfere with the moving of preferred causes, or the taking of inquests.

CORTLAND COUNTY — SUPREME COURT.

RULE XX.

It shall be the duty of the attorney, by whom the copy pleadings shall be furnished for the use of the court on a trial, to plainly designate, on each pleading, the part or parts thereof claimed to be admitted or controverted by the succeeding pleading.

EXTRACT FROM RULE XXXIX.

Every cause placed on the calendar of a General Term, Circuit or Special Term for the trial of equity cases, shall be moved for argument or trial when reached in its order, and shall not be reserved or put over except by consent of the court; and if passed without being so reserved or put over, it shall be entered on all subsequent calendars as of the date when passed, and no term fee shall be taxed therein for any subsequent term.

The clerk is directed to enter in his minutes the title of every cause passed, the date when passed, and to keep in his office a list of passed causes; and whenever a passed cause is placed upon a calendar the word "Passed," followed by the date when passed, shall be entered under the date of issue.

If two or more causes are passed upon the same day, the right to priority as between them on subsequent calendars shall be determined by the date of issue.

Special Terms, for the hearing of *ex parte* applications and motions on consent, will be held at Supreme Court chambers at Binghamton, Cortland, Canastota and Elmira on Saturday of every week, when the resident justice is not otherwise engaged, except in July and August.

No motions will be heard at Special Terms held with the Trial Terms, except in cases triable in the county where the Special Term is held, or triable in an adjoining county not within the district; or upon order to show cause, granted by one of the justices of the Supreme Court, residing in the Sixth Judicial District.

The calendars for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury. Notes

of issue filed shall state whether the action be triable with or without a jury. Those cases triable with a jury shall be first placed upon the calendar, and those triable without a jury shall follow. The call of the calendar will be governed by the day calendar rules, which follow.

Day Calendar Rules.

First. The first ten causes upon the calendar, in addition to such causes as shall be moved to the head of the calendar as preferred causes, shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of causes from those not disposed of on the day calendar; and cases from the general calendar in which a request to place upon the day calendar, stating the number of the cause upon the general calendar, shall be filed with the clerk before 4 o'clock p. m. the previous day, by an attorney who has noticed the cause for trial, and such causes shall be placed on the day calendar according to their priority upon the general calendar.

Second. Causes upon the day calendar (including those upon the first day calendar) not disposed of, shall remain upon, and retain their priority on, the day calendar until finally disposed of.

Third. The clerk shall make up the day calendar at 4 o'clock each day.

Fourth. Causes placed on the calendar must be disposed of when reached, and will not be reserved except for special reasons arising after they have been placed upon such day calendar, and satisfactory to the court. And after a case has been put upon the day calendar, no motion will be entertained to put the case over the term, except for causes arising after the cause is placed upon such day calendar.

Fifth. All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar unless reserved by the court, or as hereinafter provided.

Sixth. Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application, made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar and only upon

notice, filed with the clerk before 4 o'clock of the preceding day, by a party who has noticed said cause for trial.

Seventh. The number of causes for the day calendar shall always be under the direction of the presiding justice, and nothing in this order contained is to interfere with the moving of preferred causes or the taking or inquests.

DELAWARE COUNTY — SUPREME COURT.

RULE XX.

It shall be the duty of the attorney, by whom the copy pleadings shall be furnished for the use of the court on a trial, to plainly designate, on each pleading, the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings.

EXTRACT FROM RULE XXXIX.

Every cause placed on the calendar of a General Term, Circuit, or Special Term for the trial of equity cases, shall be moved for argument or trial when reached in its order, and shall not be reserved, or put over, except by consent of the court; and, if passed without being so reserved, or put over, it shall be entered on all subsequent calendars as of the date when passed, and no term fee shall be taxed therein for any subsequent term.

The clerk is directed to enter in his minutes the title of every cause passed, the date when passed, and to keep in his office a list of passed causes; and whenever a passed cause is placed upon a calendar, the word "Passed," followed by the date when passed, shall be entered under the date of issue.

If two or more causes are passed upon the same day, the right to priority as between them on subsequent calendars shall be determined by the date of issue.

The clerk is directed to print in every calendar — Rule XX — the foregoing extract from Rule XXXIX — and the foregoing rule for carrying into effect Rule XXXIX, which is this 22d day of March, 1881, adopted, and ordered entered in the minutes of the court.

Day Calendar Rules.

Special Terms for the hearing of *ex parte* applications and motions on consent will be held at Supreme Court chambers at Binghamton, Oneonta, Canastota and Elmira on Saturday of every week when the resident justice is not otherwise engaged, except July and August.

No motion will be heard at Special Terms held with the Trial Terms except in cases triable in the county where the Special Term is held or triable in an adjoining county not within the district; or upon order to show cause granted by one of the justices of the Supreme Court residing in the Sixth Judicial District.

The calendars for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury.

Notes of issue filed shall state whether the action be triable with or without a jury. Those cases triable with a jury shall be first placed upon the calendar and those triable without a jury shall follow.

The call of the calendar will be governed by the day calendar rules, which follow:

First. The first ten causes upon the calendar shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of ten causes from those not disposed of on the day calendar, and causes from the general calendar in which a request to place upon the day calendar, stating the number of the cause upon the general calendar, shall be filed with the clerk before 4 o'clock p. m., the previous day, by an attorney who has noticed the cause for trial, and such causes shall be placed on the day calendar according to their priority upon the general calendar.

Second. Causes upon the day calendar, including those upon the first day calendar not disposed of, shall remain upon and retain their priority on the day calendar until finally disposed of.

Third. The clerk shall make up the day calendar at 4 o'clock each day.

Fourth. Causes placed on the calendar must be disposed of when reached and will not be reserved except for special reasons arising after they have been placed upon such day calendar and satisfactory to the court. And after a case has been put upon the

day calendar no motion will be entertained to put the cause over the term except for causes arising after the cause is placed upon such day calendar.

Fifth. All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar unless reserved by the court, or as hereinafter provided.

Sixth. Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar and only upon notice filed with the clerk before 4 o'clock of the preceding day, by a party who has noticed said cause for trial.

Seventh. The number of causes for the day calendar shall always be under the direction of the presiding justice, and nothing in this order contained is to interfere with the taking of inquests.

ERIE COUNTY.

Rules of the Supreme Court, Eighth Judicial District.

The following rules are hereby established for the Supreme Court in Erie county, to take effect on the first day of January, 1909, excepting the provisions thereof with respect to the day calendar for the first day of the first term to be held in 1909, which shall take effect at the time therein prescribed for preparing such calendars and thereupon all former rules shall be deemed abrogated.

Trial Terms for Jury Cases.

RULE I.

Terms.

There shall be three terms per annum for the trial of civil causes, and each term shall be held in three parts which shall be known as Parts I, II and III. These terms shall commence on the first Monday of January and April and first Tuesday after the first Monday of September, respectively, and the first and second terms shall continue for twelve weeks each and the third for sixteen weeks.

There shall be five terms per annum for the trial of criminal causes to be known as Part IV. These terms shall commence on the first Monday of February, April, June, and November, and on the first Tuesday after the first Monday of September, respectively, and shall continue four weeks if the business warrant.

RULE II.

Grand Jury.

A grand jury shall be drawn for each term for the trial of criminal causes as herein designated.

RULE III.

Notes of Issue.

Notes of issue must specify the particular nature of and the object of the action as required by section 977 of the Code of Civil Procedure, and the clerk shall not file a note of issue unless it complies with this provision.

RULE IV.

Calendars of Civil Causes.

There shall be one general calendar and one trial calendar.

The general calendar shall remain on file in the office of the county clerk and shall not be printed or used excepting for the purpose of correcting the trial calendar until the trial calendar is exhausted. It shall consist of all civil causes, triable by jury, now undisposed of in this county, which have been duly noticed for trial and in which notes of issue have been duly filed and such additional causes as may from time to time be regularly noticed for trial and in which notes of issue shall be duly filed. Causes shall be placed upon such calendar according to the date of issue, except that when at any term a case is passed, or sent to the foot of the calendar, the date when the same shall be so passed, or sent to the foot of the calendar, shall thereafter be regarded as the date of issue of such cause in determining its position on any calendar.

There shall be a trial calendar for each term which shall consist of —

(1) All causes upon the general calendar which have not been upon the trial calendar more than one year previous to the end

of the last term; provided, however, that a cause properly on the trial calendar shall remain thereon until the end of the year unless tried or otherwise disposed of by order of the court.

(2) All other causes upon the general calendar in which either party shall file a notice with the clerk at least twelve days before the commencement of the term that the cause will be moved for trial when reached.

Causes shall appear on the trial calendar according to the date of issue except as herein otherwise provided. Causes on the general calendar but not on the trial calendar may be moved for trial after all causes on the trial calendar shall have been disposed of, but not before.

RULE V.

Printing Calendar.

The clerk shall prepare and cause to be printed for each term a sufficient number of copies of the trial calendar for the accommodation of the court and bar.

RULE VI.

Division of Calendar.

The calendar as thus printed shall be deemed divided and assigned to the respective parts as follows: The first hundred and each successive third hundred causes thereafter to Part I, the second hundred and each successive third hundred causes thereafter to Part II, and the third hundred and each successive third hundred causes thereafter to Part III.

In correcting the calendar number of a cause, or in giving a preferred or short cause a new position on the calendar, it shall remain in the part to which it has been assigned by Rule VI, and in rearranging its position or order reference shall be had only to those causes which are assigned to the same part with it.

RULE VII.

Day Calendar.

There shall be a day calendar which shall consist of thirty-two causes for each part, the first eight of which, as the calendar stands at the close of court on each day, exclusive of the case on trial, shall be known as ready causes and shall be subject to be

called for trial at any time thereafter when reached in their order and when so called no excuse for delay or postponement which was known or could have been ascertained in the exercise of due diligence before the cause became one of the first eight on the day calendar shall be accepted; but if such an excuse be presented by either party, the cause may be further held, restored to the trial calendar or marked over the term on such terms as may be imposed by the court.

If a cause be not moved for trial when reached on the day calendar, it shall be passed and ordered to the foot of the trial calendar.

The remaining twenty-four causes on the day calendar shall be known as *held* causes and shall be deemed held until they respectively fall within the first eight at the close of any day, as herein provided.

After a cause has been moved onto the day calendar, either party may, at any time before it becomes a ready cause, apply to the court by consent or on such notice as the court may prescribe, and on good cause shown arising after it was so moved, to have it further held, restored to the trial calendar or put over the term, and a party who did not move it onto the day calendar may, within the same time, likewise apply, on good cause shown existing at the time it was so moved, but at that time unknown to the party making the application or arising after, to have it further held, restored to the trial calendar or put over the term, and the court may make such order thereon and on such terms as justice requires.

In making up the day calendar, causes shall not be called separately, excepting as herein otherwise provided, but the justice presiding on the first call will invite the moving of preferred causes and if a sufficient number of preferred causes for a day calendar be not obtained, then the moving of short causes will be invited, and if a sufficient day calendar shall not be thus obtained the justice presiding will inquire whether any of the first fifty causes on his part of the trial calendar are moved, and so on by fifties until a sufficient day calendar be obtained. Each succeeding calendar call shall be resumed from the highest number reached at the preceding call, and no cause bearing a lower number than the highest number reached at the preceding call shall be again called until

the entire calendar in that part is exhausted unless it shall have been reserved until a later day; but a cause bearing a lower number and reserved to a date later than the preceding call may be moved on the first call on or after the date to which it has been reserved. After an opportunity to move every cause onto the day calendar shall have been thus afforded, the same course and order shall be repeated and observed on subsequent calls of the calendar, excepting that preferred and short causes shall lose their right to a preference and shall have only the right to be moved according to their respective calendar numbers unless moved onto the day calendar at the first opportunity or duly held or reserved until a later day.

If at any time a sufficient number of causes for a day calendar be not obtained by following the course herein prescribed the justice presiding may in his discretion give notice that any subsequent call shall be made by the calendar numbers, and, if so, then every cause not moved when called shall be passed and ordered to the foot of the calendar unless good cause be shown for not moving it.

RULE VIII.

Correcting Calendar.

On the Thursday preceding the opening of each term, at 2 o'clock p. m., applications for the correction of the calendar shall be made to the justice presiding at Special Term, before the commencement of the calendar call.

RULE IX.

Preferences.

Motions for preferences under any provision of law must be made immediately after the calendar shall have been corrected.

RULE X.

Definition of "Over."

A cause shall be marked "over," which shall mean over the term, only where a written stipulation to that effect is filed with the clerk or the court so orders at any time on consent or for good cause shown. A cause may be reserved for a later day in the term upon written stipulation to that effect filed with the clerk or

by order of the court at any time on consent or for good cause shown, and shall be marked accordingly; but a cause shall not be so reserved more than twice.

RULE XI.

First Day Calendar.

On the Thursday preceding the opening of each term, at 2 o'clock p. m., the justice presiding in Special Term shall prepare the first day calendar for each part as provided in Rule VII. Causes remaining untried on the last day calendar of the preceding term shall have a preference over all other causes in making up the first day calendar.

RULE XII.

Subsequent Day Calendars.

Thereafter from time to time whenever the number of causes on the day calendar of any part, exclusive of the cause on trial, shall be sixteen or less, causes shall be added to complete the day calendar. Such additions shall be made in Part I at 10 a. m., in Part II at 12 m., and in Part III at 2 p. m.

RULE XIII.

Posting Calendar and Notices of Calendar Calls.

The clerk in each part shall post the day calendar for each day and shall also post notice of the time when additions are to be made thereto and shall specify therein the highest number reached on the last call of the calendar.

RULE XIV.

Short Causes.

A short cause is defined as one which may be fully and fairly tried within two hours. Such causes are entitled to a preference in trial next after the causes entitled to a preference under the Code. Notice of intention to move a cause as a short cause shall be served in writing on the adverse party at least fourteen days before the commencement of the term, or such notice of intention may be indorsed on the notice of trial served. At the time the first day calendars are made up a party who has duly served such

notice of intention may move the cause as a short cause. Such motion must be based upon the affidavit of the moving party, which shall state that the notice of intention was duly served, the date of the joinder of issue, the nature of the issue, and the facts and circumstances which render it probable that the cause can be tried in two hours. Annexed to such affidavit must be a copy of the pleadings. The affidavit read in opposition to such motion shall set out the facts and circumstances which render it unlikely that the case can be tried in two hours. If the motion be granted, the case shall be entitled to the preference above provided. If the motion be denied, it cannot be renewed without leave of the court.

A cause can be moved as a short cause only at the first term for which it is noticed for trial. A cause once designated as a short cause shall remain such until disposed of or until it loses its preference as provided in Rule VII.

RULE XV.

Transfer of Causes.

A justice presiding in either part may, upon request of the justice presiding in another part, transfer to such other part one or more causes for trial, and shall send to another part any cause in which he is disqualified to sit.

RULE XVI.

If in any year the day herein prescribed for opening court shall be a legal holiday, the court shall open on the next day thereafter.

TRIAL TERMS WITHOUT A JURY—EQUITY.

RULE XVII.

General Calendar.

The general calendar shall consist of all cases triable by the court without a jury now undisposed of, and such cases as may from time to time be regularly noticed for trial and note of issue filed as required by section 977 of the Code, and shall be made up in the manner prescribed by Rule IV, and shall remain on file in the office of the county clerk, and shall not be printed.

RULE XVIII.

Trial Calendar.

The trial calendar for each term shall be made up in the same manner as is provided by Rule IV for jury terms, and all the provisions of said Rule IV shall apply to the making up of a trial calendar for terms held without a jury.

RULE XIX.

Trial Calendar — Printing.

The clerk shall prepare and cause to be printed the necessary number of copies of the trial calendar at least five days before the commencement of the term as provided in section 977 of the Code.

RULE XX.

First Day Calendar.

At 2 o'clock p. m. on Friday, immediately before the commencement of each term the justice holding the Special Term for the hearing of motions shall make up a day calendar of ten causes for the first day of the term. Motions for preference under any provision of law must be made before the call has begun. Causes shall be called in the order in which they appear on the trial calendar. The provision of Rule VII with reference to delay or postponement or failure to move a cause for trial when reached on day calendar, also the provision of Rule X, shall apply.

RULE XXI.

Subsequent Day Calendars.

After the commencement of the term day calendars shall be made up in the manner provided by the presiding justice, and the clerk shall post notice of such order, and shall also post the day calendar for each day.

RULE XXII.

Trial of Causes on Day Calendar.

All the provisions of Rule IX relating to the trial by jury causes shall apply to the trial of causes without a jury.

SPECIAL TERM FOR MOTIONS.

RULE XXIII.

When Held.

The Special Term for motions shall be held each day of the year except Saturdays and legal holidays and except during the month of August. The court may be adjourned to one or more days in August in the discretion of the justice holding such term in the month of July and *ex parte* business only shall be heard upon such adjourned days unless the justice presiding shall otherwise direct. Motions may be noticed for any day when said court sits.

If a justice for any reason fails to attend such Special Term on any day, all motions noticed for such day shall be deemed held until the next day at which a justice shall attend.

RULE XXIV.

Matters Heard.

At Special Term shall be heard all *ex parte* and litigated motions, all special proceedings where an issue of fact is not formally joined by pleadings, all arguments on demurrers, all appeals upon the law from the Municipal Court of Buffalo, and all other matters usually presented at Special Terms.

Arguments on demurrers and appeals upon the law from the Municipal Court of Buffalo will be heard on Wednesdays of each week, except during the month of August.

RULE XXV.

Entering and Certifying Orders.

Attorneys shall furnish the clerk of the Special Term at the time of the decision of any matter by such Special Term with a memorandum of the decision made, and the clerk shall not enter or certify any order unless and until his minutes justify such entry or certificate.

RULE XXVI.

Naturalization.

All applications of aliens to become citizens of the United States must be heard and final action had thereon at such Special Term at 10 o'clock a. m. on the first Wednesday of each month when said court is regularly in session, which days are hereby designated as stated days for such applications under Act of Congress, approved June 26, 1906.

If upon any stated day the calendar of such applications remains undisposed of, the justice presiding may continue the hearing on the following day or any other day of the court to which he shall adjourn the same. If the applicant fails to appear upon the call of the calendar, the application may be dismissed without prejudice to a renewal of the same.

RULE XXVII.

Application for Divorce.

First.— In all applications made in Erie county for judgment on default of the defendant, in actions for the annulment of a marriage, or the separation or divorce of the parties, the complaint, proof of service of the summons, and of defendant's default, shall be first submitted to the clerk of the special term for examination.

Second.— After the taking of testimony on the default of the defendant in any action for the annulment of a marriage, or for the divorce of the parties, the proposed findings and interlocutory judgment shall be submitted to the clerk of the court at Special Term.

Third.— It shall be the duty of such clerk to examine all papers so submitted, and to cause the same to be made correct in form and, when so made, to submit the same to the justice of this court having in charge the case to which such papers relate.

Fourth.— Applications for judgment on default of the defendant, in actions for the annulment of a marriage, or the separation or divorce of the parties, will be heard and proofs will be taken on Tuesdays only at 10 o'clock a. m., and 2 o'clock p. m., unless otherwise ordered by the justice presiding.

RULE XXVIII.

Chamber Business.

The justice holding Special Term for motions shall attend to all chamber business during his assignment to such Special Term.

Applications for chamber orders sent by mail will be addressed to the "Justice holding Special Term."

Miscellaneous.

RULE XXIX.

Criers.

The crier of each part of the court shall be in attendance promptly at the hour of opening and closing of the court, and shall make the required proclamations. He shall have the immediate supervision of the officers in attendance upon the court, and shall assign them to their respective duties. When the court shall adjourn or take a recess, it shall be his duty and the duty of all attendants and officers of the court to see that the public in attendance remain in their seats until the court and jury retire from the room. It shall also be his duty to designate one or more officers to attend upon the justice presiding when he enters the court room to open court. He shall report to the justice presiding all officers who are absent from duty, or who are guilty of any dereliction or fault, and shall at all times during the session of the court be in attendance upon the same, unless excused by the justice presiding.

RULE XXX.

Officers.

The sheriff shall provide not more than four officers for Part I, and not more than four officers for Part II, not more than three officers for Part III, and not more than six officers for Part IV, to attend the court, unless otherwise ordered by the justice holding the term.

These rules shall be printed in every trial calendar hereafter prepared by the clerk of this court.

Code and General Rules of Practice.

Attention of attorneys is especially directed to the following provisions of the Code and General Rules of Practice and to the special rules of this court.

Section 977. *Preparation of Calendar.*— The clerk must enter the cause upon the calendar according to the date of issue. The clerk must prepare the calendar and have the necessary copies ready for distribution at least five days before the commencement of the term. * * * In the county of Erie when a party has served a notice of trial and filed a note of issue for a term at which the case is not tried it is not necessary for him to serve a new notice of trial or file a new note of issue for a succeeding term; and the action must remain on the calendar until it is disposed of.

Section 789. *Preference of Certain Actions by the People.*— An action by the people to recover money or property of the State or of a public or governmental interest wrongfully obtained or converted, or to recover damages for such unlawful obtaining or converting, is entitled to a preference over all other business irrespective of its place on the calendar.

Section 791. *Preference Among Civil Actions.*— Civil causes are entitled to a preference among themselves in the following order, viz.:

1. An action brought by or against the People of the State or a State officer, or brought by the people in the relation of a party.

2. An action in which a board of officers exercising statutory powers for the protection of public health or public or private property is a party.

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5. An action in which an executor or administrator or testamentary trustee or an infant or trustee of an infant or a receiver, or the controller of the currency, or a trustee in bankruptcy, or general assignee for the benefit of creditors, or committee of a lunatic, or a creditor of a deceased insolvent debtor suing in behalf of all creditors is the sole plaintiff or sole defendant; an action for the construction of a will, or to determine the validity

of the probate of a will in which the administrator with the will annexed or the executor of the will is joined as plaintiff or defendant with other parties.

6. An action for dower when the plaintiff has no other sufficient means of support; an action for partition.

7. An action against a corporation or joint stock association issuing bank notes or other circulating medium or by or against a receiver of such corporation or association; an action in which a county or town is sole plaintiff or defendant.

8. An action against a corporation founded upon a note or other evidence of debt for the absolute payment of money; an action upon an undertaking giving an appeal to the court of Appeals.

9. An action against a sheriff in his official capacity, or an action by a sheriff or late sheriff to recover on bond or undertaking given to him in his official capacity.

10. A case entitled to preference by the General Rules of Practice or special order of the court.

11. An action for libel or slander.

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13. An action for absolute divorce in which temporary alimony has been granted.

Section 793. *Preference, How Attained.*— In the county of Erie party claiming preference must serve on opposite party, with his notice of trial, a notice that an application will be made to the court at the opening thereof or at such other time as shall be prescribed by the general or special rules of practice for leave to move the same as a preferred cause, and if the right to a preference depends on facts which do not appear in the pleadings the notice must be accompanied by affidavits showing such facts.

Code Sections and General Rules of Practice Relating to Trials.

Section 3301. *Clerk's Fees.*— The clerk is entitled to a fee of one dollar from the party bringing on an action for trial.

Section 3313. *Jurors' Trial Fee.*— A trial juror is entitled to a fee of twenty-five cents for each cause for which he is empanelled, to be paid by the party noticing the cause for trial; or

if it is noticed by more than one party, by the party which the court directs to pay it.

Section 980. *Dismissals and Inquests.*— Either party who has served the notice may bring the issue to trial and in the absence of the adverse party, unless the judge holding the term for good cause otherwise directs, may proceed with the cause and take a dismissal of the complaint, or a verdict, decision or judgment, as the case requires. An inquest for want of an affidavit of merits cannot be taken when the answer is verified.

Rule 29. *Opening of Counsel and Examination of Witnesses and Summing Up.*— In the trial of civil causes, unless the justice presiding or the referee shall otherwise direct, each party shall open his case before any evidence is introduced, and, except by special permission of the court, no other opening by either party shall thereafter be permitted.

On the trial of issues of fact, one counsel only on each side shall examine or cross-examine a witness, who shall not repeat the answer or answers of such witness at the time he shall be under examination. One counsel only on each side shall sum up the cause, and he shall not occupy more than one hour, and the testimony, if taken down in writing, shall be written by some person other than the examining counsel; but the judge who holds the court may otherwise order, or dispense with this requirement.

While addressing the court, examining witnesses or summing up, counsel shall stand.

Section 981. *Pleadings to be Furnished Court.*— When the issue is brought to trial by the plaintiff, he must furnish the court with copies of the summons and pleadings and of the offer, if any has been made. When the issue is brought to trial by the defendant and the plaintiff does not furnish these papers, they must be furnished by the defendant.

Rule 19. *Marking Pleadings.*— It shall be the duty of the attorney by whom the copy pleadings shall be furnished for the use of the court in a trial to plainly designate on each pleading the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings.

ERIE COUNTY — COUNTY COURT.

(Adopted January 20, 1904.)

RULE I.

In all actions brought in the County Court, as a court of original jurisdiction the general rules of practice adopted by the Supreme Court shall be followed as far as the same are applicable.

RULE II.

Terms of this court for the hearing of nonenumerated motions will be held at Room No. 21, at the City and County Hall, in the city of Buffalo, every morning commencing at 10 o'clock, excepting during a regular term of the court, when a jury is in attendance, and also excepting Saturdays, legal holidays and during the month of August. During a regular term of the court attended by a jury, nonenumerated motions will be heard each morning from 9:30 until 10 o'clock, and at the adjournment of the court for noon hour. Contested motions will be heard on Monday mornings only, except as may be otherwise directed by an order to show cause. Applications for *ex parte* orders will not be entertained during the trial of causes with a jury; such applications must be made before the jurors are called in the morning or at the time they are excused at noon; but may be made by delivering all papers to the clerk of the court in attendance, and the same will be considered during intermission and then handed to the clerk to be delivered to parties interested.

RULE III.

At 2 o'clock on the first day of each term of said court, the general calendar will be called for the purpose of fixing days when causes shall be placed during said term upon the day calendar, and at 2 o'clock on each day the clerk will make up from such causes a day calendar of ten causes for the next succeeding day.

RULE IV.

Cases not moved when called upon the general or day calendar may be dismissed upon the production and filing of proper proof for that purpose. If not dismissed, or reserved for a future day, such causes will be passed for the term.

RULE V.

Causes not moved or reserved upon the call of the general calendar, for three successive terms, will, be, by order of the court, stricken therefrom, to be restored to the calendar only on motion.

RULE VI.

When causes are placed upon the day calendar they will retain their places upon the same until they are tried or otherwise disposed of.

RULE VII.

A party who fails to file a note of issue in any cause with the county clerk will not be allowed to move such cause upon the day calendar or control its disposition upon the general calendar; but when such cause is placed on day calendar by party entitled so to do, the other party may have same control over the cause as if he had filed note of issue, providing he has filed the proper notice of trial. But in case he has failed to serve notice of trial, he can only appear and participate in the trial whenever it is moved for trial by the party who has served the proper notice.

ERIE COUNTY — SURROGATE'S COURT.

The attention of attorneys is called to the following rules, established to regulate the practice in this court, to take effect February 15, 1897:

RULE I.

Due proof of the service of a citation must be filed with the clerk of the court, not later than 9 o'clock of the day on which the citation is returnable, so that the clerk may certify to the court that the service is in all respects regular; otherwise, the proceeding will not be heard on that day.

RULE II.

All proceedings wherein residents of the city of Buffalo or their attorneys appear will be first called at the opening of the

court, each day. Proceedings wherein residents of the towns or their attorneys appear, thereafter.

RULE III.

Appearances by or on behalf of a party against whom citations have been issued and not served must be made by filing with the clerk a written notice of appearance.

RULE IV.

Persons not named in citation, but who claim to be interested in a proceeding and wish to intervene therein, must file a similar notice of appearance, together with an affidavit or petition showing in what way they are interested in such proceeding.

RULE V.

Except when otherwise expressly prescribed by statute, all petitions, answers, objections and other pleadings shall be in writing and verified, and shall contain a plain and concise statement of the facts constituting the party's claim, objection or defense, and a demand of the order, decree or other relief to which such party considers himself entitled.

RULE VI.

No special guardian to represent the interests of an infant in any proceeding shall be appointed on the nomination of a proponent or accounting party, or his attorney. No transfer tax appraisers will be appointed upon the nomination of a person interested in the estate, or his attorney; nor will an application for costs be entertained under chapter 908 of the Laws of 1896, without two days' written notice of such application to the parties against whom such costs are asked, or his attorney, when represented by an attorney.

RULE VII.

In probate proceedings the will propounded must accompany the petition, and be filed with the clerk of the court.

RULE VIII.

In any proceeding wherein a special guardian shall appear to protect the interests of an infant party, no decree shall be entered against such infant party by default; but, such decree shall be entered only upon the written and verified report of such special guardian, to the effect that he has examined the account — where there is one — and also the decree to be entered, and finds the same correct.

RULE IX.

When a petition for an accounting is presented to the court by an accounting party, the account to which it relates must be filed therewith. On any accounting a party entitled and desiring to contest the account, shall file specific objections, as provided in Rule V, and serve a copy thereof on the attorney for the accounting party, if he has appeared by an attorney, at least two days before the return day of the citation issued thereon, where the accounting is had upon the petition of the accounting party, and at least two days before the day set for a hearing upon an accounting in all other cases, or within such further, or other time as shall for special reasons be allowed by the court and the contest of such account shall be confined to the items so objected to.

RULE X.

A party contesting a will must, upon the return day of the citation, file a written and verified answer containing his objections to such probate. But one adjournment may be had upon the application of the contestant. Any further adjournments must be on consent of the proponents evidenced by a written stipulation filed with the clerk, or made in open court. No other adjournments shall be allowed except for legal cause shown by affidavit.

RULE XI.

No paper shall be removed from the files of this office by any person. Ample facilities will be provided for the examination and transcribing of all records by parties or their attorneys.

FRANKLIN COUNTY — SUPREME COURT.

Calendar Rules.

The calendar will be called as usual at the opening of court on the first day.

The first twenty causes will constitute the day calendar for the first day of the term.

Before adjournment each day, sufficient causes, arranged according to their order on the general calendar, as affected by previous day calendars, will constitute the calendar for the next day.

Causes undisposed of on the day calendar will stand first, and in the same order, on the next day calendar, and enough be added from the general calendar, in their order on such calendar, to make ten for each day.

Causes not ready when reached on the day calendar will be stricken from the general calendar, unless otherwise specially ordered.

Causes may be set down the first day for a future day, but subject to adjournment of court if sufficient cases are not ready continuously to provide business.

FRANKLIN COUNTY — SURROGATE'S COURT.

RULE I.

The regular court day for the return of citations and the transaction of court matters shall be Monday of each week except during the month of August.

Court will open at 9 o'clock a. m. and continue until 5 o'clock p. m.

RULE II.

This court will be closed during the month of August in each year, and no surrogate's court matters will be entertained during that time.

This court will not be opened for business on legal holidays or half holidays.

When the regular court day falls upon a legal holiday all matters returnable on that day will stand adjourned as of course until the next secular day.

RULE III.

No person other than a regularly admitted attorney-at-law shall be permitted to practice in this court.

RULE IV.

No paper filed in this court shall be permitted to be removed or taken therefrom.

RULE V.

A petition filed in this court for the probate of a will must be accompanied by the original will, which will be filed and must remain in this court until removed according to law.

RULE VI.

A petition filed in this court for the final settlement of the account of an executor or administrator must be accomplished by an account of proceedings, and proof of publication for claims.

RULE VII.

No special guardian to represent the interests of an infant in any proceeding in this court will be appointed on the nomination of a proponent or accounting party, or his attorney, or upon the application of any person having an interest adverse to that of the infant, and no allowance for services will be made to a special guardian by the court unless he has made and filed his report in the proceeding in which he may be appointed.

RULE VIII.

Whenever an infant is interested in any proceeding in this court, a special guardian will be appointed to safeguard his interests, unless the general guardian of such infant appears in person, and it appears that he has no interests adverse to those of said minor.

RULE IX.

In a contested proceeding for the probate of a will, no costs will be allowed to the contestants in case the will is admitted to probate.

RULE X.

All petitions and answers in this court, except as otherwise prescribed by law, must be in writing, and must be verified.

RULE XI.

A party seeking to contest the probate of a will must appear in person or by attorney and file a written answer, duly verified.

RULE XII.

In any matter or proceeding in which there is a contest no hearing will be had or evidence taken on Monday.

RULE XIII.

The surrogate, on the written certificate of the person appointed under section 2844 of the Code, to examine the inventory and accounts of guardians filed in said surrogate's office, that a general guardian has omitted to file such inventory or account, or the affidavit required by section 2843, or that the interest of the ward requires that the guardian should render a more satisfactory inventory or account, will make an order requiring the guardian to supply the deficiency. Whenever it shall appear by the certificate of said person that the guardian has failed to comply with such order within three months after its due service upon him, or that there is reason to believe that sufficient cause exists for the guardian's removal, the surrogate will appoint a special guardian of the ward for the purpose of filing a petition in his behalf and prosecuting the necessary proceedings for the removal of such guardian.

RULE XIV.

All bonds of administrators and general guardians must conform in all respects to forms prescribed by the surrogate.

RULE XV.

In proceedings for the sale of a decedent's real estate instituted under title V of chapter 18 of the Code of Civil Procedure there must be filed an affidavit of regularity by the attorney before a final decree will be made by the surrogate.

RULE XVI.

The rules governing the procedure in the Supreme Court, so far as they may be applicable, will be adopted as controlling the practice in this court.

GENESEE COUNTY.

(For rules of Supreme Court applicable to Genesee county, see under Allegany county.)

HERKIMER COUNTY — SUPREME COURT.

Ordered:

1. That at the Circuit Court in this county, the first twenty causes on the calendar shall constitute the day calendar for the first day of the circuit; ten causes ready for trial shall compose the day calendar for each subsequent day, unless otherwise ordered by the circuit judge.

2. The number of causes to go on the day calendar must be left with the clerk of the court by 4 p. m. the day previous. Causes not thus left with the clerk will be considered passed as upon a regular call, to and inclusive of the last cause upon the day calendar. Causes so put on the day calendar must be tried or otherwise disposed of, as the circuit judge shall order for the circuit.

3. Causes may be reserved for a particular day by filing a stipulation of the attorneys to that effect with the clerk; but reserved causes shall not have priority over causes previously put on the day calendar unless especially ordered by the court.

This order shall be published with each calendar.

JEFFERSON COUNTY — SUPREME COURT.

Day Calendar.

Ordered, That hereafter and until otherwise ordered, a day calendar be made up for the Trial Term Supreme Court of the county, the first twenty cases to constitute the day calendar for the first day. Every subsequent day calendar shall consist of ten causes placed thereon in the order of their priority on the general calendar, and shall be made up from causes, a memorandum of which shall be left with the clerk by 2.30 p. m. of the preceding day; but causes left over of the preceding day, and not disposed of, shall retain their priority on the day calendar until finally disposed of.

Causes placed on the day calendar must be disposed of when reached, and will not be reserved, except for special reasons satisfactory to the court.

All causes not placed on the day calendar will be considered as passed, down to the last cause, which will be regularly placed upon the day calendar, unless reserved by the court, or postponed, as hereinafter provided.

Attorneys may arrange to postpone causes to a day certain, and then put them on the day calendar, by a day's prior notice to the clerk, but not to take precedence of other causes already appearing on the day calendar, or such as shall be duly notified to the clerk of earlier issues.

The number of causes for the day calendar shall always be under the direction of the presiding justice.

And it is further ordered, that the clerk hereafter, at least three days prior to the commencement of each Trial Term, make a list of the first twenty causes on the calendar of said court and mail a written or printed copy thereof to each member of the bar of said county.

And it is further ordered, that no equity or Special Term causes shall be placed on the Trial Term calendar or tried at a Trial Term, except by direction of the court.

And it is further ordered, that the clerk cause a copy of this order to be printed in all the Trial Term calendars hereafter prepared for said county.

JEFFERSON COUNTY — COUNTY COURT.

RULE I.

Within ten days after the service of notice by either party that a justice's return on appeal has been filed, either party who shall deem said return insufficient may serve a notice on the justice requiring him within thirty days after service of such notice to amend his return, which notice shall specify in what respect his return does not correctly state the testimony and proceeding before said justice, as said party claims. And a copy of such notice shall also be served on the opposite party within five days after the same is served on said justice, and the said opposite party may within ten days thereafter serve on the said justice and opposite party a notice specifying in what respect the return does not correctly state the testimony and proceeding before said justice as said party claims. The said justice shall not make an amended return until the expiration of twenty days from the time of the first notice to amend his return was served on him, and he shall file with such amended return the notice served on him.

RULE II.

Appeals in civil action (where a new trial may not be had in the county court, pursuant to section 3068 of the Code of Civil Procedure) and issues of law brought up on appeal shall be heard only at law terms of the court at which no jury is required to attend.

At the commencement of the argument each party shall deliver to the court and to the adverse party a copy of his points on which he intends to rely, with a reference thereon to the authorities which he intends to cite.

RULE III.

An application to commit an indigent insane person to the State asylum at the expense of the county shall only be heard upon a reasonable notice of such application to the supervisor of the town or ward where such alleged indigent insane person resides (if a resident of any particular town or ward in said county), and upon notice to the superintendent of the poor of said county.

Note to Attorneys.

Notes of issue are required to be filed in the clerk's office for causes on appeal from justices' court, eight days before the court, and for all other causes, twelve days before the court. Unless this rule is observed causes cannot be entered on the calendar.

Attorneys are requested to notice their causes as issues of fact to be tried by jury, or issues of fact to be tried by the court, or issues of law. Do not notice as equity at all.

Where a cause is noticed by both parties it is designated thus — X.

Where a note of issue is filed by one party only, the party so filing it is designated thus — *.

MADISON COUNTY.

Notes of issue are now required to be filed in the clerk's office twelve days before the court. Unless this rule is observed, causes cannot be entered upon the calendar.

When a note of issue is filed by one party only, the party so filing is designated thus — †.

When a cause is noticed by both parties, it is designated thus — *.

Rules of the Supreme Court.

Special terms for the hearing of *ex parte* applications and motions on consent will be held at Supreme Court chambers at Binghamton, Oneonta, Canastota and Elmira on Saturday of every week, when the resident justice is not otherwise engaged, except in July and August.

No motions will be heard at Special Term held with the Trial Terms except in cases triable in the county where the Special Term is held or triable in an adjoining county not within the district; or upon order to show cause granted by one of the justices of the Supreme Court residing in the Sixth Judicial District.

The calendars for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury. Notes of issue filed shall state whether the action be triable with or with-

out a jury. Those cases triable with a jury shall be first placed upon the calendar, and those triable without a jury shall follow. The call of the calendar in all counties will be governed by the day calendar rules, which follow:

Day Calendar Rules.

1. The first ten causes upon the calendar in addition to such causes as shall be moved to the head of the calendar as preferred causes, shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of causes from those not disposed of on the day calendar, and causes from the general calendar in which a request to place upon the day calendar stating the number of the cause upon the general calendar shall be filed with the clerk before 4 p. m. the previous day, by an attorney who has noticed the cause for trial, and such causes shall be placed upon the day calendar according to their priority upon the general calendar.

2. Causes upon the day calendar, including those upon the first day calendar not disposed of, shall remain upon and retain their priority on the day calendar until finally disposed of.

3. The clerk shall make up the day calendar at 4 o'clock each day.

4. Causes placed on the calendar must be disposed of when reached and will not be reserved except for special reasons arising after they have been placed upon such day calendar and satisfactory to the court. And after a case has been put upon the day calendar no motion will be entertained to put the case over the term except for causes arising after the cause is placed upon such day calendar.

5. All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar unless reserved by the court, or as hereinafter provided.

6. Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar and only upon

notice filed with the clerk before 4 o'clock of the preceding day, by a party who has noticed said cause for trial.

7. The number of causes for the day calendar shall always be under the direction of the presiding justice, and nothing in this order contained is to interfere with the moving of preferred causes, or the taking of inquests.

MONROE COUNTY — SUPREME COURT.

Special Trial Term Calendar.

At any Trial Term, until further orders, any causes belonging to either of the following classes may be placed on a special calendar, which shall constitute the preferred day calendar for each Friday of the term.

1st. Where the action is on contract, and the answer merely denies the allegations in the complaint without setting up any new matter, and can be tried in an hour.

2d. Where the action is on contract, and new matter is set up in the answer, and there shall be reason to believe that the defense is interposed for delay only, or, where it shall appear by affidavit that the cause can be tried in an hour.

To entitle the cause to be placed upon such calendar, a stipulation, signed by the respective attorneys, must be filed with the clerk by three (3) o'clock in the afternoon of the day preceding the Friday upon which it is desired to try the same; or a motion must be made upon a notice of four days, to have such cause placed upon the short cause calendar. The motion shall be heard at the opening of the court on each Monday forenoon, and, if founded upon the belief that the defense is for delay, and that the case can be tried in an hour, affidavits must be served with the notice, which may be met by opposing affidavits.

Day Calendar — Preferred and Reserved Causes.

ORDERED, That hereafter at the Circuit Term the day calendar for the first day of the term shall consist of five causes, and the same shall retain their priority on the calendar over such as are preferred under section 793 of the Code of Civil Procedure, until tried or otherwise disposed of.

Five causes ready for trial shall compose the calendar for each subsequent day.

Such causes as are ordered to be put upon the short cause calendar for any Friday of the term, shall be put at the head of the day calendar for that day, and the regular day calendar will not be called on Friday until such special calendar has been disposed of.

A cause preferred by the Code of Criminal Procedure may be reserved for a future day of the term upon sufficient cause shown by affidavit.

The numbers of the causes to go on the day calendar on each day after the first day, other than those which have been set down for that day, must be left with the clerk of the court by 4 o'clock of the day previous. Causes not thus left with the clerk will be considered over the term, as upon a regular call, to and inclusive of the last cause upon the day calendar.

Causes may be reserved for a particular day with the consent of the court, but reserved causes, whether preferred or not, shall not have priority of causes previously put on the day calendar.

This rule shall be printed with each general calendar of this court.

MONROE COUNTY — COUNTY COURT.

RULE I.

Matters in these courts, except as otherwise specially announced, will be taken up and disposed of in the following order: First, civil jury trials; second, criminal jury trials; third, enumerated motions and appeals from justice's judgment on questions of law, and trials of issues of fact, triable by court.

RULE II.

Calendar.

Hereafter in this court the first ten causes on the calendar shall constitute the day calendar for the first day of the term. Five causes ready for trial shall compose the day calendar for each subsequent day. The number of causes to go on the day calendar must be left with the clerk of the court by 4 o'clock of the day

previous. Causes not thus left with the clerk will be considered passed as upon a regular call, to and inclusive of the last cause upon the day calendar. Causes may be reserved for a particular day by consent of the court, but reserved causes shall not have priority over causes previously put on the day calendar. No cause upon the first day's calendar shall be reserved for a subsequent day, except on account of the illness of counsel, or of a party to the action, the actual engagement of counsel in other courts of record, or for other special reasons, which, in the discretion of the court, render the postponement of the trial absolutely necessary.

Special Calendar.

Any causes which can be tried or disposed of within an hour may be placed on a special calendar, which shall constitute a preferred day calendar for each Friday of the term. To entitle any cause to be placed upon such calendar a stipulation signed by the respective attorneys must be filed with the clerk by 3 o'clock in the afternoon of the day preceding the Friday upon which it is desired to try the same, or a motion must be made upon a notice of two days to have such cause placed upon the short cause calendar. Such motion shall be heard at the opening of the court on each Monday during the continuance of the term. A certified copy of the order directing a cause to be placed upon a short cause calendar must be served upon the opposing attorney not later than Wednesday preceding the Friday when said cause is expected to be tried. If a cause shall actually occupy more than one hour in the trial thereof, the trial may be suspended, the cause placed at the foot of the calendar, and the moving party charged with the costs of the term in the discretion of the court. If a cause which has been placed upon the short cause calendar for any Friday shall not be reached on that day it shall remain upon the calendar for each succeeding Friday until disposed of, unless sooner reached and disposed of upon a call of the general calendar.

Criminal Calendar.

ORDERED, That until further order the district attorney shall, on or before the first day of each term of the Monroe County Court at which a jury is required to attend, make and file with the clerk a list or calendar of all causes he proposes to move for

trial at such term in the order in which he purposes to move them. Criminal trials will not, except by special order, be taken up until after the civil trial calendar has been disposed of and the court will endeavor to give reasonable notice of the time at which the criminal trial calendar above provided for will be taken up. At the opening of court on the day appointed for taking up said criminal trial calendar, the district attorney shall give notice of any variations or modifications he desires to make in the calendar theretofore filed by him, and any other person desiring to have the trial of any indictment postponed or put over the term shall also, at said time, make application therefor. No application for modification of said calendar, or for delay or postponement of any trial, will be heard after the first trial is begun on said calendar except for special cause shown, and no trial shall be postponed or put over the term at any time except for sufficient cause, under the rules applicable to civil causes at circuit.

This rule shall be printed in the calendar of the County Court, and it, together with the calendar to be filed as above provided, shall be construed as sufficient notice of trial as to all indictments included in the district attorney's said calendar.

MONTGOMERY COUNTY.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court. Unless this rule is observed, causes cannot be entered on the calendar.

Causes must be disposed of when reached upon the calendar, and no reservation to a day certain will be made unless for cause and at the risk of adjournment of term.

NASSAU COUNTY.

Calendar Rules.

1. At the opening of the term the general calendar will be called through. The answer "Ready" will mean the cause is to go on the day calendar when reached in numerical order. Upon

such call, causes may, with leave of the court, be set down for particular days for trial. Inquests and dismissals may be taken upon such call, and motions to postpone, and to put off, must be made thereon.

2. The first fifteen causes on the calendar, any other cause answered ready for that day, and all the issues of law, will make the day calendar for the first day of the term. The day calendar will thereafter be made up of the causes marked "Ready" on the calendar, as reached in their numerical order, and set down causes. It will be called at the opening of court each day, and inquests and dismissals may be taken thereon. No cause on the day calendar will be set down for a day. The first day a cause is on the day calendar, except the first day of the term, it will be held for that day, on request, if marked ready.

3. Causes may be reserved for a particular day, by filing a stipulation of the attorneys to that effect with the clerk, but reserved causes shall not have priority over causes previously put on the day calendar, unless specially ordered by the court.

NIAGARA COUNTY — SUPREME COURT.

[For rules of the Supreme Court applicable to Niagara county, see under Allegany county.]

To Attorneys.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court. Unless this rule is observed, causes cannot be entered upon the calendar.

The trial fee of one dollar is payable by the party bringing the same on, and must be paid to the clerk when the case is called and before proceeding to trial.

The calendar fee of fifty cents must be paid to the clerk for the use of the sheriff by the party first putting the case on the calendar, at the time of filing his note of issue. (See subdivision 4, section 3307, Code Civ. Pro.) Unless this requirement is observed, cases cannot be placed on the calendar.

ONEIDA COUNTY — COUNTY COURT.

RULE I.

Civil Calendar.

The first fifteen causes on the calendar of any jury term shall constitute the day calendar for the first day of the term.

Ten causes ready for trial shall constitute the day calendar for each subsequent day, unless otherwise ordered by the presiding judge.

Memorandum of number of causes for day calendar must be left with the clerk in court before 4 o'clock of the day previous by a party who has noticed the cause for trial at the term.

Causes not on the day calendar will be considered passed as upon a regular call of the calendar to and inclusive of the last cause upon the day calendar.

Causes on the day calendar when reached must be tried or disposed of as the court directs.

RULE II.

Copies of affidavits to be read on behalf of appellant, under section 3057, Code Civ. Pro., must be served upon the opposing party at least eight days before the term at which the cause is argued.

RULE III.

An order for an amended return under section 3055, Code Civ. Pro., will not be granted at a term for which the cause has been noticed for argument, except upon a payment of costs, unless upon proof satisfactory to the court that the application could not have been made sooner.

RULE IV.

Criminal Calendar.

A calendar of indictments to be tried at the Court of Sessions, held in connection with each Jury Term of the County Court, will be prepared by the district attorney, and published by the clerk in connection with and immediately following the civil causes on the same calendar. Such calendar of indictments will be made up as follows:

1st. Of indictments in which the defendants are detained in jail awaiting trial.

2d. Of indictments in which the defendants are at large, on bail or otherwise. These indictments shall be so arranged by the district attorney in the order as nearly as may be in which he expects to move them for trial.

RULE V.

All motions on the behalf of the defendants under indictment, concerning such indictment and the trial or disposition thereof, and all applications for the postponement of the trial of said indictments, shall be made at the opening of said County Court and Court of Sessions, on the first day thereof, and such motions and applications will not be heard later in the term except for sufficient reasons and good cause shown for the delay. The district attorney, if he is able to do so, will give notice at said time of what indictments he does not expect to move at such term of the court.

RULE VI.

The trial of indictments shall commence on the first Thursday of each Jury Term, unless otherwise ordered at the commencement of such term.

RULE VII.

Persons under indictment and so needy as to be unable to procure witnesses material to their defense, must make applications for lease to have them subpœnaed at expense of the people, not later than the first Tuesday of Trial Terms and upon three days' written notice thereof to the district attorney.

RULE VIII.

Assignments — Schedules.

The schedule of liabilities and assets required to be filed by the assignor or assignee, shall fully and fairly state the nominal and actual value of the assets and the cause for the difference.

RULE IX.

Recapitulation.

There shall be a recapitulation at the end of the schedule as follows:

Debts and liabilities amount to..... $.....
Assets nominally worth..... .....
Assets actually worth..... .....

RULE X.

Assignee.

Every assignee shall keep full, exact and regular books of account of all receipts, payments and expenditures of money by him, which said books shall always during business hours be open to the inspection of any person interested in the estate.

RULE XI.

In making sales at auction of personal property, the assignee shall give at least ten days' notice of the time and place of sale in the same manner as a sheriff is required by law to give notice of public sale of such property, send a like notice by mail to every creditor whose name appears on the books of the assignor or is known to the assignee, and may advertise the sale in such other prudent manner as the quantity, value and nature of the property to be sold, warrants.

Every notice of sale shall state the time, place and terms of sale, and shall contain a brief description, under general heads, of the kind and quantity of property to be sold. A like notice of every public sale of real property shall be given in the same manner at least twenty days immediately before the date fixed for the sale.

RULE XII.

Upon an application made for an accounting the assignee shall file with his petition his account together with vouchers.

RULE XIII.

A copy of the notice or advertisement requiring creditors to present their claims must be mailed to each creditor whose name appears on the books of the assignor, or who is known to the assignee, with the postage thereon prepaid, at least thirty days before the day specified in such advertisement or notice.

ONONDAGA COUNTY — SUPREME COURT.

Day Calendar.

At a Trial Term of the Supreme Court, held in and for the county of Onondaga, at Syracuse, on January 30, 1908.

Present — Hon. W. S. Andrews, J. S. C.

In the Matter of the Day Calendar.

ORDERED.— I. That a day calendar for each day of a trial term shall be made by the clerk of ten causes, unless otherwise directed by the presiding judge.

II. The day calendar for the first day of the October term in each year shall be made from causes noticed for such day calendar, by filing such notice with the clerk not later than the Wednesday next preceding the commencement of such term; these causes to be selected according to their numerical order on the general calendar. The party filing such notice with the clerk shall, on the same day, serve a duplicate thereof upon the attorney for the adverse party, personally or by mail, and in default of the service of such notice the cause shall not be moved for trial upon such first day of the term, but shall be stricken from such day calendar. That said day calendar shall be published in each of the Syracuse daily papers upon Thursday preceding the commencement of the term. The day calendar for the first day of every succeeding term shall be made up on the last day of the preceding term in the same manner as is prescribed below for the day calendars made during each term.

III. The day calendar for each day after the first day shall be made from a list of cases ordered placed upon the day calendar, according to their numerical order on the general calendar. To entitle a case to be put on such list:

1. Three days' notice in writing of the application by the party desiring the same shall be given to the attorney or the attorneys representing the opposite party by serving the same before the beginning or during the continuance of the term, personally, or by mail, unless the opposing attorney or attorneys, do not reside or do not have an office for the regular transaction of business within the county of Onondaga, in which case five days' notice as aforesaid shall be given; and

2. A notice that such application is to be made shall be filed with the clerk at or prior to 2 o'clock p. m. of the day when it is to be so made.

IV. Such application shall be made returnable at the hour of 2 p. m.

V. Upon the hearing of an application to place a case upon such list as aforesaid, any party objecting thereto may present to the court an affidavit or affidavits material to the grounds of his objections; if such an affidavit or affidavits are presented the trial judge may permit the moving party to file an answering affidavit or affidavits.

VI. The trial judge shall hear the application at that time or at a later time to which it may be adjourned by his order, and if, after such hearing, the case is ordered upon such list it must be tried when reached in its order, unless:

1. By the consent of counsel it is moved over the term in which case, at the discretion of the trial judge, it may be ordered to the foot of the general calendar, or

2. Unless on account of the actual engagement of counsel in a court of equal or superior jurisdiction, or unless on account of the illess of counsel, or unless the presiding justice being of the opinion that the ends of justice so require, other disposition thereof is ordered by such justice.

VII. Such list shall be printed at the foot of each day calendar, and shall be continued from term to term, from the October to and including the June term. The clerk shall, however, at the commencement of each term, alter the number of the cases on such list so that such numbers may correspond with the number of such cases on the calendar for such term.

VIII. Upon the order of the judge holding any term a special calendar of short causes may be made up which calendar shall be taken up on the day ordered by the judge, and continued, if necessary, on the following day and thereafter until disposed of. Any party desiring his cause to be placed on such calendar must show, by affidavit to the satisfaction of the court, that such cause will not occupy in its trial to exceed two hours, and must serve personally, or by mail, on the opposite party, four day's notice of such application, with a copy of such affidavit.

If the trial of any such cause shall not be completed in two hours, the court may, at its option, suspend such trial and declare it a nullity, and strike the cause from such calendar, and charge moving party with costs of the term.

IX. All previous orders in relation to the calendar in this county are hereby revoked.

(Enter.) W. S. ANDREWS, J. S. C.

At Circuit.

In the Matter of Short Cause Calendar.

ORDERED, That at the opening of the court, on the first Saturday of the circuit, or if the court does not sit on that day, then at the opening of the court on the next day of the session, a special circuit calendar of short causes on contract be made up, which calendar shall be taken up on the second Friday of the circuit, and continued, if necessary, on the following day and the third Friday. That any party desiring his cause to be placed on such calendar must show, by affidavit, to the satisfaction of the court, that such cause will not occupy in its trial to exceed one hour, and must serve personally, or by mail, on the opposite party, four days' notice of such application, with a copy of such affidavit.

If the trial of any such cause shall not be completed in one hour, the court may, at its option, suspend such trial and declare it a nullity, and strike the cause from such calendar, and charge moving party with costs of the term.

In the Matter of the Day Calendar.

ORDERED, That the following additional rules with regard to the day calendar are adopted for the Trial Term of the Supreme Court to be held at Syracuse, beginning on October 5, 1903.

RULE I.

The day calendar for the first day of the term shall be made up by the clerk as at present provided.

RULE II.

The day calendar for each day after the first day shall be made from a list of cases ordered placed upon the day calendar, accord-

ing to their numerical order on the general calendar. To entitle a case to be put on such list,

1. Three days' notice in writing of the application by the party desiring the same shall be given to the attorney or attorneys representing the opposite party by serving the same before the beginning or during the continuance of the term, personally, or by mail, unless the opposing attorney or attorneys do not reside or do not have an office for the regular transaction of business within the county of Onondaga, in which case five days' notice as aforesaid shall be given; and

2. A notice that such application is to be made shall be filed with the clerk at or prior to 4 o'clock p. m. of the day when it is to be so made.

RULE III.

Such application shall be made returnable at the hour of 4 p. m.

RULE IV.

Upon the hearing of an application to place a case upon such list as aforesaid any party objecting thereto may present to the court an affidavit or affidavits material to the grounds of his objection; if such an affidavit or affidavits are presented the trial judge may permit the moving party to file an answering affidavit or affidavits.

RULE V.

The trial judge shall hear the application at that time or at a later time to which it may be adjourned by his order, and if, after such hearing, the case is ordered upon such list it must be tried when reached in its order, unless

1. By the consent of counsel it is moved over the term, in which case, at the discretion of the trial judge, it may be ordered to the foot of the general calendar, or

2. Unless on account of the actual engagement of counsel in a court of equal or superior jurisdiction, or unless on account of the illness of counsel, or unless the presiding justice being of the opinion that the ends of justice so require, other disposition thereof is ordered by such justice.

ONTARIO COUNTY.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court.

The trial fee of one dollar is payable by the party bringing the same on, and must be paid to the clerk when the case is called and before proceeding to trial.

Calendar fee required.

ORANGE COUNTY.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court. Unless this rule is observed causes cannot be entered on the calendar.

Calendar Rules.

1. The day calendar for each day will consist of a "Ready" section and a "Reserve" section, and both sections will be called at 10 o'clock. The causes on the ready section must be ready and will be tried that day. Those on the reserve section will be passed for the day if marked "Ready" on the morning call. Inquests and dismissals will be taken on such call. The first thirty causes on the general calendar will constitute the day calendar for the first day of the term, the first fifteen being on the ready section.

2. Causes will not be set down for a day after they appear on either section of the day calendar. Before that they may be set down for a day by the court in its discretion on stipulation or motion.

3. The court will hear no excuses for not being ready or motions to postpone except on affidavits; and if motions be afterward made to open defaults, such affidavits must be made part of the moving papers.

ORLEANS COUNTY.

[For rules of the Supreme Court applicable to Orleans county, see under Allegany county.]

Notes of issue are required to be filed with the clerk twelve days before the sitting of the court, to secure entry of the same on the calendar.

Trial fee one dollar.

OSWEGO COUNTY.

Day Calendar Rules — Supreme Court.

ORDERED, That hereafter, and until otherwise ordered, a day calendar be made up for Trial Terms of the Supreme Court in Oswego county; the first twenty causes to constitute the day calendar for the first day. The day calendar for the second day will be made up from the causes of which a memorandum shall be left with the clerk by 3 o'clock p. m. of Monday, by the attorney who shall have noticed the cause for trial, and shall be put on the day calendar according to their priority on the general calendar.

Every subsequent day calendar shall include ten causes, to be made up in the same manner from memoranda left with the clerk by 3 o'clock p. m. of the preceding day; but causes left over of the preceding day and not disposed of, shall retain their priority on the day calendar until finally disposed of.

Causes placed upon the day calendar must be disposed of when reached, and will not be reserved except for very special reasons satisfactory to the court.

All causes not placed upon the day calendar will be considered as passed down to the last cause which shall be regularly placed upon the day calendar, unless reserved by the court or postponed as hereinafter provided.

Attorneys may arrange to postpone causes to a day certain, and then put them upon the day calendar by a day's prior notice to the clerk, but not to take precedence of other causes already appearing upon the day calendar, or such as shall be duly notified to the clerk of earlier issues.

The number of causes for the day calendar shall always be under the direction of the presiding justice.

OSWEGO COUNTY — COUNTY COURT.

RULE I.

All calendar causes for argument shall be argued or submitted before trials by jury shall be commenced.

RULE II.

In all calendar causes for argument, each party at the commencement of the argument shall furnish to the court a copy of the points on which he intends to rely, with reference to the authorities which he intends to cite, accompanied with a concise statement of the facts of the case which he deems established, and shall at the same time deliver a copy to the adverse party.

RULE III.

If the return of the justice is defective the court will, upon the production of an affidavit specifying the defects, upon notice, direct the justice to make a further or amended return. The court is always open for that purpose.

RULE IV.

Copies of affidavits to be read on behalf of appellant, under section 3057, Code of Civil Procedure, must be served upon the opposing party at least eight days before the term at which the cause is argued.

RULE V.

An order for an amended return under section 3055, Code Civil Procedure, will not be granted at a term for which the cause has been noticed for argument, except upon payment of costs, unless upon proof satisfactory to the court that the application could not have been made sooner.

RULE VI.

Causes on the general calendar must be tried or otherwise disposed of for the term when reached in order.

RULE VII.

All motions to correct the calendar, or to put causes over the term, or to refer causes, shall be made the first day of each term, on the informal call of the calendar at the opening of the court.

RULE VIII.

Final applications of aliens to be admitted to become citizens of the United States, pursuant to chapter 927 of the Laws of 1895, shall be heard and final action thereon had at each law term of the county court and on Monday of each week of the jury terms.

RULE IX.

Criminal Calendar.

At least ten days before the term the district attorney shall furnish the clerk with a list of indictments which he intends to try, and in the order in which they are intended to be moved for trial, giving preference on the calendar to defendants confined in jail, with the names of the defendants and the nature of the offense for which the indictment was found.

The clerk from said list shall cause to be printed a criminal calendar to be incorporated with the calendar of civil causes for said term.

The criminal calendar shall not be moved before the third day of the term, provided the civil business is sufficient to occupy the court.

All motions on behalf of the defendants under indictment, concerning such indictment and the trial or disposition thereof, and all applications for the postponement of the trial of said indictments, shall be made at the opening of court, on the first day thereof, and such motions and applications will not be heard later in the term except for sufficient reasons and good cause shown for the delay.

The district attorney, if he is able to do so, will give notice at said time of what indictments he does not expect to move at such term of court.

OTSEGO COUNTY — SUPREME COURT.

Day Calendar Rules.

RULE I.

The first ten causes upon the calendar in addition to such causes as shall be moved to the head of the calendar as preferred causes, shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of causes from those not disposed of on the day calendar, and cases from the general calendar in which a request to place upon the day calendar stating the number of the cause upon the general calendar shall be filed with the clerk before 4 o'clock p. m. the previous day, by an attorney who has noticed the cause for trial and such causes shall be placed on the day calendar according to their priority upon the general calendar.

RULE II.

Causes upon the day calendar including those upon the first day calendar not disposed of shall remain upon and retain their priority on the day calendar until finally disposed of.

RULE III.

The clerk shall make up the day calendar at 4 o'clock each day.

RULE IV.

Causes placed on the calendar must be disposed of when reached and will not be reserved except for special reasons arising after they have been placed upon such day calendar and satisfactory to the court. And after a case has been put upon the day calendar no motion will be entertained to put the case over the term except for causes arising after the cause is placed upon such day calendar.

RULE V.

All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar unless reserved by the court, or as hereinafter provided.

RULE VI.

Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar and only upon notice filed with the clerk before 4 o'clock of the preceding day, by a party who has noticed said cause for trial.

RULE VII.

The number of causes for the day calendar shall always be under the direction of the presiding justice, and nothing in this order contained is to interfere with the moving of preferred causes, or the taking of inquests.

Rules Adopted by the Court and Ordered Printed in Each Calendar.

RULE XX.

It shall be the duty of the attorney, by whom the copy pleading shall be furnished for the use of the court on trial, to plainly designate, on each pleading, the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings.

Special terms for the hearing of *ex parte* applications and motions on consent will be held at Supreme Court chambers at Binghamton, Oneonta, Canastota and Walton, on Saturday of every week, when the resident justice is not otherwise engaged, except in July and August.

No motions will be heard at Special Terms held with the Trial Terms except in cases triable in the county where the Special Term is held, or triable in an adjoining county not within the district; or upon order to show cause granted by one of the justices of the Supreme Court residing in the sixth judicial district.

The calendars for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury. Notes of issue filed shall state whether the action be triable with or without a jury. Those cases triable with a jury shall be first placed upon the calendar, and those triable without a jury shall follow. The call of the calendar in all counties will be governed by the day calendar rules.

QUEENS COUNTY.

Calendar Rules.

1. Any cause may be set down for a day, by a stipulation filed with the clerk, before it appears on the day calendar, except that it may not be advanced out of its order in that way. Causes marked "off," on the call of the day calendar, may be set down for a day of any subsequent term only, by a stipulation or a two days' notice filed with the said clerk.

2. Causes will not be set down for days upon the call of the day calendar. The answer must be "ready," or "off."

3. The first day a cause is on the day calendar it will be held for that day, if marked "ready."

4. The court will take notice of engagements of counsel in Queens county upon an oral statement.

5. The court will pay no regard to engagements of counsel elsewhere, unless a signed written statement thereof (which need not be sworn to) be submitted, giving the title of the cause in which the engagement is, in what court and part, and before what judge such cause is on trial, and when the trial commenced, and how long it is likely to continue. Engagements in an Appellate Court will not be regarded unless stated in the same way and with equal precision.

6. All other excuses, or motions for delay, or for holding, or postponing causes, must be presented by affidavit on the call of the day calendar in order to be considered for any purpose, including a motion in the Special Term to open a default.

7. The court will not hear oral statements or arguments in respect of such engagements, excuses or motions, and will pass upon such written statements, or affidavits thereof, by indorsements thereon, after the call of the day calendar, and file the same with the clerk.

8. Not more than one cause will be held ready on the day calendar for one counsel in addition to the one he may be engaged in trying in Queens county, or if he engaged out of Queens county, and in all cases the counsel who is to try the cause must be designated on the call of the day calendar, if required by the court.

RENSSELAER COUNTY.

Trial Term Rules.

1. On the first day of the Trial Term, after the grand and trial jurors shall have been sworn, and other preliminary business dispatched, the justice presiding shall call the preferred and general calendar of causes and mark the same in such manner as to the court may seem just and proper. No cause shall be peremptorily called for trial for the first day of the term, but the presiding justice shall make up a day calendar for the second day composed of the first six causes that shall be ready for trial in their order. Any causes in which both sides shall be ready for trial may be tried, with the consent of the presiding justice, on the first day of any Trial Term, irrespective of its place upon the calendar, except that if two such cases be ready, that case with the earlier date of issue shall have precedence. If the trial of any such case begun upon the first day of the term shall not be completed upon that day, the day calendar prepared for the second day shall not be taken up until final disposition is made of such case so begun.

2. The Trial Term shall be convened on the first day thereof at 12 o'clock m.

3. Causes on the general calendar marked for trial, if not responded to when called in the making up of the day calendar, shall be passed; when reserved, generally, they shall not be placed on the day calendar for trial except upon notice of twenty-four hours in writing, and shall then be put upon the day calendar, at such place as the court shall direct.

4. A cause upon the day calendar when reached must be tried or go to the foot of the general calendar for the term, unless cause be shown for a different disposition.

5. At the opening of the court on each day the day calendar shall be called through. Upon such call any cause not responded to by either party shall be passed for the term, unless the case has been specially marked by the court on the day calendar as one to be retained thereon. If, on such call, a cause be responded to by the plaintiff only, he may take judgment in default of the defendant. If, upon such call, a cause be responded to by the defendant only, he may take a dismissal.

6. Day calendars will be made up: First, from cases marked ready; second, from those marked for some specific day of the first week; third, from those marked for the second week; fourth, from those marked for some specific day of the second week; fifth, from those marked for the third week. Cases not ready to be placed upon the day calendar will go to the foot of the term calendar, from which they may be placed upon the day calendar when all other cases have been disposed of. Cases marked "reserved" when called up will go to the foot of the term calendar.

7. At 12:45 p. m. on each day, except the first day of the term, the day calendar for the succeeding court day shall be made, to consist of not more than six causes. The calendar shall consist of all the causes in the order in which they stand on the day calendar not disposed of, and after them, of such causes as shall be added, taken in the order in which they stand on the general calendar.

8. In actions on contract, where the trial will not probably occupy more than one hour, either party may apply on the first day of the term, on a notice of four days, and on affidavits served, to set down the issue as a short.

9. Short causes shall be called on Friday of each week. If the trial shall occupy more than one hour, it may be suspended in the discretion of the court, and the cause placed at the foot of the general calendar.

Miscellaneous Rules.

Notes of issue not filed twelve days (inclusive of Sundays) previous to the sitting of court will not be placed in the calendar. They should state which are for argument, and which for trial.

If a cause answered "ready" by the plaintiff, be afterward answered "off," by the plaintiff, or made unduly obstructive by the unreadiness of the plaintiff, it may be stricken from, or sent to the foot of the general calendar.

Any action on contract or for conversion or to recover a chattel which is on the calendar (having a number), may be advanced to any day calendar by any party, by filing at least thirty days prior thereto with the calendar clerk in Part I, an affidavit showing that some necessary party to the action was at the time of its commencement a resident of Queens county, and if the plaintiff is an assignee of the cause of action, that the assignor or some

necessary defendant was then such resident; together with proof of notice of such advancement to all parties who have appeared, or in lieu thereof the consent of all such parties. Causes so advanced must be tried when reached, or the preference and the right thereto under this rule is lost, unless otherwise ordered by the court.

A calendar of causes noticed for a term will be made up and printed by the clerk; the numbering thereof following consecutively the highest number on the calendar of the last preceding term. A cause once placed and numbered in a term calendar will retain such number until it is finally disposed of, unless by direction of the court, a new calendar, of all cases undisposed of, is made up, in which event, in addition to its new numbers thereon, its former number shall be parenthetically given in smaller type.

Calendar fee required.

RICHMOND COUNTY.

Calendar Rules.

1. At the opening of the term the general calendar will be called through. The answer "ready" will mean the cause is to go on the day calendar, when reached in numerical order. Inquests and dismissals may be taken upon such call, and motions to postpone and to put off must be made thereon.

2. The first twenty-five jury causes on the general calendar, and any other jury causes answered ready for that day, will make the day calendar for the first day of the term. The day calendar will thereafter be made up of causes marked ready on the general calendar, as reached in their numerical order, and set down causes. It will be called at the opening of court each day, and inquests and dismissals may be taken thereon. No cause on the day calendar will be set down for a day. The first day a cause is on the day calendar, except the first day of the term, it will be passed for that day if marked ready. Causes may be set down for a day by stipulation before appearing on the day calendar.

3. Engagements of counsel in other counties are not legal excuses for holding or postponing causes, or upon motions to open defaults. Excuses must be presented by affidavit in order to be considered, and such affidavits must be produced on motions to open defaults.

Special Term Calendar Rules.

1. Any cause may be set down for a day, by stipulation filed with the clerk, before it appears on the day calendar, except that it may not be advanced out of its order in that way. Causes marked "off" on the call of the day calendar may be set down for a day of any subsequent term only, by a stipulation or a two days' notice filed with the said clerk.

2. Causes will not be down for days upon the call of the day calendar. The answer must be "ready" or "off."

3. The first day a cause is on the day calendar it will be held for that day if marked "ready."

4. The court will take notice of engagements of counsel in Richmond county upon an oral statement.

5. The court will pay no regard to engagements of counsel elsewhere, unless a signed written statement thereof (which need not be sworn to) be submitted, giving the title of the cause in which the engagement is, in what court and part, and before what judge such cause is on trial, and when the trial commenced, and how long it is likely to continue. Engagements in an Appellate Court will not be regarded, unless stated in the same way and with equal precision.

6. All other excuses, or motions for delay, or for holding, or postponing causes, must be presented by affidavit on the call of the day calendar in order to be considered for any purpose, including a motion in the Special Term to open a default.

7. The court will not hear oral statements, or arguments in respect of such engagements, excuses or motions, and will pass upon such written statements or affidavits thereof, by indorsements thereon, after the call of the day calendar and file the same with the clerk.

8. Not more than one cause will be held ready on the day calendar for one counsel in addition to the one he may be engaged in trying in Richmond county, or if he be engaged out of Richmond county, and in all cases the counsel who is to try the cause, must be designated on the call of the day calendar, if required by the court.

9. If a cause is answered "ready" by the plaintiff, be afterward answered "off" by the plaintiff, or made unduly obstructive by the unreadiness of the plaintiff, it may be stricken from, or sent to the foot of the general calendar.

Sheriff's Calendar Fees.

Title V, section 3307, article 4, New Code, provides for the collection of calendar fees by the clerk for use of sheriff. No case will be placed on the calendar until the money is paid to the clerk as therein provided.

Notice.

Notes of issue must be filed at least twelve days before the term begins. The nature of the issue, whether of fact or of law, and if an issue of fact, whether it is triable by a jury, or by the court without a jury, should also be stated. Preferred causes should also be noted as such.

SCHOHARIE COUNTY.

Notes of issue are required to be filed in the clerk's office at least twelve days before the sitting of the court. Unless this rule is observed, causes cannot be entered upon the calendar.

Calendar fee required.

SCHUYLER COUNTY — SUPREME COURT.

Calendar Rules.

Special terms for the hearing of *ex parte* applications and motions on consent will be held at Supreme Court chambers at Binghamton, Norwich and Oneida, on Saturday of every week, when the resident justice is not otherwise engaged.

No motions will be heard at Special Terms held with the Trial Terms except in cases triable in the county where the Special Term is held, or triable in an adjoining county not within the district; or upon order to show cause granted by one of the justices of the Supreme Court residing within the Sixth Judicial District.

The calendars for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury. Notes of issue filed shall state whether the action be triable with or without a jury. Those cases triable with a jury shall be first placed upon the calendar, and those triable without a jury shall follow.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court.

Where the return has been filed the requisite time, the clerk will place the cause upon the calendar of the term for which a note of issue has been duly filed by either party, but need not place any cause upon the calendar until a note of issue in the cause has been first filed.

After a note of issue has been once filed in the cause, the clerk will place the cause upon the calendar of every subsequent regular term of the court until such appeal has been disposed of, without the filing of any new note of issue.

No party will be allowed to move the cause and take default, or have argument of the appeal at any term, unless the cause has been duly noticed for argument by one party or the other for that particular term.

And no motion will be entertained to dismiss an appeal for failure to bring it to a hearing within section 3062, Code of Civil Procedure, at any term unless the appeal has been duly noticed for argument for that term, by one of the parties.

SCHUYLER COUNTY.

Day Calendar Rules.

1. The first ten causes upon the calendar, in addition to such causes as shall be moved to the head of the calendar as preferred causes, shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of causes from those not disposed of on the day calendar, and cases from the general calendar in which a request to place upon the day calendar stating the number of the cause upon the general calendar shall be filed with the clerk before 4 o'clock p. m. the previous day, by an attorney who has noticed the cause for trial, and such causes shall be placed on the day calendar according to their priority upon the general calendar.

2. Causes upon the day calendar including those upon the first day calendar, not disposed of, shall remain upon and retain their priority on the day calendar until finally disposed of.

3. The clerk shall make up the day calendar at 4 o'clock each day.

4. Causes placed on the calendar must be disposed of when reached, and will not be reserved except for special reasons arising after they have been placed upon such day calendar and satisfactory to the court. And after a case has been put upon the day calendar no motion will be entertained to put the case over the term except for causes arising after the cause is placed upon such day calendar.

5. All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar unless reserved by the court, or as hereinafter provided.

6. Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar and only upon notice filed with the clerk before 4 o'clock of the preceding day, by a party who has noticed said cause for trial.

7. The number of causes for the day calendar shall always be under the direction of the presiding justice, and nothing in this order contained is to interfere with the moving of preferred causes, or the taking of inquests.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court, in order to have the calendar ready for delivery five days before the sitting of the court.

The calendar for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury. Notes of issue filed shall state whether the action be triable with or without a jury. Those cases triable with a jury shall be first placed upon the calendar, and those triable without a jury shall follow.

SENECA COUNTY.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court, in order to have the calendar ready for delivery five days before the sitting of the court.

ST. LAWRENCE COUNTY — SUPREME COURT.

Calendar Rules.

The calendar will be called as usual at the opening of court on the first day.

The first twenty causes will constitute the day calendar for the first day of the term.

Before adjournment each day, sufficient causes, arranged according to their order on the general calendar, as affected by previous day calendars, will constitute the calendar for the next day.

Causes undisposed of on the day calendar will stand first, and in the same order, on the next day calendar, and enough be added from the general calendar, in their order on such calendar, to make ten for each day.

Causes not ready when reached on the day calendar will be stricken from the general calendar, unless otherwise specially ordered.

Causes may be set down the first day for a future day but subject to adjournment of court if sufficient cases are not ready continuously to provide business.

STEUBEN COUNTY — SUPREME COURT.

"Every cause placed on the calendar of a General Term, Circuit or Special Term for the trial of equity cases shall be moved for argument or trial when reached in its order, and shall not be reserved, or put over, except by consent of the court; and if passed without being so reserved or put over, it shall be entered on all subsequent calendars, as of the date when passed, and no term fee shall be taxed therein for any subsequent term."

This rule will be rigidly enforced.

No reservation will be allowed any of the first five causes on the calendar except by order of the court, because of sickness of counsel or unavoidable absense of a witness, to be shown by affidavit. This order shall be printed at the top of the list of causes.

SUFFOLK COUNTY — COUNTY COURT.

RULE I.

Matters in these courts, except as otherwise specially directed, will be taken up and disposed of in the following order:

1. *Ex parte* business and motions.
2. Civil jury trials.
3. Criminal jury trials.
4. Appeals on questions of law, and trials of issues of fact by the court.

RULE II.

If a justice of the peace shall neglect to make and file his return within the time prescribed by law, either party may apply to the court, *ex parte,* for an order requiring such justice to make and file his return.

RULE III.

Before an appeal has been noticed for argument, or within ten days after the return is filed, either party may obtain one order, *ex parte,* for an amended return.

RULE IV.

On appeals in criminal actions the return shall contain all the testimony and be made substantially in the same form and manner as on an appeal on questions of law only, in a civil action.

RULE V.

A calendar of criminal actions to be tried at each jury term will be prepared by the district attorney and filed with the clerk on or before the Monday next preceding the first day of each term. These causes will be placed on such calendar in the order in which the district attorney expects to move them for trial, subject to such modification as he may find to be necessary or advisable. Such calendar shall be printed immediately following and on the same calendar with the civil causes.

RULE VI.

All motions on behalf of defendants in criminal actions and all applications for postponement of trial, shall be made at the opening of court on the first Monday thereof, and such motions and applications will not be heard later in the term, except for sufficient reasons and good cause shown for the delay.

RULE VII.

Notes of issue on appeals (on law or facts) in civil actions and on appeals in criminal actions, must be filed with the clerk at least eight days before the commencement of the term; and notes of issue in actions originally brought in the County Court, must be filed with the clerk at least twelve days before the commencement of the term.

RULE VIII.

The clerk will prepare a calendar for each jury term of the County Court (as specified in rules 7 and 5) and cause the same to be printed and furnish a sufficient number of copies for the use of the court and bar.

RULE IX.

The district attorney will furnish the county judge with copies of all indictments which he proposes to try at least ten days prior to the first day of the term at which he moves them for trial.

RULE X.

The plaintiff's or appellant's attorney, as the case may be, will furnish the county judge with copies of all the pleadings in each civil suit at least two weeks before the first day of the term at which the cause is noticed for trial.

RULE XI.

In all actions and proceedings, both civil and criminal, tried by the court without a jury, in which decision is reserved, and in all appeal cases, briefs will be furnished the court by both sides within fifteen days after final submission to the court, unless a shorter or longer period is mutually agreed on and approved by the court.

RULE XII.

The practice in other respects shall be governed by the rules of the Supreme Court, so far as the same are applicable.

TIOGA COUNTY — SUPREME COURT.

Special Terms, for the hearing of *ex parte* applications and motions on consent, will be held at Supreme Court chambers at Binghamton, Oneonta, Canastota and Elmira on Saturday of every week, when the resident justice is not otherwise engaged, except in July and August.

No motions will be heard at Special Terms held with the Trial Terms, except in cases triable in the county where the Special Term is held, or triable in an adjoining county not within the district; or upon order to show cause, granted by one of the justices of the Supreme Court residing in the sixth judicial district.

The calendars for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury. Notes of issue filed shall state whether the action be triable with or without a jury. Those cases triable with a jury shall be first placed upon the calendar, and those triable without a jury shall follow. The call of the calendar in all the counties will be governed by the day calendar rules, which follow.

Day Calendar Rules.

First. The first ten causes upon the calendar, in addition to such causes as shall be moved to the head of the calendar as preferred causes, shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of causes from those not disposed of on the day calendar; and causes from the general calendar in which a request to place upon the day calendar, stating the number of the cause upon the general calendar, shall be filed with the clerk before four o'clock p. m. the previous day, by an attorney who has noticed the cause for trial, and such causes shall be placed on the day calendar according to their priority upon the general calendar.

Second. Causes upon the day calendar (including those upon the first day calendar) not disposed of, shall remain upon, and retain their priority on, the day calendar until finally disposed of.

Third. The clerk shall make up the day calendar at four o'clock each day.

Fourth. Causes placed on the calendar must be disposed of when reached, and will not be reserved except for special reasons arising after they have been placed upon such day calendar, and satisfactory to the court. And after a case has been put upon the day calendar, no motion will be entertained to put the case over the term, except for causes arising after the cause is placed upon such day calendar.

Fifth. All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar, unless reserved by the court, or as hereinafter provided.

Sixth. Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application, made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar, and only upon notice, filed with the clerk before four o'clock of the preceding day, by a party who has noticed said cause for trial.

Seventh. The number of causes for the day calendar shall always be under the direction of the presiding justice, and nothing in this order contained is to interfere with the moving of preferred causes or the taking of inquests.

RULE XX.

It shall be the duty of the attorney, by whom the copy pleadings shall be furnished for the use of the court on a trial, to plainly designate, on each pleading, the part or parts thereof claimed to be admitted or controverted by the succeeding pleading.

RULE XXVI.

* * * Every cause placed on the calendar of the Trial Term or Special Term, for the trial of equity cases, shall be

moved for argument, on trial, when reached in its order, and shall not be reserved or put over, except by consent of the court, unless otherwise permitted by special rule, and, if passed without being so reserved or put over, it shall be entered on all subsequent calendars as of the date when passed, and no term fee shall be taxed therein for any subsequent term.

The clerk is directed to enter on his minutes the title of every cause passed, the date when passed, and to keep in his office a list of passed causes: and, whenever a passed cause is placed upon a calendar, the word "passed," followed by the date when passed, shall be entered under the date of issue.

If two or more causes are passed upon the same day, the right to priority as between them on subsequent calendars shall be determined by the date of issue.

The clerk is directed to print in every calendar Rule XX, the foregoing extract from Rule XXXVI, and the foregoing rule for carrying into effect Rule XXXVI, which was adopted on December 5, 1881, and ordered in the minutes of the court.

TOMPKINS COUNTY — SUPREME COURT.

Special Term for the hearing of *ex parte* applications and motions on consent will be held at Supreme Court chambers at Binghamton, Oneonta, Canastota and Elmira on Saturday of every week when the resident justice is not otherwise engaged except July and August.

No motion will be heard at Special Terms held with the Trial Terms except in cases triable in the county where the Special Term is held or triable in an adjoining county not within the district; or upon order to show cause granted, by one of the justices of the Supreme Court residing in the Sixth Judicial District.

The calendars for Trial and Special Terms shall contain all cases, those triable with and those triable without a jury.

Notes of issue filed shall state whether the action be triable with or without a jury. Those cases triable with a jury shall be first placed upon the calendar and those triable without a jury shall follow.

The call of the calendar will be governed by the day calendar rules which follow:

First: The first ten causes upon the calendar shall constitute the day calendar for the first day, and each day thereafter the same shall be made up of eight causes from those not disposed of on the day calendar, and cases from the general calendar in which a request to place upon the day calendar, stating the number of the cause upon the general calendar shall be filed with the clerk before 4 o'clock p. m., the previous day, by an attorney who has noticed the cause for trial and such causes shall be placed on the day calendar according to their priority upon the general calendar.

Second: Causes upon the day calendar including those upon the first day calendar, not disposed of shall remain upon and retain their priority on the day calendar until finally disposed of.

Third: The clerk shall make up the day calendar at 4 o'clock each day.

Fourth: Causes placed on the calendar must be disposed of when reached and will not be reserved except for special reasons arising after they have been placed upon such day calendar and satisfactory to the court. And after a case has been put upon the day calendar no motion will be entertained to put the case over the term except for causes arising after the cause is placed upon such day calendar.

Fifth: All causes not placed on the day calendar will be considered as passed down to the last cause, which shall be regularly placed upon the day calendar unless reserved by the court, or as hereinafter provided.

Sixth: Attorneys shall not reserve causes generally, nor reserve them to a day certain, except upon application made to and approved by the court, before such cause shall be placed upon the day calendar. When reserved to a day certain by permission of the court, they are to be placed upon the day calendar after the causes undisposed of already upon such calendar and only upon notice filed with the clerk before 4 o'clock of the preceding day, by a party who has noticed said cause for trial.

Seventh: The number of causes for the day calendar shall always be under the direction of the presiding justice, and

nothing in this order contained is to interfere with the taking of inquests.

To Attorneys.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court. Unless this rule is observed, causes cannot be entered on the calendar.

Notes of issue should be written only on one side of the paper. To insure accuracy, names should be legibly written and spelled correctly.

By section 3307, subdivision 4, of the Code of Civil Procedure, the sheriff is entitled to the following fee:

For notifying jurors to attend a Trial Term of a court of record, fifty cents for each cause placed upon the calendar for trial by a jury, to be paid by the party first putting the cause on the calendar for that term. But the sheriff is not entitled to more than one dollar and fifty cents for calendar fees in one action. The clerk shall not put a cause upon the calendar for trial by a jury until the fee specified in this subdivision is paid to him for the use of the sheriff.

Rules Adopted by the Court, and Ordered Printed in Each Calendar.

RULE XX.

It shall be the duty of the attorney, by whom the copy pleadings shall be furnished for the use of the court on a trial, to plainly designate, on each pleading, the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings.

EXTRACT FROM RULE XXXIX.

Every cause placed on the calendar of a General Term Circuit, or Special Term for the trial of equity cases, shall be moved for argument or trial when reached in its order and shall not be reserved, or put over, except by consent of the court; and, if passed without being so reserved, or put over, it shall be entered on all subsequent calendars as of the date when passed and no term fee shall be taxed therein for any subsequent term.

The clerk is directed to enter in his minutes the title of every cause passed, the date when passed, and to keep in his office

a list of passed causes; and whenever a passed cause is placed upon a calendar, the word "passed," followed by the date when passed, shall be entered under the date of issue.

If two or more causes are passed upon the same day, the right to priority as between them on subsequent calendars, shall be determined by the date of issue.

The clerk is directed to print in every calendar — Rule XX — the foregoing extract from Rule XXXIX — and the foregoing rule for carrying into effect Rule XXXIX which is, this 14th day of March, 1881, adopted and ordered entered in the minutes of the court.

WARREN COUNTY.

Notes of issue are required to be filed in the clerk's office at least twelve days before the sitting of the court.

When the date of issue is not given the cause is placed at the end of the proper calendar.

Calendar fee required.

WASHINGTON COUNTY.

Notes of issue are required to be filed in the clerk's office at least twelve days before the court convenes.

When the date of issue is not given, the cause will be placed at the end of the proper calendar.

When the note of issue filed with the clerk does not inform him whether the issue is of fact or of law, nor whether the same is triable by a jury or by a court without a jury, the cause will be placed upon the jury calendar.

Calendar fee not required.

WAYNE COUNTY.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court.

The trial fee of one dollar is payable by the party bringing the same on, and must be paid to the clerk when the case is called and before proceeding to trial.

WESTCHESTER COUNTY.

Supreme Court Calendar Rules.

1. Any cause may be set down for a day by a stipulation filed with the clerk, before it appears on the day calendar, except that it may not be advanced out of its order in that way. Causes marked "off" on the call of the day calendar may be set down for a day of any subsequent term only, by stipulation or a five days' notice to the other side filed with the clerk.

2. Causes will not be set down for days upon the call of the day calendar. The answer must be "ready" or "off."

3. The first day a cause is on the day calendar it will be held for that day if marked "ready."

4. The court will pay no regard to engagements of counsel elsewhere, unless a signed written statement thereof by the attorney or counsel (which need not be sworn to) be submitted, giving the title of the cause in which the engagement is, in what court and part, and before what judge such cause is on trial, and when the trial commenced, and how long it is likely to continue. Engagement in an Appellate Court will not be regarded, unless stated in the same way and with equal precision. An oral statement of any engagement in this county will suffice.

5. All other excuses or motions for delay, or for holding or postponing causes must be presented by affidavit on the call of the day calendar in order to be considered for any purpose, including a motion in the Special Term to open a default.

6. The court will not hear oral statements or arguments in respect of such engagements, excuses or motions, but will pass upon such written statements, or affidavits thereof, by indorsements thereon, after the call of the day calendar, and file the same with the clerk.

7. Not more than two causes will be held ready on the day calendar for one counsel in addition to the one he may be engaged in trying in this county, or if he be engaged out of this county, and in all cases the counsel who is to try the cause must be designated on the call of the day calendar, if required by the court.

8. If a cause answered "ready" by the plaintiff be afterward answered "off" by the plaintiff, or made unduly obstructive by

the unreadiness of the plaintiff, it may be stricken from, or sent to the foot of the general calendar.

9. A calendar of causes noticed for a term will be made up and printed by the clerk; the numbering thereof following consecutively the highest number on the calendar of the last preceding term. A cause once placed on a calendar will retain its number until it is finally disposed of, unless, by directions of the court, a new calendar of all causes undisposed of is made up, in which event it will receive a new number.

County Court Calendar Rules.

1. Civil causes will be tried at the opening of the term and before the criminal business is taken up.

2. Causes appearing upon this calendar will be marked ready or off on the call.

3. The clerk will make up a day calendar pursuant to section 977 of the Code of Civil Procedure, as amended in 1903, of the first fifteen cases marked ready, also a reserved calendar of the following fifteen ready cases, and add to each from day to day so that there will be fifteen cases on the day calendar and fifteen cases on the reserve calendar each day.

4. Cases appearing for the first time on the reserve calendar will be passed for the day upon the appearance or written stipulation of attorneys. No cases can be set down for a specified day without the approval of the court, but cases will not be set down for days on the call of the day calendar.

5. A cause marked "off" the term will be placed upon the calendar for any subsequent term by the clerk, upon filing a stipulation, or a notice to the other side that the case will be placed upon the calendar. Such stipulation or notice of restoral to be filed with the clerk (with proof of service) at least twelve days before the opening of the term.

To Attorneys.

The trial fee of one dollar is payable by the party bringing the same on, and must be paid to the clerk when the case is called and before proceeding to trial.

The calendar fee of fifty cents must be paid to the clerk for the use of the sheriff by the party first putting the cause on calendar,

at the time of filing his note of issue. (See sub. 4, § 3307, Code Civ. Pro.) Unless this requirement is observed, causes cannot be placed on the calendar.

Notes of issue are required to be filed in the clerk's office twelve days before the sitting of the court. Unless this rule is observed, causes cannot be entered on the calendar.

Where a party has served a notice of trial, and filed a note of issue, for a term at which the case is not tried, it is not necessary for him to serve a new notice of trial or file a new note of issue for a succeeding term; and the action must remain on the calendar until it is disposed of. (See chap. 51, Laws 1893.)

Notes of issue should be written only on one side of the paper. To insure accuracy, names should be legibly written and spelled correctly.

WYOMING COUNTY.

[For Supreme Court rules applicable to Wyoming county, see under Allegany county.]

THE JUDICIARY OF THE STATE OF NEW YORK.

ARTICLE VI OF THE CONSTITUTION OF THE STATE OF NEW YORK.

Article VI.

Supreme Court; how constituted; judicial districts.— Section 1. The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or may be prescribed by law not inconsistent with this article. The existing judicial districts of the State are continued until changed as hereinafter provided. The Supreme Court shall consist of the justices now in office, and of the judges transferred thereto by the fifth section of this article, all of whom shall continue to be justices of the Supreme Court during their respective terms, and of twelve additional justices who shall reside in and be chosen by the electors of, the several existing judicial districts, three in the first district, three in the second, and one in each of the other districts; and of their successors. The successors of said justices shall be chosen by the electors of their respective judicial districts. The legislature may alter the judicial districts once after every enumeration under the Constitution, of the inhabitants of the State, and thereupon reapportion the justices to be thereafter elected in the districts so altered. The legislature may from time to time increase the number of justices in any judicial district, except that the number of justices in the first and second district or in any of the districts into which the second district may be divided, shall not be increased to exceed one justice for each eighty thousand or fraction over forty thousand of the population thereof, as shown by the last State or federal census or enumeration, and except that the number of justices in any other district shall not be increased to exceed one justice for each sixty thousand or fraction over thirty-five thousand of the population thereof as shown by the last State or Federal census or enumeration. The legislature may erect out of the Second Judicial District as now constituted another judicial district and apportion the justices

in office between the districts, and provide for the election of additional justices in the new district not exceeding the limit herein provided.

Judicial departments; Appellate Division, how constituted; Governor to designate justices; reporter; time and place of holding Courts.— § 2. The legislature shall divide the State into four judicial departments. The first department shall consist of the county of New York; the others shall be bounded by county lines, and be compact and equal in population as nearly as may be. Once every ten years the legislature may alter the judicial departments, but without increasing the number thereof. There shall be an Appellate Division of the Supreme Court, consisting of seven justices in the first department, and of five justices in each of the other departments. In each department four shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case. From all the justices elected to the Supreme Court the Governor shall designate those who shall constitute the Appellate Division in each department; and he shall designate the presiding justice thereof, who shall act as such during his term of office, and shall be a resident of the department. The other justices shall be designated for terms of five years or the unexpired portions of their respective terms of office, if less than five years. From time to time as the terms of such designations expire, or vacancies occur, he shall make new designations. A majority of the justices so designated to sit in the Appellate Division, in each department shall be residents of the department. He may also make temporary designations in case of the absence or inability to act of any justice in the Appellate Division, or in case the presiding justice of any Appellate Division shall certify to him that one or more additional justices are needed for the speedy disposition of the business before it. Whenever the Appellate Division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments at a meeting called by the presiding justice of the department in arrears may transfer any pending appeals from such department to any other department for hearing and determination. No justice of the Appel-

late Division shall, within the department to which he may be designated to perform the duties of an appellate justice, exercise any of the powers of a justice of the Supreme Court, other than those of a justice out of Court, and those pertaining to the Appellate Division, or to the hearing and decision of motions submitted by consent of counsel, but any such justice, when not actually engaged in performing the duties of such appellate justice in the department to which he is designated, may hold any term of the Supreme Court and exercise any of the powers of a justice of the Supreme Court in any county or judicial district in any other department of the State. From and after the last day of December, eighteen hundred and ninety-five, the Appellate Division shall have the jurisdiction now exercised by the Supreme Court at its General Terms and by the General Terms of the Court of Common Pleas for the city and county of New York, the Superior Court of the city of New York, the Superior Court of Buffalo and the city of Brooklyn, and such additional jurisdiction as may be conferred by the legislature. It shall have power to appoint and remove a reporter. The justices of the Appellate Division in each department shall have power to fix the times and places for holding Special Terms therein, and to assign the justices in the departments to hold such terms; or to make rules therefor.

Judge or justice not to sit in review; testimony in equity cases. — § 3. No judge or justice shall sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any Court of which he was at the time a sitting member. The testimony in equity cases shall be taken in like manner as in cases at law; and, except as herein otherwise provided, the legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised.

Terms of office; vacancies, how filled.— § 4. The official terms of the justices of the Supreme Court shall be fourteen years from and including the first day of January next after their election. When a vacancy shall occur otherwise than by expiration of term in the office of justice of the Supreme Court the same shall be

filled for a full term, at the next general election, happening not less than three months after such vacancy occurs; and, until the vacancy shall be so filled, the Governor by and with the advice and consent of the Senate, if the Senate shall be in session, or if not in session the Governor, may fill such vacancy by appointment, which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

City Courts abolished; judges become justices of Supreme Court; salaries; jurisdiction vested in Supreme Court.—§ 5. The Superior Court of the city of New York, the Court of Common Pleas for the city and county of New York, the Superior Court of Buffalo, and the city Court of Brooklyn, are abolished from and after the first day of January, one thousand eight hundred and ninety-six, and thereupon the seals, records, papers and documents of or belonging to such Courts, shall be deposited in the offices of the clerks of the several counties in which said Courts now exist; and all actions and proceedings then pending in such Courts shall be transferred to the Supreme Court for hearing and determination. The judges of said Courts in office on the first day of January, one thousand eight hundred and ninety-six, shall, for the remainder of the terms for which they were elected or appointed, be justices of the Supreme Court; but they shall sit only in the counties in which they were elected or appointed. Their salaries shall be paid by the said counties respectively, and shall be the same as the salaries of the other justices of the Supreme Court residing in in the same counties. Their successors shall be elected as justices of the Supreme Court by the electors of the judicial districts in which they respectively reside.

The jurisdiction now exercised by the several Courts hereby abolished, shall be vested in the Supreme Court. Appeals from inferior and local Courts now heard in the Court of Common Pleas for the city and county of New York and the Superior Court of Buffalo, shall be heard in the Supreme Court in such manner and by such justice or justices as the Appellate Divisions in the respective departments which include New York and Buffallo shall direct, unless otherwise provided by the legislature.

Circuit Courts and Courts of Oyer and Terminer abolished.— § 6. Circuit Courts and Courts of Oyer and Terminer are abolished from and after the last day of December, one thousand eight hundred and ninety-five. All their jurisdiction shall thereupon be vested in the Supreme Court, and all actions and proceedings then pending in such Courts shall be transferred to the Supreme Court for hearing and determination. Any justice of the Supreme Court, except as otherwise provided in this article, may hold Court in any county.

Court of Appeals.— § 7. The Court of Appeals is continued. It shall consist of the chief judge and associate judges now in office, who shall hold their offices until the expiration of their respective terms, and their successors, who shall be chosen by the electors of the State. The official terms of the chief judge and associate judges shall be fourteen years from and including the first day of January next after their election. Five members of the Court shall form a quorum, and the concurrence of four shall be necessary to a decision. The Court shall have power to appoint and to remove its reporter, clerk and attendants. Whenever and as often as a majority of the judges of the Court of Appeals shall certify to the Governor that said Court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the Governor shall designate not more than four justices of the Supreme Court to serve as associate judges of the Court of Appeals. The justices so designated shall be relieved from their duties as justices of the Supreme Court and shall serve as associate judges of the Court of Appeals until the causes undisposed of in said Court are reduced to two hundred, when they shall return to the Supreme Court. The Governor may designate justices of the Supreme Court to fill vacancies. No justice shall serve as associate judge of the Court of Appeals except while holding the office of justice of the Supreme Court, and no more than seven judges shall sit in any case.

Vacancy in Court of Appeals, how filled.— § 8. When a vacancy shall occur otherwise than by expiration of term, in the office of chief or associate judge of the Court of Appeals, the same

shall be filled, for a full term, at the next general election happening not less than three months after such vacancy occurs; and until the vacancy shall be so filled, the Governor, by and with the advice and consent of the Senate, if the Senate shall be in session, or if not in session the Governor, may fill such vacancy by appointment. If any such appointment of chief judge shall be made from among the associate judges, a temporary appointment of associate judge shall be made in like manner; but in such case, the person appointed chief judge shall not be deemed to vacate his office of associate judge any longer than until the expiration of his appointment as chief judge. The powers and jurisdiction of the Court shall not be suspended for want of appointment or election, when the number of judges is sufficient to constitute a quorum. All appointments under this section shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

Jurisdiction of Court of Appeals.— § 9. After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the Court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said Court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them. The Appellate Division in any department may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals.

The legislature may further restrict the jurisdiction of the Court of Appeals and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved.

The provisions of this section shall not apply to orders made or judgments rendered by any General Term before the last day of

December, one thousand eight hundred and ninety-five, but appeals therefrom may be taken under existing provisions of law.

Judges not to hold any other office.— § 10. The judges of the Court of Appeals and the justices of the Supreme Court shall not hold any other office or public trust. All votes for any of them, for any other than a judicial office, given by the legislature or the people, shall be void.

Removal of judges.— § 11. Judges of the Court of Appeals and justices of the Supreme Court may be removed by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace and judges or justices of inferior Courts not of record, may be removed by the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal.

Compensation; age restriction; assignment by Governor.— § 12. No person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age. Each justice of the Supreme Court shall receive from the State the sum of ten thousand dollars per year. Those assigned to the Appellate Divisions in the Third and Fourth Departments shall each receive in addition the sum of two thousand dollars, and the presiding justices thereof the sum of two thousand five hundred dollars per year. Those justices elected in the First and Second Judicial Departments shall continue to receive from their respective cities, counties or districts, as now provided by law, such additional compensation as will make their aggregate compensation what they are now receiving. Those justices elected in any judicial depart-

ment other than the first or second, and assigned to the Appellate Divisions of the First and Second Departments shall, while so assigned, receive from those departments, respectively, as now provided by law, such additional sum as is paid to the justices of those departments. A justice elected in the Third or Fourth Department assigned by the Appellate Division or designated by the Governor to hold a trial or special term in a judicial district other than that in which he is elected shall receive in addition ten dollars per day for expenses while actually so engaged in holding such term, which shall be paid by the State and charged upon the judicial district where the service is rendered. The compensation herein provided shall be in lieu of and shall exclude all other compensation and allowance to said justices for expenses of every kind and nature whatsoever. The provisions of this section shall apply to the judges and justices now in office and to those hereafter elected.

Trial of impeachments.— § 13. The Assembly shall have the power of impeachment, by a vote of a majority of all the members elected. The Court for the trial of impeachments shall be composed of the president of the Senate, the senators, or the major part of them, and the judges of the Court of Appeals, or the major part of them. On the trial of an impeachment against the Governor or Lieutenant-Governor, the Lieutenant-Governor shall not act as a member of the Court. No judicial officer shall exercise his office, after articles of impeachment against him shall have been preferred to the Senate, until he shall have been acquitted. Before the trial of an impeachment the members of the Court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust or profit under this State; but the party impeached shall be liable to indictment and punishment according to law.

County Courts.— § 14. The existing County Courts are continued, and the judges thereof now in office shall hold their offices

until the expiration of their respective terms. In the county of Kings there shall be two county judges and the additional county judge shall be chosen at the next general election held after the adoption of this article. The successors of the several county judges shall be chosen by the electors of the counties for the term of six years. County Courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding two thousand dollars. The legislature may hereafter enlarge or restrict the jurisdiction of the County Courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds two thousand dollars, or in which any person not a resident of the county is a defendant.

Courts of Sessions, except in the county of New York, are abolished from and after the last day of December, one thousand eight hundred and ninety-five. All the jurisdiction of the Court of Sessions in each county, except the county of New York, shall thereupon be vested in the County Court thereof, and all actions and proceedings then pending in such Courts of Sessions shall be transferred to said County Courts for hearing and determination. Every county judge shall perform such duties as may be required by law. His salary shall be established by law, payable out of the county treasury. A county judge of any county may hold County Courts in any other county when requested by the judge of such other county.

Surrogates' Courts; surrogates, their powers and jurisdiction; vacancies.— § 15. The existing Surrogates' Courts are continued, and the surrogates now in office shall hold their offices until the expiration of their terms. Their successors shall be chosen by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York, where they shall continue to be fourteen years. Surrogates and Surrogates' Courts shall have the jurisdiction and powers which the surrogates and existing Surrogates' Courts now possess, until otherwise provided by the legislature. The county judge shall

be surrogate of his county, except where a separate surrogate has been or shall be elected. In counties having a population exceeding forty thousand, wherein there is no separate surrogate, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be six years. When the surrogate shall be elected as a separate officer his salary shall be established by law, payable out of the county treasury. No county judge or surrogate shall hold office longer than until and including the last day of December next after he shall be seventy years of age. Vacancies occurring in the office of county judge or surrogate shall be filled in the same manner as like vacancies occurring in the Supreme Court. The compensation of any county judge or surrogate shall not be increased or diminished during his term of office. For the relief of Surrogates' Courts the legislature may confer upon the Supreme Court in any county having a population exceeding four hundred thousand, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate cases.

Local judicial officers.— § 16. The legislature may, on application of the board of supervisors, provide for the election of local officers, not to exceed two in any county, to discharge the duties of county judge and of surrogate, in cases of their inability or of a vacancy, and in such other cases as may be provided by law, and to exercise such other powers in special cases as are or may be provided by law.

Justices of the peace; District Court justices.— § 17. The electors of the several towns shall, at their annual town meetings, or at such other time and in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the peace and judges or justices of inferior Courts not of record, and their clerks, may be removed for cause, after due notice and an opportunity of being heard by such Courts as are or may be prescribed by law. Justices of the peace and District Court justices may be elected in

the different cities of this State in such manner, and with such powers, and for such terms, respectively, as are or shall be prescribed by law; all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities, or appointed by some local authorities thereof.

Inferior local Courts.— § 18. Inferior Courts of civil and criminal jurisdiction may be established by the legislature, but no inferior local Court hereafter created shall be a Court of record. The legislature shall not hereafter confer upon any inferior or local Court of its creation, any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon County Courts by or under this article. Except as herein otherwise provided, all judicial officers shall be elected or appointed at such times and in such manner as the legislature may direct.

Clerks of Courts.— § 19. Clerks of the several counties shall be clerks of the Supreme Court, with such powers and duties as shall be prescribed by law. The justices of the Appellate Division in each department shall have power to appoint and to remove a clerk, who shall keep his office at a place to be designated by said justices. The clerk of the Court of Appeals shall keep his office at the seat of government. The clerk of the Court of Appeals and the clerks of the Appellate Division shall receive compensation to be established by law and paid out of the public treasury.

No judicial officer, except justice of the peace, to receive fees; not to act as attorney or counselor.— § 20. No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office; nor shall any judge of the Court of Appeals, or justice of the Supreme Court, or any county judge or surrogate hereafter elected in a county having a population exceeding one hundred and twenty thousand, practice as an attorney or counselor in any Court of record of this State, or act as referee. The legislature may impose a similar prohibition upon county judges and surrogates in other counties. No one shall be eligible to the office of judge of the Court of Appeals, justice

of the Supreme Court, or, except in the county of Hamilton, to the office of county judge or surrogate, who is not an attorney and counselor of this State.

Publication of statutes.— § 21. The legislature shall provide for the speedy publication of all statutes, and shall regulate the reporting of the decisions of the Courts; but all laws and judicial decisions shall be free for publication by any person.

Terms of office of present justices of the peace and local judicial officers.— § 22. Justices of the peace and other local judicial officers provided for in sections seventeen and eighteen, in office when this article takes effect, shall hold their offices until the expiration of their respective terms.

Courts of Special Sessions.— § 23. Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law.

AMENDED RULES OF PRACTICE IN FORECLOSURE CASES.

The following form has been approved by the justices of the Supreme Court.

To comply with the Amended Rules of Practice in foreclosure cases the judgment should contain immediately following the direction to sell and in substitution for the provisions now in use the following provisions:

Under the direction of ....., Esq., who is hereby appointed referee for that purpose; that said referee give public notice of the time and place of such sale according to law and the course and practice of this court; that the plaintiff or any other party to this action may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed of the premises sold; that such referee on receiving the proceeds of sale forthwith pay therefrom the taxes, assessments and water rents which are or may become liens on the premises at the time of sale. That said referee then deposit the balances of such proceeds of sale in * ..... and shall thereafter make the following payments, and his checks drawn for that purpose shall be paid by the said depository:

First.— The sum of $50 to the said referee for his fees herein.

Second.—Advertising expenses as shown on the bills presented and certified by the said referee to be correct, and duplicate copies of which shall be left with said depository.

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* A bank or trust company authorized to receive on deposit court funds.

Third.— Said referee shall also pay to the plaintiff the sum of ..... dollars, adjudged to the plaintiff for his costs and disbursements in this action, with interest thereon from the date hereof, together with an additional allowance of ..... dollars hereby awarded to the plaintiff, in addition to costs, with interest thereon from the date thereof; and also ..... dollars, the said amount so reported due as aforesaid, together with the legal interest thereon from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same.

Fourth.— If such referee intends to apply for a further allowance for his fees, he may leave upon deposit such amount as will cover such additional allowance, to await the further order of the court thereon, after application duly made.

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RULES OF PRACTICE

OF THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

ALSO

RULES FOR ADMISSION OF ATTORNEYS

ANNOTATED

Amended to October 13, 1910

By EDMUND H. SMITH
Former Reporter of the Court of Appeals

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PREFACE.

In order to completely cover the important adjudications bearing upon the practice in the Court of Appeals, it has been necessary to reset and make all new this Ninth Edition.

For these annotations, as well as for much valuable advice and assistance in the preparation of the work, the editor is under obligation to the original author, Mr. Edmund H. Smith, former Reporter of the Court.

C. J. H.

ALBANY, *October* 12, 1910.

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NOTICE TO ATTORNEYS.

The first Monday of each session only will be a motion day, on which *oral* arguments will be heard in original motions. Original motions may be *submitted,* without oral argument, on *any* Monday when the Court is in session, provided they are submitted by *both sides.*

After the day calendar is made up — at 6 o'clock P. M.— stipulations are too late. The Clerk has then no power to leave a number off.

The full number of cases and points (18) are required, without which appeals may not be heard.

The "Order Calendar" is composed of preferred causes, and the notice of argument must claim the preference as "an appeal entitled to be heard under Rule XI of the Court of Appeals." Appeals from orders should be noticed for the first Monday of a session.

The county clerk's certificate, or waiver thereof under section 3301, Code C. P., are necessary parts of the printed case on appeal.

When a new calendar is ordered, it is desirable to notice causes in which the returns are filed, *at once.*

Counsel residing in New York city and its vicinity who intend to argue causes on the General Calendar, should send their *residence* addresses to the Clerk, and should promptly notify him of changes in their *office* addresses.

The daily sessions of the Court are held from 2 o'clock P. M. to 6 o'clock P. M., except Fridays only, when the Court will sit from 10 A. M. to 2 P. M.

Every Exhibit presented to the Court should be plainly marked with the address of the Counsel presenting the same, as well as the title of the cause.

The Clerk always *submits* for Counsel who are absent when their cases are called for argument, provided their papers have been filed as directed by Rule VII.

Requests for copies of opinions should be addressed to the State Reporter, Albany, N. Y.

The eighteen printed copies of the case required by Rule VII to be filed with the Clerk must be bound in light-colored (not dark) paper, and should not be sent to the Clerk for filing until after the appeal has received a Calendar number.

Each day's Calendar and all court notices to the Bar are printed in the New York Law Journal, which is the legal publication through which the Clerk endeavors to reach the legal profession.

Attention of Attorneys is called to Rule VII, which will be strictly enforced.

COURT OF APPEALS PRACTICE.

RULES OF THE COURT OF APPEALS.

ORDER ADOPTING RULES.

IN THE COURT OF APPEALS,
December 15, 1906.

Ordered, That the following amended rules regulating the practice and proceedings in the Court of Appeals, be and the same are hereby adopted in pursuance of the provision of the Code of Civil Procedure, such rules to take effect January 7, 1907.

Rules; making and publishing.

The Judiciary Law (chapter 30 of the Consolidated Laws, chapter 35, Laws of 1909) provides as follows, in relation to rules of the Court of Appeals:

Court of Appeals may make rules of practice in its court.

§ 51. The Court of Appeals may from time to time make, alter and amend, rules, not inconsistent with the Constitution or statutes of the State, regulating the practice and proceedings in the court. (Formerly part of section 193 of the Code of Civil Procedure.)

General rule or order of Court of Appeals must be published.

§ 52. A general rule or order of the Court of Appeals does not take effect until it has been published in the newspaper published at Albany, designated pursuant to section 82 of the Executive Law, once in each week for three successive weeks. (Formerly part of section 18, Code of Civil Procedure.)

Power of the Court of Appeals as to admission of attorneys and counselors.

§ 53 (sub. 4). The rules established by the Court of Appeals, touching the admission of attorneys and counselors to practice in the courts of record of the State, shall not be changed or amended, except by a majority of

the judges of that court. A copy of each amendment to such rules must, within five days after it is adopted, be filed in the office of the Secretary of State. (Formerly part of section 57, Code of Civil Procedure.)

Application of provisions as to publishing.

It has been held that section 18 of the Code of Civil Procedure (*supra*) [section 52 of the Judiciary Law] has no application to rules of Court of Appeals relating to the admission of attorneys and counselors. 16 Alb. Law J. (1877), 309.

It is not essential to the validity of amendments to rules of the Court of Appeals regulating the admission of attorneys, that they be published in the volumes of the Session Laws, and that a copy thereof be filed with each county clerk, as required by section 57 of the Code of Civil Procedure (*supra*) [now subd. 4 of section 53, Judiciary Law]. Those requirements are only directory, not mandatory. Matter of Maxwell (Supr. Ct. 1891), 14 N. Y. Supp. 658; 60 Hun, 581.

Rules of court.

Force of.— The rules of the court, being made under special statutory authority, have the force and effect of statutes. Matter of Moore (1888), 108 N. Y. 280.

Relief from failure to comply with.— Failure to comply with a rule which is directory merely, may be obviated by the court allowing the act to be done *nunc pro tunc;* but this is not so in the case of mandatory provisions. Matter of Moore (*supra*); and see Martine v. Lowenstein (1877), 68 N. Y. 456.

In conflict with Code.—A rule of court which conflicts with the Code is inoperative; French v. Powers (1880), 80 N. Y. 146; Gormerly v. McGlynn (1881), 84 N. Y. 284; and the effect of a statutory provision cannot be altered by a rule of court. Rice v. Ehele (1874), 55 N. Y. 518; Glenney v. Stedwell (1876), 64 N. Y. 120.

Construction of statutes by rules.— Rules of court, made under the authority of the Code, may be considered as giving construction to the statute. Myers v. Feeter (Supr. Ct. 1850), 4 How. Prac. 240, 241.

Disregarding rules.— The court may deviate from its general rules whenever in its judgment a proper case is presented. Clark v. Brooks (N. Y. Com. Pl. 1864), 26 How. Prac. 285.

A substantial remedy cannot be prevented by a neglect of the opposite party to observe the rules of practice in his pleading. Goldberg v. Utley (1875), 60 N. Y. 427, 429.

Courts are opposed to departing from the customary modes of procedure, especially where such departure tends to infringe on the general rules of the court. Battershall v. Davis (Supr. Ct. 1861), 23 How. Prac. 383.

The true object of technical rules is to promote justice or prevent injustice. When they fail of those ends courts should neither encourage nor enforce them. People v. Tweed (1875), 5 Hun, 353, 358.

Practice when Code and rules silent.— The former practice of the Court for the Correction of Errors governs the Court of Appeals in cases not provided for by its rules or the Code. Hastings v. McKinley (Ct. App. 1853), 8 How. Prac. 175; and see Mut. Life Ins. Co. v. Bigler (1880), 79 N. Y. 568.

The General Rules of Practice.— By general usage, the procedure prescribed by the General Rules of Practice established under section 17 of the Code of Civil Procedure, (Judiciary Law, sections 93, 94) although, by the terms of that section, not binding on the Court of Appeals, is followed there, where applicable, in cases not otherwise provided for. See, *e. g.,* query as to application of Rule 2 of the General Rules of Practice to the Court of Appeals in People ex rel. Wallkill Valley R. R. Co. v. Keator (1885), 101 N. Y. 610, 613.

But, by force of section 3347 of the Code of Civil Procedure, which regulates the application of certain portions of that Code, subdivision 10 of section 791, which mentions among preferred causes "A cause entitled to preference by the general rules of practice," does not apply to the Court of Appeals. Nichols v. Scranton Steel Co. (1892), 135 N. Y. 634.

And the provision of section 1361 of the Code, which declares that appeals from determinations in special proceedings "are governed by the provisions of this act, and of the general rules of practice relating to an appeal in an action, except as otherwise specially prescribed by law," does not apply to appeals to the Court of Appeals. Matter of Southern Boulevard R. R. Co. (1891), 128 N. Y. 93.

Pre-existing practice.—Although a revision of court rules may

not contain any saving, in terms, of pre-existing practice, it cannot be deemed to abrogate a practice then long established, which was not dependent upon any court rule which was the subject of revision. Miller v. Stettiner (N. Y. Supr. Ct. 1862), 7 Bosw. 692, 696.

Custom of the courts.—All matters of practice are, in the first instance, in the discretion of the courts in which questions of practice arise, when there are no statutory provisions or provisions by general rules of court that govern the case. Yet matters of practice come after a while to be governed absolutely by the custom of the courts, and what is found in any case to have been held by authoritative decisions to be the custom of the courts becomes thus the way in which discretion must go. Fisher v. Gould (1880), 81 N. Y. 228, 232.

Inherent power of procedure.— The powers of courts are either statutory or those which appertain to them by force of the common law, or they are partly statutory and partly derived from immemorial usage, which latter constitutes their inherent jurisdiction. They are organized for the protection of public and private rights and the enforcement of remedies. Presumptively, therefore, whatever judicial procedure is essential to enable courts to exercise their function is authorized. McQuigan v. D., L. & W. R. R. Co. (1891), 129 N. Y. 50.

Amendments of rules; construction.— The amendments of the rules of court are analogous to the amendments of statutes and should receive the same construction. The rule of statutory construction — that when a statute is amended by enacting that it "is amended so as to read as follows," and then incorporating the changes and additions, with so much of the former statute as is retained, the part which remains unchanged is to be considered as having been continued the law from the time of its original enactment — applies to the amendments of the rules of court. Matter of Warde (1897), 154 N. Y. 342.

Former rules; changes; revision.

Practice rules.— The first rules of the Court of Appeals, on its organization under the Constitution of 1846, were adopted July 6, 1847, but being based on the old practice they were soon rendered obsolete by the enactment of the Code of Procedure, and

on May 25, 1849, new rules were adopted, which have constituted the basis of all subsequent revisions. These rules were nineteen in number, and are to be found in 2 N. Y. 573. In January, 1853, two additional rules were adopted, which, with the preceding rules as amended up to June, 1853, are given in 5 N. Y. 575. On January 23, 1854, "Calendar Practice," which originally preceded the rules, but which is now incorporated in Rule X, was established (15 N. Y. 638). A twenty-second rule was added in January, 1858, which, with the other rules as they then existed, may be seen in 15 N. Y. 632. "Calendar Practice" was amended in June, 1859 (18 N. Y. 601); and in June, 1860, a rule prescribing the classes and order of preferred causes was adopted, and added as Rule XXIII (21 N. Y. 601). In January, 1862, three additional rules were adopted, of which Rule XXV was important in that it prohibited all judgments by default. See Maher v. Carman (1868), 38 N. Y. 25. In 1870 this prohibition was limited to judgments of reversal. By January, 1864, the rules had increased to twenty-nine, and so continued until after the reorganization of the court under the constitutional amendment of 1869, which occurred on July 4, 1870. On the sixth of that month the "Calendar Practice" and rules were revised, and the latter reduced to twenty-three, which, with certain amendments, continued in force to the revision of October 28, 1892, unchanged as to subject-matter, with the exception of Rule XXIII, which originally prescribed the time for filing notices of argument, but which, in September, 1873, was supplanted by the rule on rearguments. The rule on motions was amended in June, 1889, by changing the motion days from Tuesday to Monday. These rules have been printed with the court calendars, and are also to be found in various annotated editions of the Codes and in separate publications of court rules.

On October 28, 1892, the rules were amended by the court and ordered to take effect, as so amended, on January 1, 1893. By that revision (on which the first edition of this book, that of 1893, was based), Rule I of 1870, relating to the return, and the provisions of Rule XX of that year prescribing the classes and order of preferred causes, were abrogated, having been superseded by the provisions of the Code of Civil Procedure. Rule X of 1870, relating to number of counsel heard on arguments, and

Rule XVIII, in reference to exchanged causes, etc., were omitted in 1892 as unnecessary; Rule XII of 1870, on submission of causes, was joined with "Calendar Practice" in new Rule X; and the rule in reference to making up the calendars (formerly Rule XXII, now XIX) was materially changed by providing for placing on the calendar, if so ordered, all causes in which returns are on file, although they may not have been noticed for argument. In consequence of the above changes the rules were reduced to twenty, arranged in a new order and given new numbers, which they still retain. The changes in the numbers of corresponding rules effected by the revision of 1892 are as follows:

Former Rules.	Cal. Prac.	I.	II.	III.	IV.	V.	VI.	VII.	VIII.	IX.	X.	XI.	XII.	XIII.
Present Rules.	X.	—	I.	II.	III.	IV.	V.	VI.	VII.	VIII.	—	IX.	X	XI.

Former Rules.	XIV.	XV.	XVI.	XVII.	XVIII.	XIX.	XX.	XXI.	XXII.	XXIII.
Present Rules.	XVI.	XVII.	XVIII.	XII.	—	XIII.	XIV.	XV.	XIX.	XX.

The changes effected in the Rules of Practice by the revision on which the second edition of this book is based, which revision, as appears from the above order of the court, was adopted October 22, 1894, to take effect January 1, 1895, consisted of the substitution, for the former first paragraph of Rule VII, of provisions requiring the filing of copies of the case and the filing and serving of copies of the points on both sides, before the cause is placed on the day calendar for argument; of an addition to Rule VIII, providing for the submission of causes to judges absent at the time of argument, and of an addition to Rule XII, providing for the exchange, by stipulation, of causes not on the printed calendar with causes on the calendar. On December 2, 1895, Rule IV was amended by substituting the words "the Appellate Division of the Supreme Court" for the words "General Term," in accordance with the changes introduced by the Judiciary Article of the Constitution of 1894, taking effect January 1, 1896. Rule XI, relating to motions and appeals from orders, was amended on June 19, 1896, and January 28, 1898.

The latest amendments to the Rules of Practice were made on the 15th day of December, 1906, and went into effect on January 7, 1907. Of the twenty-two rules, eleven were amended, but nearly all of these amendments are merely verbal in character, intended to make the meaning clearer rather than to change their scope or effect.

The amendment to Rule V now requires that all papers furnished to the court, if bound, shall be bound in light-colored paper, which can be legibly written upon.

The amendments to Rule XI consist of additional provisions in reference to motions and appeals from orders.

The amendment to Rule XII relates to the call of the calendar. It is now provided that any cause which is regularly called and passed without postponement by the court for good cause shown at the time of the call, instead of being placed upon all subsequent calendars, as if the return had been filed on the day when it was so passed, shall be stricken from the calendar.

The amendments of 1906 are indicated by being placed in brackets.

Rules for admission of attorneys and counselors.— The act empowering the judges of the Court of Appeals "to establish such rules and regulations as they may deem proper in relation to the admission of persons hereafter applying to be admitted as attorneys, solicitors and counselors in all the courts of this State," now embodied in the Judiciary Law and the Executive Law, was passed April 13, 1871 (Laws of 1871, chap. 486). In pursuance thereof, the judges, on May 1, 1871, adopted rules on the subject, which took effect June 1, 1871, and which are published in Volume 2 of Session Laws of 1871, p. 2194, and are also to be found in 10 Abb. Prac. (N. S.) 147, 508, in notes. Amended rules were adopted September 28, 1877, taking effect October 1, 1877. The most important feature of these amendments was the provision that applicants should be first examined and admitted as attorneys only, and should be again examined for admission as counselors two years thereafter. This division of admission was abolished in 1882, on May 4 of which year amended rules were adopted, which took effect July 1, 1882. These rules introduced the important requirement that all applicants who were not graduates of a college or university, except those who had been admitted in another State or country, should pass a regents' examination as a preliminary to the study of law. Rule II of 1882, in which this requirement was embodied, was amended in some of its details March 19, 1891, and as so amended took effect April 13, 1891, and was, together with the other rules of 1882, readopted by the court in the revision of October 28, 1892, which took effect January 1,

1893. The rules as then readopted are to be found in the first edition of this book.

By chapter 760 of the Laws of 1894, approved May 23, 1894, section 56 of the Code of Civil Procedure, relating to the examination and admission of attorneys and counselors, was amended so as to provide for the creation of a State Board of Law Examiners, to consist of three members to be appointed by the Court of Appeals, and for the conducting, under rules to be prescribed by that court, of a uniform system of examinations for admission to the bar throughout the State by such Board of Examiners. The act provided that it should go into effect January 1, 1895, but that the examiners might be appointed and rules for examination adopted immediately.

This legislation necessitated important changes in the rules for the admission of attorneys and counselors, and amendments were consequently made and adopted by the Court of Appeals on October 22, 1894, to take effect January 1, 1895. These amended rules formed the basis of the second edition of this book. The principal changes introduced by them consist of regulations for the examinations to be conducted by the State Board of Law Examiners, pursuant to section 56 of the Code as amended, precedent to admission by the Supreme Court, with provisions for the compensation of the members of the board and in reference to the times and places of holding examinations; a provision allowing the whole period of preliminary law study to be passed either in attendance at a law school or in serving a clerkship in a law office, or partly in one of these methods and partly in the other, thus dispensing with the former requirement of at least one year's clerkship in a law office; the insertion of the requirement that persons who have been admitted in another State or country must remain therein one year as attorneys, to entitle them to examination for admission here after one year's study of law in this State; the addition of advanced English, algebra and economics to the subject of the regents' examination; permission to the regents to accept certain equivalents as substitutes for their examination, with the validation of certificates previously issued by the regents upon equivalents instead of an actual examination; and the right to examination in any judicial department of the State, instead of

the former restriction to the department of which the applicant was at the time a resident.

By the terms of the amendment of 1894 to section 56 of the Code of Civil Procedure, the determination of the fact of compliance with the rules regulating admission to practice, precedent to examination for admission, was vested in the State Board of Law Examiners.

On December 2, 1895, amendments were made to the rules for the admission of attorneys, the most important of which was an addition to subdivision 3 of Rule V, providing that regents' law student certificates should be deemed to take effect as of the date of the completion of the regents' examination. On December 1, 1897, Rule VIII, relating to the State Board of Law Examiners, was amended.

On December 20, 1906, the rules for the admission of attorneys and counselors were further amended, the amendments to go into effect on the 1st day of July, 1907. These amendments were intended to make more stringent the regulations regarding examinations and to establish a still higher standard of admission to the bar of this State. Rule III, as to prerequisites to admission on examination, has been amended so as to require that the evidence of good moral character of the applicant *must* be shown by the affidavit of two reputable persons of the town or city in which the applicant resides, one of whom must be a practicing attorney of the Supreme Court, and it is required that the affidavits shall set forth in detail the facts upon which such knowledge is based. Rule IV was amended by requiring that the applicant for examination should have been an actual and not a constructive resident of this State for at least six months preceding the date of the examination. Also that the applicant must not only have attended a law school but also must have successfully completed the prescribed course of instruction therein. A year's work in a law school was required, to consist of not less than thirty-two school weeks, exclusive of usual vacations, in which not less than twelve hours' attendance upon lectures or recitations of the prescribed course, to be given or conducted by regular members of the faculty, are required in each week. The standard of educational qualifications was also raised by requiring that the applicant should have passed a satisfactory examination in second-year English instead

of in English composition and advanced English in addition to the other prescribed subjects, and under the equivalent of such examination the course of study in institutions registered by the Regents of the University as maintaining a satisfactory academic standard was raised from three to four years. Rule VI, relating to proofs that the preliminary conditions prescribed by these rules have been complied with, was amended by requiring that the evidence must be to the effect that during the entire period of law clerkship excepting usual vacations, the applicant had actually been employed by a practicing attorney of the Supreme Court as a regular law clerk and student in his law office, and under his direction and advice engaged in the practical work of the office during the usual business hours of the day.

Rule X, permitting service in the late war with Spain to count as a part of the required period of study was repealed.

In April, 1908, Rule V was amended, among the amendments being the striking out of the provision permitting the procuring and filing of the regents' certificate *within one year after* entering upon the study of the law, and retaining the single requirement of procuring and filing such certificate *before* entering upon the study of the law.

The amendments of 1906 are indicated by being printed in brackets; those of 1908 by being printed in italics.

RULES OF PRACTICE.

RULE I.

Appellant to File Return — Effect of Omission.

If the appellant shall not cause the proper return to be made and filed with the clerk of this court within the time prescribed by law (Code Civ. Pro. § 1315), the respondent may, by notice in writing, require such return to be filed within ten days after the service of the notice, and if the return be not filed in pursuance of such notice, the appellant shall be deemed to have waived the appeal. On an affidavit proving that the appeal was perfected, and the service of such notice, and a certificate of the clerk that no return has been filed, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal.

The return.

Of what to consist; time within which must be filed.—The Code of Civil Procedure prescribes the contents of the return to the Court of Appeals, and that it shall be transmitted within twenty days after the appeal is perfected by giving and serving the requisite undertaking.

The sections of the Code on the subject are as follows:

What papers transmitted, and when.

§ 1315. Where an appeal is taken from a final judgment as prescribed in title second or third of this chapter, the appellant must, within twenty days after it is perfected, cause a copy of the judgment-roll and of the case and notice of exceptions, if any, filed after the entry of judgment and a certified copy of the judgment* given thereon and of the notice of

* The return to the Court of Appeals on appeal from a judgment should contain a copy of the decisive order of the Appellate Division as well as of the judgment entered thereon.

appeal to be transmitted to the appellate court by the clerk upon whom the notice of appeal was served. Where an appeal from an order or a part of an order, is taken as prescribed in title second, third and fifth of this chapter, the appellant must, within the same time, cause a certified copy of the notice of appeal, of the order, and of the papers upon which the order was founded, to be transmitted to the appellate court by the same clerk. If the appellant fails so to do, the respondent may cause those papers to be so transmitted; and he is entitled to tax the expense thereof, as a disbursement, where he recovers costs. The clerk of the appellate court must file the papers so transmitted; and except where it is otherwise specially prescribed by law the appeal must be heard upon them.

Appeal, how taken.

§ 1300. An appeal must be taken by serving, upon the attorney for the adverse party, as prescribed in article third of title sixth of chapter eighth of this act, and upon the clerk, with whom the judgment or order appealed from is entered by filing it in his office, a written notice to the effect that the appellant appeals from the judgment or order, or from a specified part thereof. Upon an appeal to the court of appeals from an order of the Appellate Division, made upon an appeal from the Surrogate's Court, the notice of appeal shall be filed with the clerk of the Surrogate's Court.

When notice of appeal to specify interlocutory judgment, etc.

§ 1301. Where the appeal is from a final judgment, or from a final order in a special proceeding, and the appellant intends to bring up, for review thereupon, an interlocutory judgment, or an intermediate order, he must, in the notice of appeal, distinctly specify the interlocutory judgment, or intermediate order, to be reviewed.

Limitation of time to appeal.

§ 1325. An appeal to the court of appeals must be taken within sixty days after service upon the attorney for the appellant, of a copy of the judgment or order appealed from, and a written notice of the entry thereof. (Amended by Laws 1909, chap. 418.)

When time cannot be extended.

§ 784. A court, or a judge, is not authorized to extend the time fixed by law, within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a disability; or the time fixed by the court within which a supplemental complaint must be made, in order to continue an action; or an action is to abate, unless it is continued by the proper parties. A court, or a judge, cannot allow either of those acts to be done, after the expiration of the time fixed by law, or by the order, as the case may be, for doing it; except in a case specified in the next section.

Qualification of last section.

§ 785. Where a party, entitled to appeal from a judgment or order, or to move to set aside a final judgment for error in fact, dies, either before or after this chapter takes effect, and before the expiration of the time within which the appeal may be taken, or the motion made, the court may allow the appeal to be taken, or the motion to be made, by the heir, devisee or personal representative of the decedent, at any time within four months after his death.

Undertaking to perfect appeal.

§ 1326. To render a notice of appeal, to the Court of Appeals, effectual for any purpose, except in a case where it is specially prescribed by law, that security is not necessary, to perfect the appeal, the appellant must give a written undertaking, to the effect that he will pay all costs and damages, which may be awarded against him on the appeal, not exceeding five hundred dollars. The appeal is perfected, when such an undertaking is given, and a copy thereof, with notice of the filing thereof, is served, as prescribed in this title.

Defects in proceedings may be supplied.

§ 1303. Where the appellant, seasonably and in good faith, serves the notice of appeal, either upon the clerk or upon the adverse party, or his attorney, but omits, through mistake, inadvertence, or excusable neglect, to serve it upon the other, or to do any other act, necessary to perfect the appeal, or to stay the execution of the judgment or order appealed from; the court, in or to which the appeal is taken, upon proof, by affidavit, of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

Security may be waived.

§ 1305. An undertaking, which the appellant is required, by this chapter, to give, or any other act which he is so required to do, for the security of the respondent, may be waived by the written consent of the respondent.

Deposit in lieu of undertaking.

§ 1306. Where the appellant is required by this chapter, to give an undertaking, he may, in lieu thereof, deposit with the clerk with whom the judgment or order appealed from is entered, a sum of money equal to the amount for which the undertaking is required to be given. The deposit has the same effect as filing the undertaking; and notice that it has been made has the same effect as notice of the filing and service of a copy of the undertaking. The court, wherein the appeal is pending, may direct the mode in which the money shall be kept and disposed of, during the pendency, or after the determination of the appeal.

Undertaking must be filed.

§ 1307. An undertaking, given as prescribed in this chapter, must be filed with the clerk with whom the judgment or order appealed from is

entered, except that upon an appeal to the court of appeals the undertaking must be filed with the clerk of the court wherein the original judgment or order was entered.

No security necessary on appeal by the people, etc.

§ 1313. Upon an appeal taken by the people of the State, or by a State officer, or board of State officers, or a board of supervisors of a county, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking or other security.

Id.; on appeal by a domestic municipal corporation.

§ 1314. Upon an appeal taken by a domestic municipal corporation, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking or other security; except that, where an appeal is taken, as prescribed in title second, third or fourth of this chapter, the court in or from which the appeal is taken, may, in its discretion, require security to be given. In that case, the form, nature and extent of the security, not exceeding that which is required in a like case from a natural person, and the time and manner in which it must be given, must be prescribed by the order of the court; and the mayor, comptroller, or counsel to the corporation, may execute, in behalf of the corporation, an undertaking so required to be given.

Case made in Appellate Division.

§ 1339. Where an appeal to the Court of Appeals, from a judgment, rendered by the Appellate Division of the Supreme Court, upon a verdict, subject to the opinion of the court, has been perfected, a case, containing a concise statement of the facts, of the questions of law arising thereupon, and of the determination of those questions by the Appellate Division, must be prepared and settled, by or under the direction of the court below, and annexed to the judgment-roll. An exception is not necessary, to enable the Court of Appeals to review the determination of a question of law, arising upon the verdict. A certified copy of the case must be transmitted to the Court of Appeals, instead of the case upon which the judgment of the court below was rendered. The court below, or a judge thereof, may extend the time, limited by law, within which the papers must be transmitted to the Court of Appeals, for the purpose of enabling the appellant to procure the case to be prepared or settled.

Certification, or stipulation in lieu thereof.

Section 1315, of the Code of Civil Procedure, prior to amendment in 1890, required the return on appeal from a final judgment to consist "of a *certified* copy of the notice of appeal, of the judgment-roll, and of a case or notice of exceptions, if any,"

etc. At that time, the last paragraph of section 3301, as amended in 1882, provided that —

> Where the attorneys for all the parties interested, other than parties in default, or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provision of this act, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same, or entitled to any fee therefor.

It was held in Dow v. Darragh (1883), 92 N. Y. 537, that the above provision of section 3301 was not intended to alter the provision of section 1315, and of Rule I of the Court of Appeals, then in force, requiring the return to the Court of Appeals to be certified by the clerk of the court below, the court saying that parties "cannot by stipulation make up a case for this court until the law shall be further changed; the returns to this court should be made by a responsible officer under the sanction of his official oath, and his responsibility to the law; any other practice would be extremely unwise and mischievous."

Shortly before the above amendment to section 3301, it was held by courts from which returns come to the Court of Appeals that no authority existed either in the parties or their counsel to compel the clerk to accept the return prepared for his certificate as it may be presented to him, but he has a duty to perform in seeing to it that the return is a proper one, and for that service he is entitled to charge the legal rate of fees, which is expressly allowed by section 3301 of the Code, and probably was intended as a check upon frivolous appeals. Chambers v. Appleton (1881), 47 N. Y. Supr. Ct. 534, quoting from Townsend v. Nebenzahl (Supr. Ct., Spl. T. 1880), 2 Civ. Proc. R. (McCarty), 342, in note.

In Lewisohn v. Niederwiesen (1886), 40 Hun, 545, the Supreme Court refused to hear an appeal, because the papers were not certified as required by section 1353 on appeal to the General Term — remarking that the observance of the duty imposed by that section was extremely important, its object undoubtedly being to secure the presentation to the appellate court of the entire proceedings sought to be reviewed.

Thereafter, in 1890, the above clause of section 1315 was amended as set forth on page 14 *ante,* by changing "a *certified* copy of the notice of appeal, of the judgment-roll and of a case or notice of exceptions, if any," to "a copy of the judgment-roll and of the case and notice of exceptions, if any * * * and a *certified* copy of the judgment given thereon and of the notice of appeal."

At the same time, section 3301 was amended, by adding to the paragraph thereof quoted the following words:

> And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts, and shall be used or filed with the same force and effect as if certified by a clerk of the court.

Since this amendment of 1890 to section 3301 of the Code, although there has been no express determination by the court as to its effect, it has been the unquestioned practice of the clerk of the Court of Appeals to receive and file returns not certified by the clerk of the court below, when accompanied by a stipulation of attorneys under section 3301. But since section 1315 no longer requires "a certified copy of the judgment-roll and of the case and notice of exceptions, if any," but only requires "a copy" thereof, it has, in some instances, been claimed that the stipulation, authorized by section 3301 in the case of "a copy of any paper whereof a certified copy is required by any provision of this act," is not required for the judgment-roll and case and notice of exceptions, if any, but only for the judgment appealed from and the notice of appeal to the Court of Appeals, of which alone a certified copy is now required by section 1315. That is, in effect, that the copy of the judgment-roll and case and notice of exceptions, if any, mentioned in section 1315, need be neither certified nor stipulated, but should only purport to be a copy. If this is so, the anomaly is presented that while a copy of a case made under section 997 of the Code, and a notice of exceptions under section 994, need not, by force of sections 1315 and 3301, be either certified or stipulated on transmission to the Court of Appeals, a copy of a case made for appeal to the Court of Appeals directly, under section 1339, must be either certified or stipulated, since that section says that a certified copy of the case must be transmitted. Although the appeal papers should show that the

case therein was settled by the trial judge and that they are copies of the record, Brigg v. Hilton (1885), 99 N. Y. 517, yet the Code is silent as to how the evidence of these facts shall be authenticated for the Court of Appeals, except as above set forth.

On appeals from orders, section 1315 still requires "a *certified* copy of the notice of appeal, of the order, and of the papers on which the order was founded" to be transmitted to the Court of Appeals, and by force of section 3301, providing for stipulation in lieu of certification, all these papers, if not certified, must be stipulated to be copies. The stipulation should cover all the papers in the return. For stipulation in lieu of certification in Surrogate's Court proceedings, see Code, sections 2567, 3302; in City Court of New York cases, see section 3194a.

It is probable that the omission of the word "certified" before the words "copy of the judgment-roll and of the case and exceptions," in the amendment of 1890 to section 1315 of the Code of Civil Procedure, was owing to the fact that section 1353 of the Code required those papers to be certified on appeal to the General Term (now the Appellate Division of the Supreme Court), and therefore it was thought that a second certification of the same papers on a subsequent appeal from the General Term to the Court of Appeals was unnecessary. This would seem to be so, where the return to the Court of Appeals contains a copy of the original certification to the Appellate Division, or a copy of a stipulation in lieu thereof.

Return; contents of.

Same papers as below.—The review in the Court of Appeals must be upon the same case as that on which the cause was decided below, and the court below cannot change the case so as to present the facts otherwise than as found, or insert therein exceptions not taken on the trial or to its final decision. Johnson v. Whitlock (1856), 13 N. Y. 344. The Court of Appeals should be furnished with the same facts as those on which the Appellate Division based its judgment; Smith v. Grant (Supr. Ct. 1859), 17 How. Prac. 381; and can consider only errors alleged to have been committed by the court below; it cannot base a reversal upon matter brought into the case subsequently by stipulation. People v. Dewey (1891), 128 N. Y. 606.

The Court of Appeals is confined to and controlled by the record on appeal and cannot correct even an obvious error, contained in an exception appearing upon a record, which, if imperfect, should have been corrected by the appellant. Schoepflin v. Coffey (1900), 162 N. Y. 12.

Where, upon an argument in the Court of Appeals, a party presented an offer to withdraw his proposed amendments to the case below, which had been presented to the referee who had tried the action, after he had become disqualified, by the act of the party, to settle the case, the offer was not considered by the court, as it was not contained in the appeal papers and did not appear to have been presented to the court below. Leonard v. Mulry, (1883), 93 N. Y. 392.

The Court of Appeals cannot disregard the record and look beyond its statement of the proceedings upon the trial, for the purpose of reviewing an alleged error of the court below in refusing the admission of evidence claimed on appeal to have been offered for a purpose other than that stated in the record. Corley v. McElmeel (1896), 149 N. Y. 228.

The jurisdiction of the Court of Appeals is confined to a review of the determination actually made by the court below, and must be had upon the same papers which were before the Appellate Division. N. Y. Cable Co. v. Mayor of N. Y. (1887), 104 N. Y. 1.

Appeals, except only in cases of judgment of conviction for murder in the first degree, can only go to the Court of Appeals through the Appellate Division and the Court of Appeals has authority only to consider the case presented to and passed upon by the Appellate Division. A finding may not be stricken out pending an appeal to the Court of Appeals. Ward v. Ward (1909), 133 App. Div. 73.

Judgment of Appellate Division.— The judgment entered upon the decisive order of the Appellate Division in an action, although entered in the office of the county clerk, is nevertheless the judgment of the Appellate Division, for it is the judgment from which any appeal to the Court of Appeals must be taken. Bulkley v. Whiting Mfg. Co. (1910), 136 App. Div. 479.

Under section 1339 *of Code.*— Unless the return on an appeal from a judgment rendered by the Appellate Division upon a

verdict subject to the opinion of the Appellate Division includes a case containing a statement of facts and of the questions of law arising thereon and the determination of the Appellate Division upon such questions, prepared and settled as required by section 1339 of the Code, the cause cannot be heard in the Court of Appeals. It is not enough that the return contains the case as heard by the Appellate Division, with the judgment-roll. Cowenhoven v. Ball (1890), 118 N. Y. 231; Reinmiller v. Skidmore (1875), 59 N. Y. 661; People v. Featherly (1892), 131 N. Y. 597. The facts presented in such statement are the only ones to be considered by the Court of Appeals; and if the statement is defective in any respect it must be sent back to the court below for correction. Jaycox v. Cameron (1872), 49 N. Y. 645.

Under section 999 of Code.— Where, after a verdict, a motion made pursuant to and upon the grounds stated in section 999 of the Code of Civil Procedure to set it aside is granted, an appeal to the Court of Appeals, from a judgment entered upon the verdict pursuant to an order of the Appellate Division reversing the order setting aside the verdict, should not be dismissed for failure to prepare and settle a case as required by section 1339 of the Code, but the appeal may be heard upon a case prepared and settled in the usual manner. South Bay Company v. Howey (1907), 190 N. Y. 240.

Amendments.—After a return has been filed in the Court of Appeals, the court below so far retains jurisdiction as to enable it to make such amendments as it shall deem proper, and when such an amendment has been duly filed with the clerk of the Court of Appeals it is to be regarded as part of the original return. Peterson v. Swan (1890), 119 N. Y. 662. See Birnbaum v. May (1902), 170 N. Y. 314. (See further as to amendment of return, under Rule II.)

Where findings are incorrectly stated in case on appeal to General Term, Court of Appeals cannot correct. Binghamton Opera House Co. v. Binghamton (1898), 156 N. Y. 651.

Omissions.— The Court of Appeals cannot review an order which does not appear in the record and in regard to which no papers are found therein, although the notice of appeal to that court assumes its existence. Zapp v. Miller (1888), 109 N. Y. 51.

An appellant cannot take advantage or complain of the omission from the return or case before the Court of Appeals, of a paper which it was his duty to insert. Struthers v. Pearce (1873), 51 N. Y. 365.

Upon appeal from an order affirming an order for a new taxation of costs, the papers referred to in the notice of appeal and in the Special Term order were not before the Court of Appeals, but the papers contained a copy of a memorandum which was before the General Term, containing an extract from the judgment and the costs as taxed, and endorsed by the attorneys for the respective parties "Approved and assented to, as and for papers on appeal." It was held, the appellant being the same as in the court below, that the memorandum might be presumed to contain all considered by his counsel material to present the question intended to be raised, and it showing nothing which alone or with other matter in the case made the appellant's objection intelligible, the order appealed from was affirmed. Creshull v. Mullen (1887), 104 N. Y. 660.

Where a General Term order recited the facts of an appeal from the order of Special Term considered therein, it was assumed that such an appeal was taken, although no notice thereof was contained in the case. Struthers v. Pearce (1873), 51 N. Y. 365 (*supra*).

Upon an appeal from an order reducing the fees charged by a referee appointed to sell, the return did not contain the papers in the action, but consisted of the referee's report of sale and the order appealed from. The report stated that it was made "in partition;" and it was held that this statement, being uncontradicted, was sufficient to show that the sale was in a partition suit. Hobart v. Hobart (1881), 86 N. Y. 636.

Where the return in an action tried by the court contained no statement of facts found by the trial court, as required by the Code, but only a statement of facts signed by the presiding justice of the General Term which heard the case on appeal, the appeal to the Court of Appeals was dismissed, in Essex County Bank v. Russell (1864), 29 N. Y. 673.

Where the return in a cause tried by the court or a referee contains no case showing that any question was raised or any exceptions taken, and no findings of the court or report of referee,

with exceptions, the Court of Appeals has no jurisdiction, and no appeal lies. Smith v. Starr (1877), 70 N. Y. 155. And an appeal, in such a case from an order dismissing the complaint does not bring up for review the proceedings on the trial. *Id.*

Where the court below has received and acted upon papers imperfect in that the case did not appear to have been settled or signed by the trial judge or referee as required by section 997 of the Code, still when such papers constitute the return to the Court of Appeals, that court must receive them as sufficient. Reese v. Boese (1883), 92 N. Y. 632. But where the record on appeal in a case tried by the court contained a paper headed "requests to find," also another paper containing exceptions to assumed refusals of the requests, but there was no "note upon the margin" of the requests as required by section 1023 of the Code, or elsewhere, showing how, if at all, the propositions were disposed of, or that the attention of the court had been called to them, it was held that such assumed requests could not be considered in determining the appeal. Harris v. Van Wart (1884), 96 N. Y. 642. And upon appeal from a judgment entered upon a referee's report, the court cannot, in the absence of findings or requests to find upon particular questions of fact, look into the evidence to see if facts were proved which, if proved, would subvert the judgment. Holden v. Burnham (1875), 63 N. Y. 74.

Improper insertions.— When an order, which the Court of Appeals has no jurisdiction to review, and the papers on which such order was granted by the court below, are incorporated in the return, they will be stricken out on motion. Smith v. Grant (1857), 15 N. Y. 590.

It is improper to insert in a return on an appeal from a judgment entered after a second trial any of the proceedings at, or case made on, the first trial; and if this is done, such improper portions will be stricken out by the Court of Appeals on motion. Ferguson v. Ferguson (Ct. App. 1852), 7 How. Prac. 217; Bissel v. Hamlin (1859), 20 N. Y. 519; Wilcox v. Hawley (1864), 31 N. Y. 648. (See, also, as to defective returns, cases cited under Rule II.)

Appeal perfected; undertaking; time prescribed for filing return.

The provisions of section 1326 of the Code, requiring an undertaking for costs to perfect the appeal, apply to appeals from

orders as well as to appeals from judgments; Cowdin v. Teal (1876), 67 N. Y. 581; an appeal to the Court of Appeals from an order, as from a judgment, is, until the undertaking is given, a mere nullity, and so is ineffectual to affect the finality of the decision below; Ferris v. Tannebaum (N. Y. Com. Pl., 1891), 15 N. Y. Supp. 295; and the courts have no power to dispense with the undertaking. Architectural Iron Works v. City of Brooklyn (1881), 85 N. Y. 652. Where, however, notice of appeal was served in good faith, without giving an undertaking for costs, in reliance upon an order of the court below dispensing therewith, the Court of Appeals held that the neglect should be deemed excusable, and that the omission might be supplied under section 1303 of the Code. *Id.*

Where an appellant to the Court of Appeals has perfected his appeal from a judgment which is thereafter amended, the Supreme Court is without jurisdiction to amend the notice of appeal so as to include the amended judgment or to allow a further undertaking to be filed, but that power, as well as the whole power of amendment under section 1303 of the Code in cases appealed to the Court of Appeals, lies wholly with that court. Moreover, an amendment of such notice of appeal will not be allowed even by the Court of Appeals if it would allow an appeal where the time to take the same has expired. Bulkley v. Whiting Mfg. Co. (1910), 136 App. Div. 479.

Surety's liability is limited to costs of appeal to Court of Appeals. Bennett v. Am. Surety Co., 73 App. Div. (1902) 468.

The appeal is perfected, so that the twenty days within which the return must be filed begin to run, when notice of appeal, with a proper undertaking, is given, notwithstanding the sureties are not excepted to and do not justify and the undertaking is not approved until afterwards. Wade v. De Leyer (1875), 63 N. Y. 318; Thompson v. Blanchard (1850), 2 N. Y. 561. But see Polito v. Pitriello (1909), 196 N. Y. 517.

The appeal may be perfected by service of the requisite undertaking at any time before the time to appeal expires, and it need not accompany the notice of appeal. Section 1334, Code; Blake v. Lyon Mfg. Co. (1878), 75 N. Y. 611. But the notice of appeal, when served before the undertaking, as it may be under sections 1300 and 1334 of the Code, does not become effectual for

any purpose until the undertaking has been given. Section 1326, Code; Raymond v. Richmond (1879), 76 N. Y. 106.

While the Court of Appeals may permit the undertaking to be filed *nunc pro tunc* on proper terms, it will not do so where the amount involved is so small that a continuance of litigation would consume most of it; Hunter v. Hatfield (1878), 73 N. Y. 600; 7 Wkly. Dig. 191; but where no undertaking has been filed or served, the court below has no power to grant an order allowing the appellant to perfect his appeal by filing an undertaking; Nelson v. Tenney (1889), 113 N. Y. 616; and has no power to stay proceedings under the judgment appealed from. Guilfoyle v. Pierce (1897), 22 App. Div. 131.

In Culliford v. Gadd (1892), 135 N. Y. 632, it appeared that in pursuance of a stipulation which recited that an undertaking given on appeal to the Court of Appeals had been canceled, an order had been entered in the Court of Appeals which gave the plaintiff leave to file "another undertaking to perfect the appeal" within five days and provided that the new undertaking should have, when filed, the same force and effect as if it had been filed and served when the first undertaking was given, and that if not filed as specified, the appeal should be dismissed. A new undertaking not having been filed, the appeal was dismissed. Another appeal was thereafter taken and perfected. On motion to strike the case from the calendar, it was held that the case was placed by the stipulation and order on the same footing as if no undertaking had been given, and that the appellant had the right, within the statutory time for appealing, to take and perfect another appeal, and the motion was, therefore, denied.

Where an executor, upon his appeal to the Appellate Division from an order of a surrogate adjudging him guilty of contempt, gives the undertaking required by section 2579 of the Code, providing that he will surrender himself in obedience to the decree, to the custody of the sheriff of the proper county, and, upon an affirmance of the order and his appeal therefrom to the Court of Appeals, procures by order a stay conditional upon his giving the undertaking for costs in that court required by section 1326 of the Code, his appeal to the Court of Appeals is, upon giving the latter undertaking, perfected, and, as perfected, operates by the express provisions of section 1310 of the Code as a stay of all

proceedings designed to enforce the order appealed from. And it seems that if, in such a case, the appellant, upon an appeal to the Court of Appeals gives the required undertaking for costs in that court, his appeal is perfected, and all proceedings are stayed, without it being necessary to resort to a stay by order. Matter of Pye (1897), 21 App. Div. 266. See, also, Grin v. Little, 43 Misc. Rep. 421.

An undertaking, in the usual form, upon an appeal to the Court of Appeals taken jointly from a judgment against two defendants severally liable, has the same effect as though each defendant had appealed separately, and the sureties had signed a separate undertaking upon each appeal; and, under the provision in such undertaking that "if the said judgment appealed from, or any part thereof, be affirmed, the said appellants will pay the amount," the sureties are liable if the judgment is affirmed against one appellant, though reversed as to the other. Seacord v. Morgan (1867), 4 Abb. Prac. (N. S.) 249; 3 Keyes, 636.

When jurisdiction of Court of Appeals attaches.

After notice of appeal has been served and the proper undertaking given, the Court of Appeals is so far possessed of the cause as to be competent to make any necessary order, although the return has not been filed. Adams v. Fox (1863), 27 N. Y. 640. Thenceforward the jurisdiction of the Court of Appeals attaches and the authority of the court below, except as specially preserved, ends, so that, *e. g.*, it cannot grant a motion to compel the appellant to file a new undertaking; but such motion should be made in the Court of Appeals. Parks v. Murray (1888), 109 N. Y. 646. In all matters pertaining to the appeal itself, and to the proper hearing thereof, the Court of Appeals has jurisdiction, and also in regard to all applications which by statute may be made to that court after the taking of an appeal; but, as to all other applications, the case is regarded as still pending in the court of original jurisdiction, and such applications should be made to that court. People ex rel. Hoffman v. Board of Education (1894), 141 N. Y. 86; Bulkley v. Whiting Mfg. Co. (1910), 136 App. Div. 479. A motion, made by an attorney for appellant who had been substituted after appeal to the Court of Appeals, for an order directing the former attorneys to deliver to him the

papers in the case, is not properly made in the Court of Appeals, but should be made in the court below. *Id.*

The pendency of an appeal in the Court of Appeals, does not prevent a motion in the court below for a new trial on the ground of newly discovered evidence, and, in such case, an order to transmit the return on appeal to the court below is unnecessary. Henry v. Allen (1895), 147 N. Y. 346.

The pendency of an appeal in the Court of Appeals is no bar to a motion in the Appellate Division for such amendment of an order or judgment as it may see fit to make. Birnbaum v. May (1902), 170 N. Y. 314.

For the purposes of a motion in the Court of Appeals to dismiss appeal, an appeal is to be regarded as pending when notice of appeal has been duly served and an undertaking given and the appellant has not abandoned the appeal. Stevens v. Glover (1880), 83 N. Y. 611. But until the appeal is perfected by the filing of the requisite undertaking, there is no appeal pending in the Court of Appeals, although a notice of appeal may have been served; and it will not entertain a motion to dismiss appeal, or take any action in the cause, except to strike it from the calendar. Raymond v. Richmond (1879), 76 N. Y. 106, *supra;* Benedict Mfg. Co. v. Thayer (1880), 82 N. Y. 610.

This distinction, however, does not appear to be always enforced, and motions to dismiss appeal for failure to give undertaking have been entertained. See *e. g.,* Reese v. Boese (1883), 92 N. Y. 632; Nichols v. McLean (1885), 98 N. Y. 458; Nelson v. Tenney (1889), 113 N. Y. 616; People ex rel. Blakeslee v. Com'rs of Land Office (1892), 133 N. Y. 616. An order dismissing the appeal, rather than one simply striking from the calendar, is desirable where a return has been filed, as it leads to the issuance of a remittitur, which takes the record back to the court below, with instructions to proceed in the cause. See Dresser v. Brooks (1850), 2 N. Y. 559.

Default and dismissal under the rule.

The appellant must see to it, at his peril, that the return is actually filed in due time, or procure an extension of the time. An appeal, regularly dismissed for want of a return, will not be reinstated unless the appellant establishes a clear case of diligence

and shows that the inexcusable default of the clerk below or an unavoidable accident has prevented the filing of the return, or the extension of the time to file it. Spoore v. Fannan (1858), 16 N. Y. 620.

A judge of the Supreme Court has no jurisdiction to extend the time to file the return on appeal to the Court of Appeals, except in cases under section 1339 of the Code (p. 14, *ante*); the power conferred by that section is limited to appeals in cases therein mentioned. Mead v. Smith (Ct. App. 1883), 18 Wkly. Dig. 221.

Default waived.—Where the respondent has omitted to avail himself of the neglect of the appellant to procure the return within twenty days after the appeal was perfected, until after the return has been made, and has, after the filing of the return, noticed the cause for argument, the objection that the return was not made in time is waived. Beecher v. Conradt (Ct. App. 1855), 11 How. Prac. 181.

Appeal must have been perfected.—The filing of a return to the Court of Appeals cannot be compelled until the appeal is fully perfected. Hence, a dismissal under Rule I will not hold where it appears that the justification of sureties executing the undertaking on the appeal is pending and undetermined in the court below. Polito v. Pitriello (1909), 196 N. Y. 517.

Opening default.—A default taken on failure to file return will not be opened where an examination of the return which would be filed, if allowed, shows no good grounds for the appeal. Schenck v. Bengler (1887), 105 N. Y. 630; S. C., *sub nom.* Schenck v. Ringler, 11 Northeast. Rep. 382. But unless the respondent can show some delay or inconvenience from failure to file the return, a default taken therefor under the rule should be relieved against upon terms, where it appears the appeal is brought in good faith. Waterman v. Whitney (Ct. App. 1853), 7 How. Prac. 407.

Imperfect return.—An *ex parte* dismissal under the rule can only be had where there is a total failure to serve any return within the time required. Where an imperfect return has been filed, the respondent should proceed, on notice, either under Rule II or by motion to the court, as the case may require, for a further or corrected return, with an alternative demand for the dis-

missal of the appeal. See Bowers v. Tallmadge (1861), 23 N. Y. 166; Bliss v. Hoggson (1881), 84 N. Y. 667.

Costs.— When an appeal is dismissed with costs, general costs follow, whether the appeal is from an order or a judgment. White v. Anthony (1861), 23 N. Y. 164; Brown v. Leigh (1872), 50 N. Y. 427.

Practice of the clerk's office.

Filing return.—A return containing the papers required by section 1315 of the Code, certified by the clerk of the court below, under his hand and seal, to be copies of the originals on file in his office, or accompanied by a stipulation in writing, in lieu of such certification, as provided by section 3301 of the Code, under the hands of the several attorneys required to join therein; or, on appeal from a final judgment, a return in which the judgment appealed from and the notice of appeal to the Court of Appeals are certified or stipulated as above to be copies of originals on file and the judgment-roll and the case and notice of exceptions, if any, purport to be copies of the originals thereof by having been so certified or stipulated to the Appellate Division of the Supreme Court (except a copy of a case under section 1339 of the Code which must be certified or stipulated to the Court of Appeals) will be filed by the clerk of the Court of Appeals on receipt thereof at his office, and the cause will thereupon be entered.

The fee for filing a return is fifty cents. (Code, § 3300.)

As the cause and appearances are entered on the records of the Court of Appeals from the notice of appeal in the return, it is important that the title of the cause and the names of attorneys should be correctly and fully stated therein. A note of issue is not required.

Appeals in civil causes from judgments and from orders not entitled to be heard under Rule XI, go upon the calendar, when made up, in the order and by the date of filing the returns, except as changed by right to preference. It is therefore advantageous to transmit returns to the clerk as early as possible, to be filed and await the ordering of a new calendar, when notices of argument should be served and filed. (See Rules XIV and XIX.)

A notice of argument filed before the return is filed is of no effect; nor is one filed before an order for a new calendar is pro-

mulgated, except in criminal cases (see Rule IX), and appeals from orders entitled to be heard under Rule XI.

Dismissing appeal.— The clerk, on receiving from the respondent's attorney the affidavit prescribed by the rule, will, if the return has not been filed, make a certificate to that effect, and enter, in an established form, the proper order (which need not be drafted by the attorney), and furnish a certified copy thereof.

The fee for certificate, order and copy, is one dollar and fifty cents.

Clerk's fees.

§ 3300. The clerk of the Court of Appeals is entitled, for the services specified in this section, to the following fees: For filing a notice of appeal to that court, and all the papers transmitted therewith, fifty cents.

For filing any other paper, ten cents.

For drawing an order, twenty cents for each folio.

For entering an order, twenty cents; and for each folio more than two, ten cents.

For drawing a judgment, twenty-five cents; and for each folio more than two, ten cents.

For entering a judgment, twenty-five cents; and for each folio more than two, ten cents.

For a certified copy of an order, record, or other paper, entered or filed in his office, ten cents for each folio.

For engrossing a remittitur, ten cents for each folio.

For a certificate, other than that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

For sealing any paper, when required, fifty cents.

Return in criminal causes.

The Code of Criminal Procedure provides as follows:

Transmission of return.

§ 532. Upon the appeal being taken, the clerk, with whom the notice of appeal is filed, must, within ten days thereafter, without charge, transmit a copy of the notice of appeal and of the judgment-roll, as follows:

2. If it [the appeal] be to the Court of Appeals, to the clerk of that court.

(See, also, § 485, subd. 8, under Rule IV.)

Dismissal for want of return.

§ 534. The court may also, upon like motion [of the respondent upon five days' notice], dismiss the appeal, if the return be not made, as provided in § 532 unless, for good cause, the time to make such return be enlarged. (As amended by Laws 1897, chap. 427.)

Jurisdiction of Court of Appeals.

The provisions of the Constitution as to the jurisdiction of the Court of Appeals are as follows:

After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them. The Appellate Division in any department may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals. The Legislature may further restrict the jurisdiction of the Court of Appeals and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved. The provisions of this section shall not apply to orders made or judgments rendered by any General Term before the last day of December, one thousand eight hundred and ninety-five, but appeals therefrom may be taken under existing provisions of law. [Art. 6, § 9.]

The provisions of the Code of Civil Procedure on the subject, are as follows:

Jurisdiction in civil actions.

§ 190. The Court of Appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, eighteen hundred and ninety-five, at a general term of the Supreme Court, or by either of the superior city courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the Court of Appeals. From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the Court of Appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the Appellate Division of the Supreme Court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings,* and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

* Code Civil Proc., § 1997, the final determination of the rights of the parties to a special proceeding instituted by State writ is styled a final order. § 2550. The final determination of the rights of parties to a special proceeding in a Surrogate's Court is styled indifferently, a final order or a final decree.

2. Appeals may also be taken from determinations of the Appellate Division of the Supreme Court in any department where the Appellate Division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the Court of Appeals shall certify to the Appellate Division its determination upoh such questions.

Limitations, exceptions and conditions.

§ 191. The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court, in any civil action or proceeding commenced in any court other than the Supreme Court, Court of Claims, County Court, or a Surrogate's Court, unless the Appellate Division of the Supreme Court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury† or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors, or in an action to recover wages, salary or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, or in an action upon an individual bond or individual undertaking on appeal, when the decision of the Appellate Division of the Supreme Court is unanimous, unless such Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the Court of Appeals.*

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† § 3343, sub. 9: A "personal injury" includes libel, slander, criminal conversation, seduction and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another. See McNamara v. Goldan (1909), 194 N. Y. 322.

* § 1310. * * * In a case, specified in subdivision two of section 191 of this act, a party aggrieved, upon presenting to the court proof by affidavit that he intends to apply to the Appellate Division, rendering such decision, for leave to appeal to the Court of Appeals, and in case such Appellate Division shall refuse such leave, then that such party intends to apply to a judge of the Court of Appeals to be allowed to appeal to said Court of Appeals, and proof that an undertaking given, as prescribed in this chapter, has been filed with the clerk with whom the judgment appealed from is entered, shall be entitled to an order staying all proceedings to enforce such judgment, until the granting or refusal of such leave to appeal by such Appellate Division or a judge of the Court of Appeals. The party desiring to make such application must do so at the same term or at the term of the said Appellate Division next succeeding that at which judgment of affirmance was rendered and notice of entry thereof served upon the party aggrieved, and

3. The jurisdiction of the court is limited to a review of questions of law.

4. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. (Amended by Laws 1896, chap. 559 and Laws of 1898, chap. 574; subd. 2 by Laws 1900, chap. 592.)

Review of interlocutory judgment or intermediate order.

§ 1316. An appeal, taken from a final judgment, brings up for review, an interlocutory judgment, or an intermediate order which is specified in the notice of appeal, and necessarily affects the final judgment; and which has not already been reviewed, upon a separate appeal therefrom, by the court or the term of the court, to which the appeal from the final judgment is taken. The right to review an interlocutory judgment, or an intermediate order, as prescribed in this section, is not affected by the expiration of the time, within which a separate appeal therefrom might have been taken.

Appeal from order granting new trial.

§ 1318. Where a judgment from which an appeal is taken, is reversed upon the appeal, and a new trial is granted, an appeal cannot be taken from the judgment of reversal; but upon an appeal from the order granting a new trial, taken, as prescribed by law, the judgment of reversal must also be reviewed.

Appeal from final judgment after affirmance of interlocutory judgment.

§ 1336. Where final judgment is rendered in the court below, after the affirmance, upon an appeal to the Appellate Division of the Supreme Court, of an interlocutory judgment; or after the refusal by the Appellate Division of a new trial, either upon an application made in the first instance, at a term thereof, or upon an appeal from an order of the special term, or of the judge before whom the issues, or questions of fact, were tried by a jury; the party aggrieved may appeal directly from the final judgment to the Court of Appeals, notwithstanding that it was rendered at a special term, or at a trial term, or pursuant to the direction contained in a referee's report. But such an appeal brings up, for review, only the determination of the Appellate Division of the Supreme Court affirming the interlocutory judgment or refusing the new trial.

Review in Court of Appeals.

§ 1350. Where final judgment is taken, at a special term or trial term, or pursuant to the directions of a referee, after the affirmance, upon an appeal to the Appellate Division of the Supreme Court of an interlocutory judgment; or after the refusal by the Appellate Division of a new trial, either upon an application, made, in the first instance, at a term of the

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in case said Appellate Division refuses such application, then such party shall have thirty days, from and after service of a copy of the order of said Appellate Division denying such application, with notice of entry, in which to apply to a judge of the Court of Appeals, to be allowed to so appeal.

Appellate Division, or upon an appeal from an order of the special term, or of a judge, before whom the issues, or questions of fact, were tried by a jury; an appeal to the Appellate Division from the final judgment brings up, for review, only the proceedings to take the final judgment, or upon which the final judgment was taken, including the hearing or trial of the other issues in the action, if any. If an appeal is taken, to the Court of Appeals, from the determination of the Appellate Division upon the appeal from the final judgment, the determination of the Appellate Division, affirming the interlocutory judgment or refusing the new trial, may, at the election of either party, be reviewed thereupon. If the respondent elects to bring it up for review, he may take a cross-appeal therefrom, notwithstanding the expiration of the time to take an original appeal therefrom.

Appeal in summary proceedings.

§ 2261. An appeal cannot be taken to the Court of Appeals, from a final determination of the Appellate Division of the Supreme Court, upon an appeal [in a summary proceeding to recover the possession of real property], unless the latter court by an order, made at the term of the Appellate Division where the final order is made, or the next term thereafter, allows it to be taken.

Jurisdiction dependent upon statute.— The Court of Appeals has no jurisdiction to entertain an appeal unless it is conferred by statute; Szuchy v. Hillside C. & I. Co. (1896), 150 N. Y. 219; and this rule applies to special proceedings of a criminal nature; People ex rel. Commissioners of Charities v. Cullen (1896), 151 N. Y. 54; and to criminal actions, People v. Malone (1902), 169 N. Y. 568.

The Court of Appeals has no jurisdiction except such as is conferred by Constitution or statute. The right of appeal in civil actions and proceedings is governed by sections 190 and 191 of the Code of Civil Procedure, and in criminal actions and proceedings by sections 515 to 533 of the Code of Criminal Procedure. These provisions are exclusive, and unless they authorize an appeal the Court of Appeals has no jurisdiction. Matter of Jones (1905), 181 N. Y. 389.

Jurisdiction not conferred by stipulation.— The Court of Appeals cannot be empowered by stipulation of parties to entertain an appeal not within its statutory jurisdiction. Hoes v. Edison Gen. Elec. Co. (1896), 150 N. Y. 87.

Enlargement of jurisdiction.— It seems that the provisions of the Constitution regulating the jurisdiction of the Court of Ap-

peals and providing that the Legislature may further restrict it, do not prohibit the Legislature from enlarging the jurisdiction of the court, save only in those special cases which are expressly withdrawn from its review. Hence, the Legislature had power to enact a statute (such as L. 1895, ch. 601, § 20), the effect of which was to provide for a final review in the Court of Appeals of a determination by a city magistrate in the city of New York convicting a party as a disorderly person, not theretofore reviewable in that court. People ex rel. Commissioners of Charities v. Cullen (1897), 153 N. Y. 629.

Limitation of time to appeal.— In applying the amendment of section 1325 of the Code of Civil Procedure by chapter 418 of the Laws of 1909, which took effect September 1, 1909, and which provides that an appeal to the Court of Appeals must be taken within sixty days after service of a copy of the judgment or order appealed from, it was held, in the case of a judgment served before the amendment took effect, that the appellant had sixty days after September 1, 1909, within which to appeal, unless the year that he otherwise would have had would expire within that period, in which case his time is limited by the expiration of that year. Coffey v. Burke (1909), 196 N. Y. 65.

Review of legislative apportionment.— The right of the Court of Appeals to review the action of the Supreme Court in cases relating to a legislative apportionment (see Constitution, art. 3, § 5) proceeds from its general appellate jurisdiction. In the absence of express legislative authority it cannot, in a proceeding attacking the validity of an apportionment, entertain an appeal from an order of the Appellate Division affirming an order of the Special Term denying an application for a common-law writ of mandamus, unless it affirmatively appears on the face of the order that it was not made in the exercise of discretion; and the jurisdiction of the court should not be strained when the effect of an adverse decision might be to throw a general election about to be held into inextricable confusion and chaos. Matter of Sherill v. O'Brien (1906), 186 N. Y. 2.

While the Constitution does not expressly confer jurisdiction upon the Court of Appeals to review an act of apportionment, that court has such power by virtue of its general jurisdiction to review actual determinations of the Appellate Division, provided

the constitutionality of the act and the procedure for its review on appeal present a question of law. Matter of Sherill v. O'Brien (1907), 188 N. Y. 185.

Criminal cases.— The Court of Appeals cannot review the facts on appeal in a criminal case, except where the judgment is of death; nor can it review any questions relating to the sufficiency of the evidence, where the Appellate Division has affirmed a conviction by a unanimous decision. People v. Helmer (1898), 154 N. Y. 596; People v. Miller (1902), 169 N. Y. 339; People v. Adams (1903), 176 N. Y. 351; People v. DeGarmo (1904), 179 N. Y. 130; People v. Ferone (1909), 196 N. Y. 522; People v. Thompson (1909), 198 N. Y. 396.

It is argued, but not decided, in People v. Gaffey (1905), 182 N. Y. 257, that the limitations upon appeals to the Court of Appeals prescribed by the Constitution have no application to criminal cases; but in People v. Maggiore (1907), 189 N. Y. 514, it is decided that as the constitutional provision as to the conclusiveness upon questions of fact of a unanimous affirmance by the Appellate Division is unqualified it precludes a review of such questions by the Court of Appeals as well in criminal as in civil causes.

A motion to dismiss an indictment, although not specifically mentioned in section 485 of the Code of Criminal Procedure, is embraced in the general provisions thereof and is included in and becomes a part of the judgment-roll; and an order of the trial judge denying such a motion, made upon the ground that the defendant had been compelled to testify against himself before the grand jury, is under section 517 reviewable by the Appellate Division, and under section 519, subdivision 3, by the Court of Appeals. People ex rel. Hummel v. Trial Term (1906), 184 N. Y. 30.

Return in criminal causes.— Where it appears from the record on appeal that the only authentication of a charge to the grand jury is the affidavit of a newspaper reporter that he made and published a copy of a paper given him by the court stenographer purporting to be a transcript of the charge, an alleged error therein will not be considered by the Court of Appeals. People v. Glen (1903), 173 N. Y. 395.

Amendment of criminal return.— The trial judge has power,

in a criminal case, on motion made upon notice to the defendant, to amend the record on appeal by annexing thereto a copy of an exhibit, received in evidence upon the trial and afterward lost, where there is no doubt as to the substantial accuracy of the copy and the judge acts, not only upon the affidavits presented, but also upon his own recollection. People v. Flanigan (1903), 174 N. Y. 356.

Jurisdiction of criminal appeals.— The limitation upon appeals contained in section 9, article 6 of the Constitution, applies to civil cases only, and the jurisdiction of the Court of Appeals to hear appeals in criminal cases rests entirely upon section 519 of the Code of Criminal Procedure, which extends to an appeal from an order of the Appellate Division reversing a judgment of conviction and granting a new trial. People v. Miller (1902), 169 N. Y. 339.

Erroneous designation of judgment as order.— Where a judgment of conviction was affirmed by the Appellate Division by a paper which, although named an order, is in form a judgment affirming the judgment of conviction, and the notice of appeal therefrom to the Court of Appeals refers to it as an order, but the judgment is sufficiently identified from the date and reference made thereto in the notice of appeal, such defect may be treated as a clerical error not affecting the validity of the notice as an appeal from the judgment. People v. Canepi (1905), 181 N. Y. 398.

Intermediate orders in criminal case.— Upon an appeal from a judgment of conviction, the rulings upon intermediate orders or proceedings forming a part of the judgment-roll are reviewable by the Appellate Division, and its determinations thereon are reviewable by the Court of Appeals. People v. Canepi (1905), 181 N. Y. 398.

Unanimous decision of Appellate Division.—A quorum of four justices, holding an Appellate Division of the Supreme Court, are in contemplation of law the Appellate Division, and their unanimous vote of affirmance is a unanimous decision within the meaning of the Constitution and the Code. Harroun v. Brush Elec. Light Co. (1897), 152 N. Y. 212.

A judgment of the Appellate Division reciting that one of the judges sat but did not vote, that the remaining four judges con-

curred, and that a judgment, which was rendered in an action for personal injuries "be affirmed," is not a unanimous affirmance, precluding a review thereof by the Court of Appeals. Warn v. N. Y. C. & H. R. R. R. Co. (1900), 163 N. Y. 525.

A decision of the Appellate Division in which all of the justices concur is a unanimous decision, although part of the justices concur in result only; and when the order and judgment entered upon such decision do not show that it was unanimous, the Appellate Division, at a subsequent term, although composed in part of different justices, may, upon proper and sufficient evidence of the fact, amend the order and judgment so as to show that the decision was unanimous. MacArdell v. Olcott (1907), 189 N. Y. 368.

To give a decision of the Appellate Division the effect of unanimity, the record on appeal must show affirmatively that the decision was in fact unanimous. Kaplan v. N. Y. Biscuit Co. (1896), 151 N. Y. 171; Matter of Marcellus (1900), 165 N. Y. 70.

Code, section 190, subdivision 1;

Appeals as of right; final judgments in actions and orders in special proceedings.—The provision of the Code, allowing appeals as of right to the Court of Appeals from "judgments or orders finally determining actions or special proceedings," refers only to final judgments in actions and final orders in special proceedings, and does not allow an appeal to the Court of Appeals from an order in an action, even although it is one which ends the litigation. An action is determined, within the meaning of the Code, only when the issues of fact or law, if any, have been tried and decided and the final judgment entered, which judicially settles the controversy between the parties. Van Arsdale v. King (1898), 155 N. Y. 325. It is not enough that the action or special proceeding be ended by the judgment or order; it must be determined on the merits. Van Nostrand v. Van Nostrand (1908), 125 App. Div. 718.

Orders granting new trial.— The right of the Court of Appeals to review an order which reverses a judgment in an action and grants a new trial, where the appellants stipulate for judgment absolute in the event of affirmance, does not extend to orders granting new hearings in special proceedings, and hence

does not extend to an order reversing a decree of a Surrogate's Court and directing a new hearing. Matter of Gibson (1909), 195 N. Y. 466.

Time to appeal.— The fact that a notice of entry of an order of the Appellate Division refers to the final entry in the office of the county clerk, without referring to the preliminary entry in the office of the clerk of the Appellate Division, does not render the notice insufficient to limit the time to appeal from the order. Guarantee Trust Co. v. P. R. & N. E. R. R. Co. (1899), 160 N. Y. 1.

No right of appeal conferred by section 1325 *of the Code.*— Section 1325 of the Code of Civil Procedure, providing that an appeal to the Court of Appeals from an order must be taken within sixty days after service of a copy of the order and notice of its entry, confers no right of appeal, but merely limits the time within which appeals must be taken where the right exists. Steamship Richmond Hill Co. v. Seager (1899), 160 N. Y. 312.

Non-appealable orders.—An order of the Appellate Division, affirming an order of Special Term directing the permanent receiver of an insolvent domestic corporation, appointed by a final judgment in an action brought by the Attorney-General for the dissolution of the corporation, to pay, out of the fund in his hands, the claim of a creditor of the corporation made upon an application by the creditor in the action for dissolution, is not an order finally determining an action or special proceeding, and hence is not appealable as of right to the Court of Appeals. People v. Am. Loan & Trust Co. (1896), 150 N. Y. 117; People v. St. Nicholas Bank (1896), 150 N. Y. 563.

An appeal does not lie to the Court of Appeals from an order of the Appellate Division which reversed an order of a County Court denying, without passing upon the merits, a motion to confirm an inquisition in proceedings *de lunatico inquirendo,* and remitted the proceedings to the County Court for the exercise of the discretion conferred upon it as to the confirmation of the inquisition and the appointment of a committee. Matter of Wells (1902), 169 N. Y. 595.

An order setting aside orders directing the examination of the plaintiff as a party before trial and dismissing the complaint, being an order made in an action and not a final order in a spe-

cial proceeding, is not reviewable in the Court of Appeals. Murphy v. Walsh (1902), 169 N. Y. 595.

Interlocutory judgment.—An interlocutory judgment directing the trustees of a corporation in dissolution to make a final accounting is not rendered a final judgment and so appealable to the Court of Appeals by the insertion of a provision that the plaintiff recover costs. Osborn v. Cardeza (1904), 180 N. Y. 69.

Foreclosure.—An order determining the petition of a claimant for payment from a receiver appointed in a pending action for the foreclosure of a corporation mortgage is not a final order in a special proceeding, and hence is not appealable to the Court of Appeals as a matter of right. Guarantee Trust Co. v. P. R. & N. E. R. R. Co. (1899), 160 N. Y. 1.

A judgment of foreclosure, while in other respects interlocutory, is final for all purposes of review. Nutt v. Cuming (1898), 155 N. Y. 310.

A judgment which, although finally determining certain matters in controversy, orders an accounting before a referee, is an interlocutory, not a final judgment, and is not appealable to the Court of Appeals as matter of right. McKeown v. Officer (1891), 127 N. Y. 687.

Remittance for further consideration below — intermediate orders.— When an appeal from the affirmance of a final judgment also brings up for review an order dismissing an appeal from orders on the ground that they were not "intermediate" within the meaning of section 1316 of the Code of Civil Procedure, and, consequently, not reviewable, and the Court of Appeals decides that the orders were intermediate and involve questions which the appellant was entitled to have considered below, but which the Court of Appeals is without power to consider, it will reverse the order of dismissal and remit the case to the Appellate Division for consideration of the questions presented by the appeal from the orders. Fox v. Matthiessen (1898), 155 N. Y. 177; Taylor v. Smith (1900), 164 N. Y. 399.

Final order on intermediate accounting by general assignee.— An order of the Appellate Division affirming, with modifications as to the priority of payment of claims and as to commissions and costs, an order of the Special Term confirming the report of a referee in a proceeding under section 11 of the General Assign-

ment Act (L. 1877, ch. 466), for the settlement of an assignee's account, allowing the account, adjusting the claims of creditors and directing payment thereupon, relieving the assignee from liability for all matters included in his account, and releasing his sureties to that extent, is a final order in a special proceeding and therefore appealable as of right to the Court of Appeals, although the proceeding was intermediate in the sense that the assigned estate was not then ready for final distribution. Matter of Talmage (1899), 160 N. Y. 512.

Final order on intermediate accounting by executors.—An order of the Appellate Division, affirming an order or decree of a Surrogate's Court settling an intermediate account of executors and awarding commissions thereon, in a proceeding for that purpose, and determining the rights of the parties to the extent that it actually adjudged them, is an order finally determining a special proceeding, and therefore appealable as of right to the Court of Appeals. Matter v. Prentice (1899), 160 N. Y. 568.

Removal of city magistrate.—A proceeding in the Appellate Division for the removal of a city magistrate of the city of New York is not a special proceeding, and an appeal therein does not lie to the Court of Appeals as matter of right. Matter of Droege (1909), 197 N. Y. 44.

Admission to bar and disbarment.— Proceedings for admission to the bar and for removal or suspension from practice are, by reason of their unique conditions, deemed to be special proceedings, and final orders of the Appellate Division therein are appealable as matter of right. Matter of Cooper (1860), 22 N. Y. 67; Matter of Droege (1909), 197 N. Y. 44.

Attorney's lien.—An application by attorneys in a proceeding in a Surrogate's Court for an accounting, to vacate the satisfaction of a decree rendered therein, on the ground that it was executed in disregard of their lien for services and by collusion, is a special proceeding, and an order of the surrogate vacating the satisfaction is a final order in that proceeding, reviewable by the Court of Appeals. Matter of Regan (1901), 167 N. Y. 338.

Where, in a proceeding to enforce an attorney's lien, the Appellate Division reverses an order of Special Term appointing a referee to ascertain and report the value of the petitioner's services, and in addition denies the application, thus depriving the

petitioner of his lien, it becomes a final order in a special proceeding and is appealable to the Court of Appeals. Matter of King (1901), 168 N. Y. 53.

An order of the Appellate Division reversing an order of the Surrogate's Court, which, upon the petition of an attorney for the contestant, continued a proceeding for a compulsory accounting by an administratrix who had made a secret and collusive settlement with his client and had procured the client's agreement to withdraw his objections and to consent that her account be allowed as filed, for the purpose of allowing the attorney, who claimed a lien upon and recovery to which his client would have been entitled on the accounting, to establish such lien, which order of the Appellate Division denied and dismissed the petition, ordered the objections to the account withdrawn and the account as filed approved, is a final order in a special proceeding, and therefore appealable to the Court of Appeals. Matter of Fitzsimons (1903), 174 N. Y. 15.

An application by the attorney of record of the plaintiff in an action, to vacate a satisfaction of judgment executed by the client, and to conforce the judgment by execution to the extent of the attorney's lien thereon, based upon facts wholly distinct from those passed upon on the trial of the action, is a special proceeding and not a motion in the action; and, hence, an order of the Appellate Division, affirming an order granting the application, is appealable to the Court of Appeals, as an order finally determining a special proceeding. Peri v. N. Y. Central R. R. Co. (1897), 152 N. Y. 521.

Contempt.—A proceeding to punish the defendant in an action for contempt, to enforce a civil remedy, instituted by an order to show cause, is a proceeding in the action and not a special proceeding; and an order made therein, even if final, not being in a special proceeding is not appealable as of right to the Court of Appeals. Ray v. N. Y. Bay Extension R. R. Co. (1898), 155 N. Y. 102; Jewelers Mer. Agency v. Rothchild (1898), 155 N. Y. 255; Douglass v. Halstead (1899), 161 N. Y. 621; Holton v. Robinson (1901), 167 N. Y. 616; and this applies to an order on a motion to punish the defendant for contempt in failing to pay alimony under a judgment of divorce. Clark v. Clark (1909), 195 N. Y. 612; but an order punishing the wilful dis-

obedience of an injunction, constituting a criminal contempt, is appealable to the Court of Appeals. People ex rel. Negus v. Dwyer (1882), 90 N. Y. 402; People ex rel. Stearns v. Marr (1905), 181 N. Y. 463.

Proceedings taken under section 915 of the Code of Civil Procedure to punish a witness for contempt in failing to give testimony for use in another State constitute a special proceeding, and the final order therein, from which an appeal will lie to the Court of Appeals, as a matter of right, is that which punishes or refuses to punish the witness. No appeal lies to the Court of Appeals from an order which merely directs the witness to answer specified questions and is, therefore, interlocutory in its character. Matter of Strong v. Randall (1904), 177 N. Y. 400.

Order of restitution.—Even if an order of restitution of the Appellate Division, made under section 1323 of the Code of Civil Procedure, is to be deemed a final order in a special proceeding, which is doubtful, it is a discretionary order, and, consequently, cannot be reviewed by the Court of Appeals in the absence of a certificate. Merriam v. Wood & Parker Lith. Co. (1898), 155 N. Y. 136.

Certiorari.—An order of the Appellate Division which not only reverses an order of Special Term quashing a writ of certiorari to review an assessment, but also reinstates the writ and remits the proceedings to the Special Term for its determination upon the merits, is not an order finally determining a special proceeding, and hence is not appealable as of right to the Court of Appeals. People ex rel. Bronx Gas Co. v. Barker (1898), 155 N. Y. 308.

Habeas corpus.—Although, by force of section 2058 of the Code of Civil Procedure, no appeal lies even to the Appellate Division from an intermediate order in *habeas corpus,* still if on such an appeal the Appellate Division renders a final order, the latter order is reviewable by the Court of Appeals. People ex rel. Duryee v. Duryee (1907), 188 N. Y. 440.

Order appointing commissioners.—An order of the Appellate Division, affirming an order of the Special Term appointing commissioners to ascertain the damages of a property owner by reason of a change of grade of a village street, although made in a special proceeding is not a final order, and hence is not appealable as of right. Matter of Grab (1898), 157 N. Y. 69.

Public Service Commission.— The Public Service Commission is entitled to prosecute an appeal to the Court of Appeals from an order of the Appellate Division which annulled its determination denying an application by a railroad company for permission to construct and operate an extension of its road. People ex rel. South Shore Trac. Co. v. Willcox (1909), 196 N. Y. 212.

Municipal investigation.—An order made by a justice of the Supreme Court, and affirmed by the Appellate Division, determining, as a result of the investigation, a summary investigation into the financial affairs of a village instituted by taxpayers and freeholders, under the General Municipal Law (L. 1892, ch. 685, section 3), is reviewable as a final order in a special proceeding. Matter of Taxpayers of Plattsburg (1898), 157 N. Y. 78.

Interlocutory judgment.—An appeal does not lie to the Court of Appeals from an interlocutory judgment unless allowed by the Appellate Division; and, where not so allowed, such an appeal must be dismissed. Anderson v. Daley (1899), 159 N. Y. 146.

Dissolution of corporation.—A proceeding for the voluntary dissolution of a corporation under the statute is a special proceeding, and a final order made therein is reviewable as of right by the Court of Appeals. Matter of Hulbert Bro's & Co. (1899), 160 N. Y. 9.

Execution against person.—An order of the Appellate Division, reversing an order vacating an execution against the person of the judgment debtor, is not a final order in a special proceeding. Steamship Richmond Hill Co. v. Seager (1899), 160 N. Y. 312.

Final order under Railroad Law.—An order of the Appellate Division directing the Board of Railroad Commissioners to issue a certificate of public convenience, in a proceeding for that purpose, is a final order in a special proceeding, and, in the absence of any provision in the Railroad Law giving the right to appeal to the Court of Appeals, is appealable under section 190 of the Code so far as questions of law are concerned. Matter of Wood (1905), 181 N. Y. 93.

Presentment of grand jury.— The Court of Appeals has no power to review an order of the Appellate Division affirming an order of a County Court denying a motion to strike from its

minutes a presentment of a grand jury censuring public officers. Matter of Jones (1905), 181 N. Y. 389.

Order vacating service of summons.—An order of the Appellate Division, which reverses an order of Special Term denying a motion to set aside the service of summons in an action and grants the motion, is not appealable as of right. Kramer v. Buffalo Union Furnace Co. (1909), 196 N. Y. 532.

Order refusing to bring in party.—An order of the Appellate Division, which affirms an order denying a motion to bring in an additional party, is not appealable as of right. Elmore & Hamilton Contracting Co. v. The State (1909), 196 N. Y. 531.

Appointment of trustee.—An order of the Appellate Division, affirming an order of the Special Term which vacated a former order appointing a trustee under a will in place of a deceased trustee, is a final order in a special proceeding and, therefore, may be appealed from to the Court of Appeals. Matter of Earnshaw (1909), 196 N. Y. 330.

Examination before action.—A proceeding for the examination of witnesses before the commencement of an action, under the Act to Prevent Monopolies (L. 1897, chap. 383), is not a special proceeding; and an order of the Appellate Division affirming an order vacating an order for such an examination granted *ex parte* by a justice of the Supreme Court under section 5 of the act, is not an order finally determining a special proceeding and is not appealable to the Court of Appeals. Matter of Attorney-General (1898), 155 N. Y. 441.

Election Law.—An order of the Appellate Division of the Supreme Court finally determining a proceeding by mandamus under section 114 of the Election Law (L. 1896, chap. 909), for the recount of ballots objected to as marked for identification or rejected as void, and presenting a question of law for review, is appealable as of right to the Court of Appeals as an order finally determining a special proceeding. People ex rel. Feeny v. Board of Canvassers (1898), 156 N. Y. 36.

Foreclosure of corporation mortgage.— Orders of the Appellate Division, reversing orders of the Special Term, made upon a motion to determine whether the fund in question was covered by the lien of a corporation mortgage then being foreclosed by an action in which a sequestration receiver and a foreclosure receiver had been appointed, settling the account of the foreclosure

receiver and refusing to direct the attorney for the sequestration receiver to pay over to the former money in his hands, are not final orders in a special proceeding, but are orders in the foreclosure action, and therefore not appealable as matter of right. N. Y. Security & Trust Co. v. Saratoga Gas & El. L. Co. (1898), 156 N. Y. 645.

Condemnation proceeding.—An order of the Appellate Division, reversing an order of the Special Term vacating a final order and judgment in a condemnation proceeding, is not a final order in the special proceeding, within the meaning of the Constitution and section 190 of the Code, and therefore is not appealable as of right. City of Johnstown v. Wade (1898), 157 N. Y. 50.

Judicial accounting.—An order of a Surrogate's Court, denying an application to open the decree entered in a proceeding for the final judicial settlement of an executor's accounts and to require a further accounting is not an order "finally determining" the special proceeding, and therefore an order of the Appellate Division affirming the same is not appealable as of right to the Court of Appeals. Matter of Small (1899), 158 N. Y. 128.

Orders on judicial sales.— Orders requiring the purchaser to complete, or relieving him from, his purchase at a sale in foreclosure or partition are, when they present solely questions of law, reviewable by the Court of Appeals as being final orders in special proceedings. Holme v. Stewart (1898), 155 N. Y. 695; Smith v. Secor (1898), 157 N. Y. 402; Kingsland v. Fuller (1899), 157 N. Y. 507; Merges v. Ringler (1899), 158 N. Y. 701; Trustees of Church v. Mullowney (1909), 164 N. Y. 578; Parish v. Parish (1903), 175 N. Y. 181.

An order deciding an application, made on the foot of the judgment in foreclosure, to compel a defaulting purchaser on a foreclosure sale to execute a deed of the property bid off by him thereat, to a purchaser on a resale, is not reviewable by the Court of Appeals as matter of right. Knickerbocker Trust Co. v. Oneonta Ry. Co. (1910), 197 N. Y. 391.

In the case of private judicial sales, such as a sale by a receiver appointed by the court, the question of compensation to a person relieved from completing his purchase rests in the discretion of

the court, and its determination thereon is not reviewable by the Court of Appeals. People v. N. Y. B. L. Banking Co. (1907), 189 N. Y. 233.

Surplus proceedings.—A proceeding for the disposition of surplus moneys arising from a mortgage foreclosure is a special proceeding, and an appeal from an order of distribution therein lies to the Court of Appeals without permission. Velleman v. Rohrig (1908), 193 N. Y. 439.

New trial on exceptions.—An order granting a new trial on exceptions, within the meaning of the provision which authorizes appeals, as of right, to the Court of Appeals, from orders of the Appellate Division "granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them," may be founded on an exception filed, as provided by the Code of Civil Procedure (section 1022), to a decision which does not state separately the facts found. Otten v. Manhattan R. Co. (1896), 150 N. Y. 395.

Under the Constitution, the Court of Appeals has no jurisdiction to review an appeal from an order granting a new trial on exceptions unless accompanied by a stipulation for judgment absolute in case of affirmance, even though the Appellate Division has allowed the appeal and certified a question of law for review. Mundt v. Glokner (1899), 160 N. Y. 571; N. Y. C. & H. R. R. Co. v. State of N. Y. (1901), 166 N. Y. 286.

An order and judgment of the Appellate Division reversing an interlocutory judgment and granting a new trial is not reviewable by the Court of Appeals upon the ground that the appeal is from an order granting a new trial upon a motion made upon exceptions under section 1001 of the Code of Civil Procedure, where the record fails to disclose that the Appellate Division in any way disposed of or decided the exceptions. Townsend v. Van Buskirk (1900), 162 N. Y. 265.

Assessment.— Order of Appellate Division affirming an order to vacate an assessment is a final order and reviewable by Court of Appeals. In re Munn, 165 N. Y. 149, 58 N. E. 881.

An order of the Appellate Division, affirming an order appointing commissioners in a railroad condemnation proceeding is not appealable as of right. N. Y., Lack. & West. Ry. Co. v. Erie R. R. Co. (1899), 161 N. Y. 616.

Attachment.— Appeal does not lie from an order by the Appellate Division denying a motion to vacate warrants of attachment. Hammond v. Nat. Life Ass'n, 168 N. Y. 262, 61 N. E. 244.

Direction to guardian.— An order directing resumption of certain payments by a guardian of the property of an infant to the guardian of the person is not reviewable by Court of Appeals. Matter of White, 95 App. Div. 104.

Order dismissing appeal.— No appeal can be taken to the Court of Appeals from an order of the Appellate Division dismissing an appeal from the judgment below, but the proper practice is to enter a judgment of dismissal upon the order and then appeal from such judgment. Stevens v. Central Nat. Bank (1900). 162 N. Y. 253.

An order of the Appellate Division dismissing an appeal from an order amending a judgment is not appealable to the Court of Appeals. Van Nostrand v. Van Nostrand (1908), 125 App. Div. 718.

Incompetent person.— An order charging the committee of an incompetent person with a certain sum upon the report of a referee appointed to take and state the account, is a final order in a special proceeding. Matter of Chepman (1901), 162 N. Y. 456.

Alimony.— A reversal, with denial of the application, by the Appellate Division of an order of the Special Term granting an application to modify a decree for alimony by reducing the amount, is reviewable by the Court of Appeals, since it is either a final order in a special proceeding or a final judgment in an action. Wetmore v. Wetmore (1900), 162 N. Y. 503; Livingston v. Livingston (1903), 173 N. Y. 377.

Insolvent debtor.— A motion under section 2182 of the Code of Civil Procedure to cancel a judgment against a discharged insolvent debtor is a special proceeding, and a final order thereon is reviewable as of right by the Court of Appeals. Duer v. Hunt (1900), 162 N. Y. 605.

Order setting aside assessment for local improvement.— An order in a special proceeding instituted by a property-owner to review an assessment levied for a local improvement, which sets aside the assessment not only as to him but as to all the property-owners, is a final order determining the proceeding and is appealable to the Court of Appeals. Matter of Munn (1900), 165 N. Y. 149.

Order in proceeding under Condemnation Law.— An order and judgment entered on a decision of the Appellate Division which not only reversed an order and judgment of the Special Term condemning water rights of the defendant in favor of the plaintiff, in a proceeding instituted under the Condemnation Law (Code Civ. Proc., § 3357 *et seq.*), but dismissed the proceeding, are final and appealable. Village of Champlain v. McCrea (1901), 165 N. Y. 264.

Order reversing judgment condemning private interests in water rights for village purposes is reviewable by Court of Appeals. Champlain v. McCrea, 165 N. Y. 264; Matter of King, 168 N. Y. 53.

In a condemnation proceeding under a statute which provided that "in case of a new appraisal the second report shall be final and conclusive," it was held that this did not apply where the first report was set aside by the Special Term and new commissioners appointed; but that such first report must be regarded as no appraisal and no report, and the report of the new commissioners as an original report, whose confirmation was reviewable by the Appellate Division and the Court of Appeals. Matter of Daly (1907), 189 N. Y. 34.

Physical examination.— An order affirming an order denying a motion to vacate an order directing the plaintiff in an action for damages for personal injuries to appear before a person named for personal and physical examination, is not appealable as of right to the Court of Appeals. Taylor v. Anglo-Swiss Condensed Milk Co. (1900), 165 N. Y. 611.

Non-appealable orders.—An appeal does not lie to the Court of Appeals from an order affirming an order denying a motion to set aside and vacate a judgment of foreclosure and sale (Hull v. Wilcox [1901], 166 N. Y. 598); nor from an order affirming an order denying a motion for a new trial and to set aside a verdict (Wiedeman v. Everard [1901], 166 N. Y. 598); nor from an order affirming an order denying a motion to be made a party to the action (Stoutenburgh v. Davison [1901], 166 N. Y. 636); such order being only reviewable upon appeal from the judgment. Com. Bank of Rochester v. Spencer (1879), 76 N. Y. 155.

Order denying motion for new trial.—An order of the Appellate Division denying a motion for a new trial made upon excep-

tions pursuant to section 1001 of the Code, intermediate the interlocutory and final judgments, is not appealable as matter of right. Young v. Gilmour (1901), 167 N. Y. 500.

Order resettling judgment.—An order resettling a judgment is not an order finally determining a special proceeding and is not appealable as of right to the Court of Appeals. Whalen v. Stuart (1909), 194 N. Y. 495.

Attachment.— No appeal lies to the Court of Appeals from an order denying a "motion herein to vacate and set aside the warrants of attachment and judgment in this action" without the allowance of the Appellate Division, since it is an order in an action and not in a special proceeding. Hammond v. National Life Assn. (1901), 168 N. Y. 262.

Forfeited recognizance.—An appeal does not lie as of right to the Court of Appeals to review an order denying a motion to vacate a judgment entered upon a forfeited recognizance. People v. Clark (1901), 168 N. Y. 676; People v. Baker (1901), 168 N. Y. 677; People v. Russell (1902), 171 N. Y. 655.

Conditional order not final.—An order of the Appellate Division made in certiorari proceedings imposing as a condition for the reinstatement of relator, a member of the police force of the city of New York, that he should stipulate not to claim back salary from the date of his dismissal from the force, but containing no provision as to the disposition of the proceedings if the stipulation was not given, does not finally determine the proceedings in the absence of the stipulation and is not appealable to the Court of Appeals. People ex rel. Hart v. York (1902), 169 N. Y. 452.

Modified final order.—A Special Term order which modifies and corrects a final order in a special proceeding thereby becomes the final order in that proceeding, and an order of the Appellate Division reversing it is reviewable by the Court of Appeals. Matter of Board of Education (1902), 169 N. Y. 456.

Failure to enter judgment on order of affirmance.—An order of the Appellate Division which reversed a determination of the Special Term setting aside a verdict on the ground of newly-discovered evidence and granting a new trial, and affirmed the judgment of the trial court entered upon the verdict, is not reviewable upon the merits by the Court of Appeals; and an appeal there-

from, even if allowed by the Appellate Division and question certified, must be dismissed when the record does not disclose the entry of a judgment of affirmance, nor any appeal therefrom, if it had in fact been entered. Reiss v. Town of Pelham (1902), 170 N. Y. 54. See, also, Moore v. Bd. of Education (1909), 195 N. Y. 601.

Appeal from judgment of reversal on demurrer.—A judgment of the General Term reversing an interlocutory judgment of the Special Term on demurrer and holding the demurrer well taken and directing a final judgment unless the plaintiff should amend within a certain time does not, when perfected by entry of a final judgment dismissing the complaint on failure of the plaintiff to amend, become a final and actual determination by the General Term upon the issue raised by the demurrer appealable to the Court of Appeals; but the proper mode of bringing the question to the Court of Appeals is by an appeal through the Appellate Division from the judgment so entered. Abbey v. Wheeler (1902), 170 N. Y. 122.

A final judgment entered pursuant to section 1222 of the Code of Civil Procedure upon an order of Special Term sustaining a demurrer and dismissing the complaint upon the merits after a reversal by the late General Term of a final judgment overruling the demurrer, the order of reversal giving the plaintiff leave to amend, which he failed to do, but containing no direction for final judgment in case of his default, is not appealable to the Court of Appeals. Leonard v. Barnum (1901), 168 N. Y. 41.

Interlocutory judgment — review of.— When an appellant seeks to review an interlocutory judgment he should give notice in his notice of appeal of his intention to review the determination of the Appellate Division affirming such interlocutory judgment and cause the judgment of the Appellate Division to be returned with the record so that it can be reviewed by the Court of Appeals. An appeal in form as from an interlocutory judgment entered in the Trial Court does not bring up for review an affirmance of such judgment by the Appellate Division. Waldo v. Schmidt (1910), 198 N. Y. 193.

Interlocutory judgment — direct appeal — section 1336.— When the Appellate Division reverses part of a final judgment and so modifies it in other respects as to make it an interlocutory

judgment, the judgment thereafter rendered by the Special Term upon the report of a referee appointed under such interlocutory judgment is not appealable directly to the Court of Appeals, under section 1336 of the Code, authorizing such an appeal where a final judgment is rendered in the court below after affirmance, upon an appeal to the Appellate Division, of an interlocutory judgment. Hollister v. Simonson (1902), 170 N. Y. 357.

Where the Appellate Division reverses an interlocutory judgment and an order at Special Term is subsequently entered thereon, the unsuccessful party must go through the formality of another appeal to the Appellate Division, though in case of an affirmance he can appeal directly to the Court of Appeals from the judgment of the Special Term. McNamara v. Goldan (1909), 194 N. Y. 315.

It is only in the case of an affirmance by the Appellate Division of an interlocutory judgment that an appeal from the final judgment of Special Term thereon may be taken directly to the Court of Appeals, since the provision of the Code on the subject (§ 1336) mentions only affirmances and does not include reversals. Will v. Barnwell (1910), 197 N. Y. 298.

Denial of new trial — direct appeal — section 1336.— The provision of section 1336 of the Code that, after the refusal by the Appellate Division of a new trial, the party aggrieved may appeal directly to the Court of Appeals from the final judgment, although rendered at Special Term, applies to a judgment upon the verdict entered after the reversal by the Appellate Division of an order granting a new trial. The reversal of such an order is a refusal of a new trial within the meaning of the section. South Bay Co. v. Howey (1907), 190 N. Y. 240; Girling v. City of New York (1910), 197 N. Y. 302.

Review of intermediate orders.— Section 1301 of the Code relates to all appeals provided for in chapter 12 and authorized the review by the Court of Appeals, on appeal from a final judgment in an action or a final order in a special proceeding, of those intermediate orders which are specified in the notice of appeal. N. Y., L. & W. Ry. Co. v. Erie R. R. Co. (1902), 170 N. Y. 448.

Surrogate's decree.—An order of the Appellate Division cannot be reviewed by the Court of Appeals upon an appeal taken di-

rectly from a decree of a Surrogate's Court made after and in accordance with such order. Matter of Union Trust Co. (1902), 172 N. Y. 494.

Amendment of judgment.—An order reversing an order denying a motion to amend a judgment is not appealable to the Court of Appeals as a matter of right. Peggo v. Dinan (1902), 172 N. Y. 605.

Accounts of receiver.—An order settling the accounts of a receiver of rents and profits in an action for the foreclosure of a mortgage, being an order in an action, is not appealable to the Court of Appeals. Frankenstein v. Hamburger (1902), 172 N. Y. 609.

Order discharging receiver.— Where real estate has been sold under a testamentary power, freed from a dower right on the admeasurement of which a receiver had been appointed, an order, made on the petition of the purchaser, discharging the receiver and awarding possession to the purchaser, is a final order in a special proceeding and appealable as such. Conlon v. Kelly (1910), 199 N. Y. 43.

Delivery of books and papers.—An order of the Appellate Division reversing an order of the Special Term granting an application made under section 2471a of the Code, to compel the delivery of books and papers to a public officer, and which denied the application, is a final order in a special proceeding and is reviewable by the Court of Appeals. Matter of Brenner (1902), 170 N. Y. 185.

Discovery of decedent's property.—An order punishing the witness for contempt in refusing to disclose information which was not privileged, in a proceeding instituted under section 2707 of the Code of Civil Procedure to discover property belonging to a decedent's estate, is the final order in the proceeding and, therefore, appealable to the Court of Appeals. Matter of King v. Ashley (1904), 179 N. Y. 281.

Security for costs.—An order of the Appellate Division reversing an order requiring the plaintiff to give additional security for costs is not appealable as matter of right. Dunk v. Dunk (1904), 177 N. Y. 264.

Dismissal of complaint.— Where a judgment dismissing the complaint does not declare that the dismissal was upon the merits

the judgment is, nevertheless, to be deemed a final one, and not merely a nonsuit, if an inspection of the judgment-roll, on appeal, makes it clearly appear that the dismissal was upon the merits. Keys v. Smith (1906), 183 N. Y. 376.

Appeal from order granting new trial.—Where a judgment of a trial court is reversed and a new trial granted, an appeal cannot be taken from the judgment of reversal, but it must be reviewed upon an appeal from the order granting the new trial (Code Civ. Pro., § 1318); and if the judgment is not entered until after the order, the sixty days within which an appeal must be taken from the order (Code Civ. Pro., § 1325) does not commence to run until the entry of the judgment. Wingert v. Krakauer (1905), 180 N. Y. 265.

Review of order denying new trial.— There is no authority for an appeal to the Court of Appeals from an order affirming an order denying a motion for a new trial. In such case, the appeal must be taken from the judgment, and on such an appeal only can the Court of Appeals review the decision below. Matter of Hopkins (1906), 186 N. Y. 580.

Code, section 190, subdivision 2.

Appeals by allowance and certification; certified questions.— A question certified by the Appellate Division, under section 190 of the Code, should be a distinct point or proposition of law, clearly stated, so that it can be definitely answered without regard to other issues in the case, and should be a question of law only. If a question is stated in such broad and indefinite terms that it will admit of one answer under one set of circumstances, and a different answer under another, or if it presents merely an abstract proposition, and no facts are disclosed in the record which show that it arose in the case, the Court of Appeals will decline to answer it. Grannan v. Westchester Racing Asso. (1897), 153 N. Y. 449; Hearst v. Shea (1898), 156 N. Y. 169.

Where an appeal lies to the Court of Appeals as matter of right, the scope thereof cannot be limited by the certification by the Appellate Division of questions for review. Seaward v. Davis (1910), 198 N. Y. 415.

Even if a notice of entry of an order fails, by reason of in-

sufficiency, to limit the time to appeal, no case is presented for the Court of Appeals by an order of the Appellate Division allowing *nunc pro tunc* an appeal previously taken without a prerequisite permission, where no appeal has been taken within sixty days after the allowance of the right of appeal. Guarantee Trust Co. v. P. R. & N. E. R. R. Co. (1899), 160 N. Y. 1.

Questions certified to the Court of Appeals can be reviewed only so far as they actually arose and were determined by the Appellate Division, Schenck v. Barnes (1898), 156 N. Y. 316, for the Court of Appeals has no jurisdiction, under this section of the Code, to review a certified question which was not passed upon by the Appellate Division, Coatsworth v. Lehigh Valley Ry. Co. (1898), 156 N. Y. 451. Hence, where, on an appeal upon certified questions, from an interlocutory judgment upon a demurrer, it appears that the only question passed upon by the Appellate Division was whether the complaint stated a cause of action, the Court of Appeals will not answer other questions. *Id.*

On an appeal by allowance of the Appellate Division, upon questions certified by it, under section 190 of the Code of Civil Procedure, the Court of Appeals has no authority to determine any of the questions involved except those certified for that purpose. Grannan v. Westchester Racing Assn. (1897), 153 N. Y. 449.

Question must require determinative answer.—When a case not otherwise reviewable by the Court of Appeals is brought up on specific certified questions, the questions should be so framed that the answers may determine the particular controversy involved in the appeal and not merely a part of it. Where the decision below may stand upon several grounds, it is not enough that the questions certified present only the weak propositions involved in the particular ground claimed to be affected with error, ignoring all the other grounds upon which the decision may well stand. Blaschko v. Wurster (1888), 156 N. Y. 437.

An appeal from an order, brought up on a certified question, will be dismissed where the answer to the question would not necessarily determine as a matter of law whether the order should have been granted or denied. Smith v. Brown Brothers Co. (1909), 196 N. Y. 31.

While, on an appeal by certification, the Court of Appeals is

confined to the question certified, it is its duty to ascertain all the facts that raise the question, so that it can be decided as an existing issue between the parties, and the danger of passing upon merely abstract propositions avoided. Baxter v. McDonnell (1897), 154 N. Y. 432.

Question involving discretion.— On the certification by the Appellate Division, of the question of law whether the Supreme Court had jurisdiction of an action for an injunction which it had refused to entertain, the Court of Appeals cannot determine whether the Supreme Court might in its discretion have declined to entertain jurisdiction. Davis v. Cornue (1896), 151 N. Y. 172.

A certified question as to the propriety of the Supreme Court exercising its discretion on a state of facts not presented by the complaint must be regarded as containing an abstract statement of facts and is not reviewable by the Court of Appeals. Steinway v. Bernuth (1901), 167 N. Y. 498.

Permission must precede appeal.— Where an appeal from an order not appealable as of right has been taken to the Court of Appeals without prior permission, the Appellate Division has no authority to grant a retroactive allowance of the appeal *nunc pro tunc*. Guarantee Trust Co. v. P. R. & N. E. R. R. Co. (1899), 160 N. Y. 1.

An appeal taken without prior permission, from an order not appealable as of right, is not cured by a subsequent order of the Appellate Division purporting to allow the appeal *nunc pro tunc* and certifying a question for review, made after the expiration of the statutory time to appeal. Guarantee Trust Co. v. P. R. & N. E. R. R. Co. (1899), 160 N. Y. 1.

The service of a notice of appeal to the Court of Appeals from an order other than a final order in a special proceeding, without leave of the Appellate Division, is a mere nullity; and an order granting leave subsequently obtained does not validate the appeal. Steamship Richmond Hill Co. v. Seager (1899), 160 N. Y. 312.

Time to appeal after allowance of right.— The time to appeal from an order requiring an allowance by the Appellate Division to create the right to appeal may be extended by the necessity of obtaining the allowance; and when, by diligence, it has been obtained, the appeal must then be taken within a reasonable

time, not to exceed sixty days. Steamship Richmond Hill Co. v. Seager (1899), 160 N. Y. 312.

Order assessing damages upon judgment absolute on stipulation.— While an order of the Appellate Division, affirming an assessment of damages upon a judgment absolute directed by the Court of Appeals, is not appealable to the Court of Appeals, as a matter of right (Bassett v. French [1898], 155 N. Y. 46), or even when certified by the Appellate Division, where the assessment of damages involves a discretion on the part of the court or jury making the assessment (Lewin v. Lehigh Valley R. R. Co. [1902], 169 N. Y. 336), yet, where items of damages disallowed are definitely fixed and determined and the court making the assessment has certified that they were rejected "as a matter of law and not as a matter of discretion," and the Appellate Division has certified that a question of law has arisen which ought to be determined by the Court of Appeals, thereby raising questions of law as to the items rejected and bringing the case within the requirements of section 190 of the Code of Civil Procedure, the appeal is well taken and the order is reviewable in the Court of Appeals. City Trust, etc., Co. v. Am. Brewing Co. (1905), 182 N. Y. 285.

Interlocutory judgment.—An appeal from the interlocutory judgment or order which decided the question, while not reviewable of itself, is proper to enable the Court of Appeals to entertain a question of law certified to it by the Appellate Division for review. Bank of Metropolis v. Faber (1896), 150 N. Y. 200.

The answer of the Court of Appeals to questions certified to it for decision must be limited to the questions which were before the courts below as raised by the facts disclosed, and cannot extend to abstract propositions or contingent questions. Matter of Robinson (1899), 160 N. Y. 448.

Allowance of appeals.— The provision of the Constitution permitting the Appellate Division to allow appeals was intended to apply to cases where the appeal is not given as matter of right; and that court has no power to allow an appeal, given as matter of right upon certain conditions, by dispensing with the conditions. Mundt v. Glokner (1899), 160 N. Y. 571.

The provision of the Constitution empowering the Appellate Division to "allow an appeal upon any question of law which,

in its opinion, ought to be reviewed by the Court of Appeals," applies only to the allowance of appeals from interlocutory or nonfinal judgments and orders, and was not intended to nullify or affect the provision which prevents the Court of Appeals from reviewing questions as to the sufficiency of the evidence. Reed v. McCord (1899), 160 N. Y. 330.

The right of appeal to the Court of Appeals by allowance of the Appellate Division, under either sections 190 or 191 of the Code, does not become absolute until the Appellate Division has made the proper order allowing the appeal, and the time within which such appeal must be taken, under section 1325 of the Code of Civil Procedure, does not begin to run until such order is granted; but application for such leave to appeal must be made at the term of the Appellate Division at which the order or judgment appealed from was granted, or before the end of the next succeeding term, and if the order allowing the appeal is not obtained within that time, none can be subsequently granted. Porter v. International Bridge Co. (1900), 163 N. Y. 79; Matter of City of N. Y. (1900), 119 App. Div. 74.

Appeal, by allowance, from interlocutory judgment.— The time within which an appeal by allowance of the Appellate Division can be taken to the Court of Appeals from an interlocutory judgment on a demurrer may be limited by notice to sixty days after the right to appeal exists. Porter v. International Bridge Co. (1900), 163 N. Y. 79.

Abstract questions.— The Appellate Division has no power to certify abstract questions to the Court of Appeals for review, and the latter court has no power to answer such questions, since it is limited to a review of the determination of the Appellate Division. Matter of Davis (1901), 168 N. Y. 89.

Certified questions of fact.— Where, after reversing a surrogate's decree, passing the accounts of trustees, upon questions of fact as well as of law, the Appellate Division certifies to the Court of Appeals certain questions whose answers depend upon the facts established by the evidence from which different inferences may be drawn, the Court of Appeals cannot answer the question certified, as its jurisdiction is limited to the review of questions of law, and the power of the Appellate Division to allow an appeal to the Court of Appeals is also limited to questions of law. Matter of Westerfield (1900), 163 N. Y. 209.

Ineffective questions.—A certified question should present a question of law only; and if it presents a mixed question of law and fact it is not reviewable. Matter of Opening Townsend Ave. (1903), 175 N. Y. 508.

Questions which were not properly before the original tribunal are not answered by the Court of Appeals, although certified to it by the Appellate Division. Matter of Coatsworth (1899), 160 N. Y. 114.

The allowance of an appeal by the Appellate Division does not require the Court of Appeals to adopt any different rule in determining the questions which are thus brought before it from that enforced in ordinary cases where no such allowance is necessary; and where the appeal is from an order not reviewable, it must be dismissed, notwithstanding its allowance. Caponigri v. Altieri (1900), 164 N. Y. 476. But see Routenberg v. Schweitzer (1909), 165 N. Y. 175.

Form of certified question.— Each question certified to the Court of Appeals should be separately stated, so that it can be answered yes or no; and several propositions should not be combined in a compound question, alternative in form, which cannot be categorically answered. Devlin v. Hinman (1899), 161 N. Y. 15; Fairweather v. Burling (1905), 181 N. Y. 117.

For examples of faulty forms of certified questions, see Malone v. Saints Peter & Paul's Church (1902), 172 N. Y. 269.

Scope of subdivision 2.— It is only where an appeal is allowed under subdivision 2 of section 190 that questions should be certified to the Court of Appeals. Seaward v. Davis (1910), 198 N. Y. 415.

The requirements of this subdivision, as to certified questions, have reference only to appeals allowed by the Appellate Division other than appeals from judgments or orders finally determining actions or special proceedings and from orders granting new trials on exceptions, and do not apply to appeals that are allowed under section 191 of the Code. Klein v. East River Elec. Light Co. (1905), 182 N. Y. 27.

Code, section 191, subdivision 1.

Appeals from inferior local courts by allowance.—The provisions of subdivision 1 of section 191 of the Code of Civil Procedure, which took effect January 1, 1896, that

"no appeal shall be taken to" the Court of Appeals "in any civil action or proceeding commenced in any court other than the Supreme Court, County Court or a Surrogate's Court, unless the Appellate Division of the Supreme Court allows the appeal," was intended to refer only to courts existing when it took effect, namely, inferior local courts, and does not apply to actions commenced in superior city courts, which, by force of the Constitution of 1894 ceased to exist on December 31, 1895. Halliburton v. Clapp (1896), 149 N. Y. 183.

This provision applies to an action originally commenced in a Justice's Court, discontinued there on the interposition of an answer of title, and thereupon prosecuted in the Supreme Court. Sidwell v. Greig (1898), 157 N. Y. 30.

The entry of a judgment on the order of the Appellate Division affirming a judgment carried to it from the Municipal Court of the City of New York through the Appellate Term is essential to a review by the Court of Appeals, and the appeal to that court must be from such judgment. Moore v. Board of Education (1909), 195 N. Y. 601.

General statement.—In allowing an appeal under this subdivision it is sufficient and proper for the Appellate Division to state generally that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals. It is not required to certify questions to be answered. Klein v. East River Elec. Light Co. (1905), 182 N. Y. 27.

Specific question nugatory.— The Court of Appeals cannot answer a question certified to it by the Appellate Division upon the allowance of an appeal from a final judgment in an action commenced in an inferior local court, in the absence of a provision for the certification of questions upon such an allowance of appeal. Swan v. Inderlied (1907), 187 N. Y. 372.

Code, section 191, subdivision 2.

Jurisdiction.—This amendment did not add to the questions which the Court of Appeals may review, and is controlled by the provision of the Constitution which prohibits that court from reviewing the question of the sufficiency of the evidence to sustain a verdict not directed by the court, unanimously affirmed by the Appellate Division. Reed v. McCord (1899), 160 N. Y. 330.

The permission to appeal, under subdivision 2 of section 191,

in no way enlarges the jurisdiction of the Court of Appeals with respect to the questions that may be reviewed by it upon a hearing of the appeal. Commercial Bank v. Sherwood (1900), 164 N. Y. 310.

A decision or memorandum of decision of the Appellate Division is not a judgment; and the amendment to section 191 of the Code of Civil Procedure (L. 1896, ch. 559), restricting appeals from a judgment of affirmance in actions to recover damages for personal injuries where the decision is unanimous, applies to a judgment entered subsequent to its passage although the decision was prior thereto. Niendorff v. Manhattan R. Co. (1896), 150 N. Y. 276.

The burden of showing that a judgment of affirmance in an action for a personal injury was by a unanimous decision of the Appellate Division rests upon the party asserting it, in order to deprive the Court of Appeals of power to review, under section 191 of the Code of Civil Procedure; and recourse cannot be had to the opinion, but the fact should be established either by the judgment or by a certificate of the court appearing in the record. Kaplan v. N. Y. Biscuit Co. (1896), 151 N. Y. 171.

A judgment entered upon an order of the Appellate Division overruling exceptions directed to be heard by it in the first instance, denying the motion for a new trial based thereon, and ordering judgment upon the verdict, is a judgment of affirmance, within the meaning of the provision of section 191 of the Code of Civil Procedure which prohibits appeals as of right to the Court of Appeals from a judgment of affirmance in an action for a personal injury when the decision of the Appellate Division is unanimous. Huda v. American Glucose Co. (1897), 151 N. Y. 549.

The prohibition of appeals as of right to the Court of Appeals, from judgments of affirmance in actions for personal injuries, when the decision of the Appellate Division is unanimous, is expressly authorized by the Constitution (Corveno v. Atlantic Ave. R. R. Co. [1896], 150 N. Y. 225); and was a competent exercise of the legislative power. Sciolina v. Erie Preserving Co. (1896), 151 N. Y. 50.

Scope of provision.— It seems that subdivision 2 of section 191 applies to the unanimous affirmance by the Appellate Division of any final judgment in an action enumerated therein, such as a

judgment entered upon the dismissal of the complaint by the trial court (Rahm v. N. Y. C. & H. R. R. R. Co. [1909], 194 N. Y. 572); or a final judgment on demurrer following a unanimous affirmance by the Appellate Division of an interlocutory judgment. McNamara v. Goldan (1909), 194 N. Y. 315.

When leave to appeal not required.— Where the final judgment of Special Term on a demurrer, in an action specified in subdivision 2 of section 191 of the Code was entered solely in compliance with the reversal by the Appellate Division of an interlocutory judgment, such final judgment is in effect that of the Appellate Division and not of the Special Term; and an unanimous affirmance thereof by the Appellate Division, being not an affirmance but a reversal of the action of the trial court, is appealable to the Court of Appeals without leave. McNamara v. Goldan (1909), 194 N. Y. 315.

Allowance of appeal.— The authority reserved by the amendment of 1896 (chap. 559) to section 191 of the Code of Civil Procedure, for the allowance of an appeal to the Court of Appeals by the Appellate Division, by certificate, or, on its refusal, by a judge of the Court of Appeals, was intended primarily to provide for exceptional cases where public interests or the interest of jurisprudence might be endangered by permitting a decision to go unchallenged; and the mere existence of errors prejudicial to the particular parties does not of itself warrant the allowance of an appeal. Sciolina v. Erie Preserving Co. (1896), 151 N. Y. 50.

For an appeal under subdivision 2 of section 191 of the Code, a certificate of the Appellate Division stating generally that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals is sufficient without specifying questions for review, since such appeal by certification (as distinguished from that provided by subdivision 2 of section 190), is general, and does not call for the formulation or certification of specific questions of law for review (Young v. Fox [1898], 155 N. Y. 615; Kurz v. Doerr [1904], 180 N. Y. 88; Fisher Co. v. Woods [1907], 187 N. Y. 90); and under such general certificate all questions of law raised by exceptions and presented by the record may be reviewed except the legal question as to the sufficiency of the evidence to sustain a finding of fact or a verdict not directed by the trial court. Commercial Bank v. Sherwood (1900), 162 N. Y. 310.

Upon a motion to the Appellate Division for leave to appeal to the Court of Appeals, pursuant to section 191 of the Code of Civil Procedure, the question of law which the moving party desires to have reviewed must be definitely and concisely stated in the notice of motion; and in case the questions are not so stated the motion will be denied. Harroun v. Brush Elec. Light Co. (1897), 14 App. Div. 19.

In Delaney v. Valentine (1896), 11 App. Div. 523, it was considered that a case which has been decided in the Appellate Division in deference to a previous decision of the General Term in the same case, made before the enactment of the amendment to section 191 of the Code of Civil Procedure restricting appeals as of right to the Court of Appeals in actions for a personal injury or to set aside a transfer as in fraud of creditors, does not come within the ordinary rules governing applications for leave to appeal to the Court of Appeals, and that, in such a case, the application for leave to appeal to that court should be granted.

The Appellate Division, on an application for leave to appeal to the Court of Appeals under subdivision 2 of section 191 of the Code, cannot determine whether the case is appealable without a certificate that a question of law is involved which ought to be reviewed, that question being for the Court of Appeals. Springs v. James (1910), 137 App. Div. 669.

An application for leave to appeal to the Court of Appeals under section 191, subdivision 2, should be denied, where the record presents no question involving any principle that concerns any one except the immediate parties to the action. The provisions of the statute authorizing the allowance of appeals to this court in cases where appeals are not given as matter of right, were intended to provide for exceptional cases where public interests or the interests of jurisprudence might be endangered by permitting a decision to go unchallenged. The mere existence of errors prejudicial to the particular parties to the controversy does not of itself warrant the allowance of an appeal. MS. memorandum in Meeker v. Remington & Son Co., cited 68 App. Div. 651, in case of Garlock v. N. Y. C. & H. R. R. R. Co.

An application, under subdivision 2 of section 191, to a judge of the Court of Appeals for the allowance of an appeal may be made *ex parte;* and the allowance, when regularly granted, is not reviewable by the court (Harmon v. Siegel-Cooper Co. [1900],

164 N. Y. 566); but when the appeal has been irregularly allowed, the allowance may be reviewed by the court. Carlisle v. Barnes (1905), 183 N. Y. 272.

Where an application for leave to appeal to the Court of Appeals has been denied, by a judge of that court, an allowance of the appeal by another judge on a subsequent application must be set aside, since the statute (Code Civ. Pro., § 191) does not contemplate or authorize a repetition of such an application after its denial by one judge of the court to the other judges in succession until the list of judges has been exhausted. Carlisle v. Barnes (1905), 183 N. Y. 272.

The Court of Appeals cannot, after a unanimous affirmance by the Appellate Division, review the sufficiency of the evidence to sustain a verdict, in an action for personal injuries, notwithstanding the allowance of an appeal, but can consider only such questions of law as are raised by proper exceptions. Kleiner v. Third Ave. R. R. Co. (1900), 162 N. Y. 193.

Personal injury.— In an action for negligence, exceptions to a charge and refusal to charge as to the duty defendant, a telephone company, owes a lineman to inspect a pole used but not owned by it, without any request for the direction of a verdict or for a nonsuit, entitle the defendant, on appeal by permission, to have the question thereby raised passed upon by the Court of Appeals, although it is one necessarily determined by a denial of the motion to dismiss the complaint and a judgment entered upon a verdict in favor of the plaintiff has been unanimously affirmed by the Appellate Division. McGuire v. Bell Telephone Co. (1901), 167 N. Y. 208.

The claim that the decision of the Appellate Division upon the question of the plaintiff's contributory negligence is in direct conflict with the controlling decisions on the subject, furnishes no ground for the allowance, by a judge of the Court of Appeals, of an appeal from a unanimous affirmance of the judgment of the trial court, as such affirmance prevents the Court of Appeals from reviewing the motion to dismiss the complaint at the close of the case. MS. memorandum in Vandecar v. Universal Trust Co. (1903).

Nor does an exception to the admission of a deposition of the deceased stating the facts and circumstances of the injury which

resulted in his death, where the question is merely one of practice that concerns only the parties to the action and involves simply the construction and legal effect of a stipulation in reference to the deposition, made by the respective attorneys who had control of the case at the time. MS. memorandum in Ludeman v. Third Ave. R. R. Co. (1903).

Libel.—An action of libel is within this provision, since "personal injury" includes libel. McNamara v. Goldan (1909), 194 N. Y. 315.

Compensation for services.— The restriction of the right of appeal to the Court of Appeals from a unanimous affirmance by the Appellate Division "in an action to recover wages, salary or compensation for services" extends to an action to recover compensation for professional services of an attorney. Boyd v. Gorman (1898), 157 N. Y. 365.

Code, section 191, subdivision 3.

Questions of law.— Exceptions to rulings upon the admission and rejection of evidence, in an action tried by a jury, which appear from a mere inspection of the record to be without merit and frivolous, present no question of law that can be reviewed by the Court of Appeals. Szuchy v. Hillside C. & I. Co. (1896), 150 N. Y. 219.

Unless an error upon a trial is so substantial as to raise a presumption of prejudice, it does not require a new trial and should be disregarded. Post v. Brooklyn Heights R. R. Co. (1909), 195 N. Y. 62.

Although a question of law is presented, it will not ordinarily be entertained by the Court of Appeals where, by the lapse of time or other reason, it has become merely abstract and academic, unless of great public importance, as, for instance, where liable to affect future general elections. Matter of Social Democratic Party (1905), 182 N. Y. 442.

It is unnecessary to label either the facts or the law, because they classify themselves according to their nature and cannot be changed if classified wrongly, by court or counsel. If a fact is characterized as a conclusion of law, that does not make it one, for it is a fact still regardless of the name given it. See Jefferson Co. Nat. Bank v. Dewey (1905), 181 N. Y. 115.

A finding of fact does not lose its character by being mis-

placed or misnamed. A so-called conclusion of law may be treated as a finding of fact for the purpose of upholding a judgment, and it may be so treated for the purpose of reversal. Whalen v. Stuart (1909), 194 N. Y. 495.

Erroneous designation of finding.— The Appellate Division cannot create an error of law by certifying that there is one. People v. Huson (1907), 187 N. Y. 97; and a finding, when it is a statement of conclusions of law, can be reviewed upon an exception, although denominated a conclusion of fact. Smyth v. Brooklyn Union El. R. R. Co. (1908), 193 N. Y. 335.

Question of law dependent upon determination of question of fact.— The question as to whether a contract is void under the Statute of Frauds is ordinarily a question of law reviewable by the Court of Appeals under an exception taken to a refusal to nonsuit it upon that ground; but in a case where that question is dependent upon the determination of a question of fact, viz., as to whether there was a consideration sufficient to sustain the contract, and that has been settled by a verdict and by a unanimous affirmance by the Appellate Division, exceptions to the refusal to nonsuit upon that ground raise no question which the Court of Appeals has power to review. Lamkin v. Palmer (1900), 164 N. Y. 201.

Upon appeal from an order and judgment of the Appellate Division, reversing a judgment in favor of the plaintiff and dismissing the complaint upon the merits, in an action tried by the court or a referee, where the decision did not state separately the facts found and the order of the Appellate Division is silent as to its grounds, the review by the Court of Appeals is confined to the consideration of whether, upon the decision made by the trial court upon the facts, the legal conclusion followed that the plaintiff was entitled to the relief awarded him, and, if there was no error in that respect, whether there were errors of law committed in the rulings upon the trial, which would, in any event have justified a reversal of the judgment and rendered a new trial necessary. Bomeisler v. Forster (1897), 154 N. Y. 229.

On appeal from an order of the Appellate Division reversing a referee's judgment dismissing the complaint, where the order does not show that the reversal was upon the facts, the review by the Court of Appeals is confined to the consideration of whether,

upon the decision made by the referee upon the facts, the legal conclusion followed that the defendant was entitled to a dismissal of the complaint. Petrie v. Hamilton College (1899), 158 N. Y. 458.

On appeal from an order of reversal of the Appellate Division, stating that the reversal was on a question of fact, a question of law arises whether a question of fact was presented upon the evidence for determination, and the Court of Appeals gains jurisdiction to review the case to that extent; but if that review results in ascertaining that there was a question of fact, the right to review ceases and the appeal must be dismissed. Health Dept. v. Dassori (1899) 159 N. Y. 245.

Discretion.—A judgment granting a divorce to plaintiff, but awarding the custody of the children to defendant, is within the discretion of the Supreme Court, and where that court does not exceed its powers an affirmance thereof by the Appellate Division is not reviewable by the Court of Appeals. Osterhoudt v. Osterhoudt (1901), 168 N. Y. 358.

The question of the award and amount of costs in an action in equity for the construction of a will, being in the discretion of the Supreme Court, is not subject to review by the Court of Appeals so long as the allowances do not exceed the limitations provided by statute. Allen v. Stevens (1899), 161 N. Y. 123.

Where an order appealed from states that the determination of the Appellate Division was based upon a want of power to grant the application, without considering the question of discretion, a question of law is presented which it is the duty of the Court of Appeals to review, even if the courts below might have denied the application in the exercise of discretion. Matter of Thurber (1900), 162 N. Y. 244.

Where the order of the Special Term refusing a writ of mandamus does not state the ground of refusal, and the facts would have justified a refusal as matter of discretion, the refusal is not reviewable in the Court of Appeals, even though the order of the Appellate Division affirming the order of refusal expressly bases its determination not upon discretion but upon the questions of law involved. Matter of Hart (1899), 159 N. Y. 278.

An appeal from an order of the Appellate Division will not be dismissed on the ground that so far as the record discloses it may

have been made in the exercise of discretion, where the court allows the appeal and certifies a question of law for review, since it will be presumed under such circumstances that the determination was made upon the merits, unless it expressly appears by the record that it was made in the exercise of discretion. Matter of Davies (1901), 168 N. Y. 89.

Where the denial of a motion for a new trial upon the ground of the misconduct of a juror is, upon the facts as disclosed, discretionary with the trial court, the Court of Appeals, as a general rule, will not interfere, even in a capital case. People v. Koepping (1904), 178 N. Y. 247.

In Matter of Estate of Baldwin (1899), 158 N. Y. 713, a surrogate's order vacating a stay on probate, denying an application for issuance of letters testamentary and relief from a stipulation of renunciation by an executor, and granting letters of administration with the will annexed, was held to be discretionary and, therefore, not reviewable in the Court of Appeals.

The Court of Appeals may not review the discretionary action of other courts — such, for instance, as that involved in setting off judgments, DeCamp v. Thompson (1898), 159 N. Y. 444; or that exercised under a writ of certiorari. People ex rel. Toms v. Bd. of Supervisors (1910), 199 N. Y. 150.

Discretion — Certiorari.— The Court of Appeals cannot review an order which simply dismisses a common law writ of certiorari, such an order being the result of an exercise of discretion by the court below. People ex rel. May v. Maynard (1899), 160 N. Y. 453.

Discretion — Extra allowance of costs.—An appeal from an order granting an extra allowance of costs presents no question for review when there was sufficient evidence before the trial court to justify the exercise of its discretionary power to grant such an allowance. Woodbridge v. First Nat. Bank (1901), 166 N. Y. 238.

Under the rule that the Court of Appeals has no power to review discretionary orders, the exercise by the trial court of power possessed by it to grant an additional allowance is not subject to review in the Court of Appeals; but the question as to whether the trial court had the power or authority to grant any additional allowance is a question of law subject to review in the Court of

Appeals. Standard Trust Co. v. N. Y. C & H. R. R. R. Co. (1904), 178 N. Y. 407.

It is only where there is no power in the trial court to grant an extra allowance that the Court of Appeals will review an order granting the same; and when that power exists the amount of the allowance rests in the discretion of the court below, subject only to the limitations of the statutes relating thereto. MacDonnell v. Buffalo L., T. & S. D. Co. (1908), 193 N. Y. 92.

But where there is no dispute about the facts, the question whether a case is so difficult and extraordinary as to justify an extra allowance is a question of law reviewable by the Court of Appeals upon an appeal from the judgment. Campbell v. Emslie (1907), 188 N. Y. 509.

Adding Party.— The Court of Appeals cannot review an order of the Supreme Court, such as an order bringing in an additional party, made in the exercise of its sound discretion, even though brought up by a certified question. Gittleman v. Feltman (1908), 191 N. Y. 205.

Discretion — Remarks of counsel.— Exceptions to the remarks of counsel in summing up are addressed to the discretion of the trial court and the Appellate Division, and raise no question of law for review by the Court of Appeals. The Appellate Division, in such case, could have reversed on the facts. Reehil v. Fraas (1909), 197 N. Y. 64.

Injunction.— While a temporary injunction involves discretion, a permanent injunction does not when the facts conclusively show that it would be inequitable and unjust as matter of law; and in such case the Court of Appeals will review and reverse its allowance. McClure v. Leaycraft (1905), 183 N. Y. 36.

An order of Special Term, within its discretion and affirmed by the Appellate Division, granting, instead of an alternative, a perpetual injunction in the first instance, restraining the construction of an electric railway upon a street, the fee of which is in the abutting landowner, and leaving the company to its proceeding to condemn, presents no question of law reviewable by the Court of Appeals. Peck v. Schenectady Ry. Co. (1902), 170 N. Y. 298.

Discretion — Mandamus.— Where the court below has the power to grant a mandamus as a matter of discretion, its action in allowing the writ is not reviewable by the Court of Appeals.

People ex rel. Rodgers v. Coler (1901), 166 N. Y. 1; People ex rel. Treat v. Coler (1901), 166 N. Y. 144.

The Court of Appeals is not at liberty to review an order refusing a writ of peremptory mandamus where, even if a case was made out in which a peremptory writ might have been issued, the court below had a discretionary power upon the facts to refuse it. People ex rel. Steinson v. Board of Education (1899), 158 N. Y. 125.

An order of the Appellate Division affirming an order of Special Term denying a motion for a peremptory writ of mandamus which fails to show that the writ was refused upon a question of law only, and, therefore, must be assumed to have been denied as a matter of discretion, is not reviewable by the Court of Appeals. People ex rel. Lentilhon v. Coler (1901), 168 N. Y. 6.

Where the facts are sufficient to justify the court below in refusing a common-law mandamus as matter of discretion the Court of Appeals will not review its action unless it affirmatively appears in the order denying the writ that it did not refuse the application in the exercise of discretion. People ex rel. N. Y. & H. R. R. Co. v. Board of Taxes (1901), 166 N. Y. 154.

An application for a peremptory writ of mandamus is addressed to the sound discretion of the Supreme Court, and where it appears that the facts are such as to justify that court in refusing the writ as a matter of discretion, the Court of Appeals will not interfere unless it affirmatively appears in the order denying the writ that the court did not refuse the writ in the exercise of its discretion. People ex rel. Lehmaier v. Interurban Street Ry. Co. (1904), 177 N. Y. 296, citing Matter of Hart, 159 N. Y. 284; People ex rel. Durant L. I. Co. v. Jeroloman, 139 N. Y. 14; People ex rel. Jacobus v. Van Wyck, 157 N. Y. 495.

Criminal contempt.— To render a review by the Court of Appeals effective, an order of the Appellate Division reversing an order adjudging one guilty of criminal contempt should show on its face that the reversal was solely on the law. People ex rel. Drake v. Andrews (1909), 196 N. Y. 538.

Discretionary decisions not reviewable.— Decisions resting in discretion, and free from abuse of its exercise, raise no question of law and are not reviewable by the Court of Appeals, the rule

being that the decisions of one court resting in discretion, are not reviewable in another unless such review is especially authorized by law. White v. Benjamin (1896), 150 N. Y. 258.

An order of the Appellate Division simply dismissing a common-law writ of certiorari, without affirming the proceedings or in any way passing upon the questions sought to be reviewed, being a discretionary order, is not reviewable by the Court of Appeals. People ex rel. Coler v. Lord (1898), 157 N. Y. 408.

Where an order of the Appellate Division refusing a writ of mandamus does not state the ground of decision and the writ may have been refused as a matter of discretion, the order must stand. People ex rel. Jacobus v. Van Wyck (1899), 157 N. Y. 495.

An order affirming an order denying a motion for a new trial on the ground of newly discovered evidence, is an order resting in discretion and not reviewable by the Court of Appeals. White v. Benjamin (1896), 150 N. Y. 258; Gaines v. Fidelity & Casualty Co. (1907), 188 N. Y. 415.

Costs in equity.—An abuse of the exercise of discretion applicable to the granting of costs in an equitable action can be corrected by the Court of Appeals on review of the judgment in the action. Roberts v. N. Y. Elevated R. R. Co. (1898), 155 N. Y. 31.

Withdrawal of juror.— Leave to withdraw a juror rests in the discretion of the trial court, and an exception to its denial presents no error reviewable by the Court of Appeals. Cattano v. Met. Street Ry. Co. (1903), 173 N. Y. 565.

Bill of particulars.— While the granting or denial of a motion for a bill of particulars ordinarily rests within the sound discretion of the Supreme Court, which discretion is not reviewable by the Court of Appeals, yet there is a limit to such discretion, and where an order requires a plaintiff to furnish the particulars of evidence, which it is not within his power to furnish, or precludes him from giving lawful and proper evidence upon the trial because he has failed to specify in advance what such evidence will disclose, a question of law is presented which is reviewable in the Court of Appeals. People v. McClellan (1908), 191 N. Y. 341.

Abstract or academic question.—An enactment by the Legislature, prohibiting in express terms the corporation counsel of the

city of New York from making an offer of judgment against the city does not render the question of the power of a corporation counsel to confess judgment academic as to cases arising prior to its passage or as to cases arising in other cities of the State. Bush v. O'Brien (1900), 164 N. Y. 205.

It is the general practice of the Court of Appeals to refuse to decide abstract questions; Matter of Norton (1899), 158 N. Y. 130; and relief from a judgment for costs merely is not adequate ground upon which to reverse a judgment, if the questions arising upon the merits have become obsolete by lapse of time. Williams v. Montgomery (1896), 148 N. Y. 519; Matter of Croker v. Sturgis (1903), 175 N. Y. 158.

Waiver of exception raising question of law.—An exception to the denial of a motion for the dismissal of the complaint at the close of the plaintiff's case is not available in the Court of Appeals to present the question of law that there is no evidence to support the verdict, where the defendant, after the denial of the motion, proceeded with his case and went to the jury without having renewed the motion to dismiss at the close of the whole evidence, as such action worked a waiver of the exception. Hopkins v. Clark (1899), 158 N. Y. 299.

Assessment of franchise tax.—An order of the Appellate Division reversing a determination of the State Comptroller in the assessment of a franchise tax, not as to the amount of property held by a corporation within the State, but as to the character of a part of it, presents a question of law reviewable by the Court of Appeals. People ex rel. Commercial Cable Co. v. Morgan (1904), 178 N. Y. 433.

Discretionary reversal in criminal case.—An order of reversal in a criminal case, such as an order of reversal upon the ground that justice requires a new trial, which does not upon its face exclude the possibility that it was based upon an examination of the facts or made as a matter of discretion, presents no question of law reviewable by the Court of Appeals. People v. Calabur (1904), 178 N. Y. 463.

Reversal on law and facts.— Upon an appeal from an order of the Appellate Division reversing a surrogate's decree, upon the law and the facts, where the inferences from the uncontradicted evidence all point in one direction so that a reasonable mind can

reach but one conclusion, there is no question of fact and the Court of Appeals has jurisdiction of the appeal. Matter of Totten (1904), 179 N. Y. 112.

Short form decision.— On review of a decision in the short form, although unanimously affirmed, the Court of Appeals cannot presume that any fact was found not embraced within the pleadings, the findings as they appear in the record and the proofs upon which the decision was made; and a general exception to the conclusion of law that the plaintiff was entitled to judgment raises the question of law of the plaintiff's right to maintain the action. Falk v. American West Indies Trading Co. (1905), 180 N. Y. 445.

Non-reviewable question of law.—An error of law, claimed to be raised by the declaration of a question of fact by the Appellate Division in an order of reversal where there is no question of fact in the case, in an action tried by a jury, is not reviewable by the Court of Appeals any more than a unanimous determination by the Appellate Division that there is evidence to support a verdict when, in the judgment of the Court of Appeals, there is no such evidence. Allen v. Corn Exchange Bank (1905), 181 N. Y. 278.

Question of law on denial of nonsuit.— Where a judgment on a verdict for the plaintiff, rendered upon issues submitted to the jury after the denial of a motion for a nonsuit, is affirmed by the Appellate Division, but not unanimously, the question of law is open in the Court of Appeals whether there was any evidence sufficient to justify the submission, and whether the motion for a nonsuit should not have been granted. Grady v. City of New York (1905), 182 N. Y. 18.

Questions of law not raised on the trial by proper exceptions cannot be reviewed by the Court of Appeals, although the decision of the Appellate Division was not unanimous. Wangner v. Grimm (1902), 169 N. Y. 421.

Questions of law under surrogate's decree.— Exceptions to a surrogate's conclusions of law, in dismissing a proceeding in Surrogate's Court, present questions of law which are reviewable by the Court of Appeals upon an appeal from an order of the Appellate Division, affirming the decree of the Surrogate's Court en-

tered upon and in accordance with such conclusions of law. Matter of Killan (1902), 172 N. Y. 547.

The Court of Appeals has no power to review the determination of the Appellate Division in reversing a decree of a surrogate upon the facts. Matter of Thorne (1900), 162 N. Y. 238.

Mandamus.—An order of the Appellate Division reversing an order directing a peremptory writ of mandamus upon a verdict rendered upon the issues raised by the return to an alternative writ, and granting a new trial, is not reviewable by the Court of Appeals when it does not appear from the records that the reversal was not based upon the ground that the verdict was against the weight of evidence; the proper remedy is a new trial of the issues joined upon the alternative writ. People ex rel. McDonald v. Clausen (1900), 163 N. Y. 523.

Question of law raised.— When the defendant has requested to go to the jury upon the facts and the request has been denied, although the record discloses no exception to the denial, an exception noted to the subsequent direction of a verdict for the plaintiff suffices to raise on appeal the question of law whether the material facts in the case should not have been submitted to the jury. Kumberger v. Congress Spring Co. (1899), 158 N. Y. 339.

Question of law not presented by record.— Upon an appeal from a judgment of the Appellate Division, entered upon a unanimous decision that there is evidence supporting or tending to sustain the findings of fact of a referee, the Court of Appeals cannot review a question of law arising upon conceded facts not appearing in the findings of the referee. Hilton v. Ernst (1900), 161 N. Y. 226.

The rule that the Court of Appeals cannot review questions of fact does not apply where an affirmance by the Appellate Division is not unanimous and there is a question whether there is any evidence in the case to support a finding of fact, as such conditions raise a question of law which the Court of Appeals may decide; Ostrom v. Greene (1900), 161 N. Y. 353; Beck v. Catholic University (1902), 172 N. Y. 392; but where there is such evidence the question is no longer one of law, and the decision of the courts below upon the facts is final even though it may be erroneous. Hawkins v. Mapes-Reeve Construction Co. (1904), 178 N. Y. 236.

Question of law raised by exception to direction of verdict.—An exception to the direction of a verdict is sufficient to present the question upon appeal, without requesting that any fact be submitted, in the absence of implied consent that the case be decided by the court. Second Nat. Bk. v. Weston (1900), 161 N. Y. 520.

Review of nonsuit.—A judgment dismissing a complaint, on the ground that plaintiff had failed to make out a cause of action, entered without a decision of the trial court upon the facts established at the trial, is a judgment upon a nonsuit, and may be reviewed in the Court of Appeals. Ware v. Dos Passos (1900), 162 N. Y. 281.

An order of the Appellate Division reversing a judgment of the Special Term and granting a new trial, upon the ground that there was no evidence to sustain a finding of the trial court as to anyone of the facts material and necessary to sustain the judgment below, presents a question of law which must be reviewed by the Court of Appeals. Shotwell v. Dixon (1900), 163 N. Y. 43.

Refusal to nonsuit presenting no error of law.—Where the Appellate Division has reversed a judgment based upon a verdict held to be against the weight of evidence and grants a new trial, and on a subsequent trial the evidence is substantially the same as on the former trial, the refusal of the trial court to nonsuit presents no error reviewable by the Court of Appeals, where the evidence is sufficient to support a verdict either way. Fealey v. Bull (1900), 163 N. Y. 397.

An exception to the finding of fact unanimously affirmed by the Appellate Division presents no question reviewable by the Court of Appeals, and where the facts as found justify the conclusions of law and no other exceptions appear which present any questions of law, the judgment must be affirmed. Krekeler v. Aulbach (1902), 169 N. Y. 372.

Failure to find other facts.—Where a judgment is sustained by findings of fact and conclusions of law which are supported by evidence the failure of the trial court to find other facts, claimed to have been established by evidence, is not an error of law reviewable by the Court of Appeals. New York Cent. &c., R. R. Co. v. Auburn, &c., R. R. Co. 1904), 178 N. Y. 75.

Failure to raise question below.— The objection that an action

of ejectment cannot be maintained for nonpayment of rent where the lease reserved to the landlord no right of re-entry in case of default and contained no provision that in such contingency the lease should determine, cannot be considered by the Court of Appeals where no motion was made at the trial to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. Jones v. Reilly (1903), 174 N. Y. 97.

Reversal upon law.—Where, on appeal from an order of reversal upon the law only, it is found that the evidence supports the verdict, there is nothing open to review by the Court of Appeals other than exceptions relating to the evidence and the charge; and unless one or more of these exceptions is sufficient to justify the reversal by the Appellate Division, it is the duty of the Court of Appeals to reverse the reversal and affirm the judgment of the trial court. Devoe v. N. Y. C. & H. R. R. R. Co. (1903), 174 N. Y. 1.

An appeal to the Court of Appeals from an order of the Appellate Division which involves a question of fact must be dismissed. Matter of Board of Education (1903), 173 N. Y. 321.

The Court of Appeals has no power to set aside a verdict as against the weight of evidence. Merchants' Nat. Bank v. Barnes (1902), 172 N. Y. 618.

As to what is and what is not a question of law, see People ex rel. North v. Featherstonhaugh (1902), 172 N. Y. 112.

Review of reversal on facts.—Where the findings are in accordance with the conceded facts or the uncontroverted testimony, the Appellate Division is not authorized to reverse upon the facts; and, if it does, a question of law is presented which the Court of Appeals may properly review. Benedict v. Arnoux (1898), 154 N. Y. 715.

The denial of a motion for a nonsuit based upon the insufficiency of the evidence, does not present a question of law which will authorize the Court of Appeals to review a case in which the Appellate Division has unanimously decided that there was evidence supporting the verdict. Szuchy v. Hillside C. & I. Co. (1896), 150 N. Y. 219.

An appeal from an order of reversal of the Appellate Division, made by a divided vote, granting a new trial on exceptions filed, and stating that it is upon questions of fact, or questions of fact

and law, raises a question of law as to whether there was any evidence to support the view of the Appellate Division, and if there is no material question of fact appearing in the record, the Court of Appeals has power to review; but if it appears that there was any material and controverted question of fact, and hence, that the Appellate Division had power to reverse upon the facts, its decision is final, and the Court of Appeals must, by force of the restriction of its jurisdiction to the review of questions of law affirm the order or dismiss the appeal therefrom. Otten v. Manhattan R. Co. (1896), 150 N. Y. 395.

Upon appeal from an order of reversal of the Appellate Division stating that the reversal was upon questions of fact, or of both law and fact, the Court of Appeals is not concluded by such statement, but has power to determine whether a question of fact is involved in the case, and if there is none it has jurisdiction to review the law. Hirshfeld v. Fitzgerald (1898), 157 N. Y. 166; Griggs v. Day (1899), 158 N. Y. 1; Hirsch v. Jones (1908), 191 N. Y. 195.

As to when Court of Appeals may examine the facts to discover questions of law, see, also, Penryhn Slate Co. v. Granville El. L. & P. Co. (1905), 181 N. Y. 80; also, Reich v. Dyer (1905), 180 N. Y. 107.

Order involving disputed fact.— The Court of Appeals has no power to review an order denying a motion to resettle and amend an order dismissing a writ of certiorari to review an assessment, so as to have it appear that the hearing took place upon a stipulation as to a fact, where the making of the stipulation was denied by opposing affidavits. People ex rel. Ford v. Gillette (1899), 159 N. Y. 125.

(See, also, under sections 1337 and 1338 of the Code under Rule VIII.)

Code, section 191, subdivision 4.

Unanimous decision of Appellate Division.— The provision that "No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain * * * a verdict not directed by the court, shall be reviewed by the Court of Appeals," is final and conclusive; and the Court of Appeals is without jurisdiction to review such a decision, even if the trial court erred in

holding that the evidence was sufficient to require the submission of the case to the jury, and the Appellate Division was wrong in deciding that the evidence sustained the verdict. Szuchy v. Hillside C. & I. Co. (1896), 150 N. Y. 219.

It seems that the provision that "No unanimous decision of the Appellate Division of the Supreme Court, that there is evidence supporting or tending to sustain a finding of fact, * * * shall be reviewed by the Court of Appeals," applies to special proceedings as well as to actions, and to implied findings as well as to those written out *in extenso.* People ex rel. Manhattan Ry. Co. v. Barker (1897), 152 N. Y. 417.

The effect of an unanimous judgment or order of affirmance by the Appellate Division is a decision that there is evidence supporting the findings of fact as expressed or necessarily implied. It is not necessary for that court to specify what findings of fact are sustained by evidence, when it intends to sustain them all, or to repeat the language of the Constitution and apply it generally to all the findings of fact. People ex rel. Manhattan Ry. Co. v. Barker (1897), 152 N. Y. 417; Keyes v. Smith (1906), 183 N Y. 376.

The restriction imposed by the Constitution upon a review of a unanimous decision of the Appellate Division, that there is evidence supporting a finding of fact, applies to an order of affirmance in a statutory proceeding to review an assessment in which a trial *de novo* has been had at Special Term, upon new evidence, as to the value of the relator's property, resulting in a confirmation of the assessment and a dismissal of the writ of certiorari. People ex rel. Manhattan Ry. Co. v. Barker (1897), 152 N. Y. 417.

When the Appellate Division has unanimously affirmed an order dismissing, upon the merits, a writ of certiorari to review an assessment, the Court of Appeals has no jurisdiction to review the facts which are alleged to show the existence of the grounds of the writ. People ex rel. Bdway. Imp. Co. v. Barker (1898), 155 N. Y. 322.

Judgment solely on incompetent evidence.— Where it appears, upon an appeal to the Court of Appeals from a judgment entered upon a decision of the Appellate Division unanimously affirming a judgment entered upon a decision of the Court at Special Term, that there is no evidence, except that held incompetent by the

Court of Appeals, to justify the findings of fact made by the trial court, such evidence must be presumed to have controlled the result and its admission requires a reversal of the judgment. Hindley v. Manhattan Ry. Co. (1906), 185 N. Y. 335.

Construction of instrument.— The provision that no unanimous decision of the Appellate Division that there is evidence supporting a finding of fact shall be reviewed by the Court of Appeals, has no application where no question of fact was in controversy and the only question involved was the legal construction of the instrument of transfer and the statute. Matter of Green (1897), 153 N. Y. 223. See, also, Kennedy v. Mineola H. & F. Traction Co. (1904), 178 N. Y. 508.

Unanimous decision — unanimity not assumed.— If it does not appear from the order or judgment that an affirmance by the Appellate Division was unanimous, the Court of Appeals will assume that it was not, and will determine whether the evidence was sufficient to warrant the submission of the case to the jury where the defendant has moved for a dismissal of the complaint. Perez v. Sandrowitz (1905), 180 N. Y. 397.

Effect of unanimous decision by Appellate Division. See Consolidated Ice Co. v. The Mayor (1901), 166 N. Y. 92; Woodbridge v. First Nat. Bank (1901), 166 N. Y. 238; Johnston v. Dahlgren (1901), 166 N. Y. 354; Blun v. Mayer (1907), 189 N. Y. 153.

Where a determination made by the State Board of Railroad Commissioners, involving a question of fact, has been affirmed unanimously by the Appellate Division on certiorari, the Court of Appeals has no power to review, when no question is raised that is not necessarily determined by the decision of the question of fact. People ex rel. Loughran v. Railroad Com'rs (1899), 158 N. Y. 421.

When it appears from the record that the affirmance by the Appellate Division of a judgment entered on a verdict not directed by the court was unanimous, the Court of Appeals is compelled to presume that there was sufficient evidence to sustain the facts found by the jury. Ayres v. Del., Lack & West. R. R. Co. (1899), 158 N. Y. 254.

A unanimous affirmance by the Appellate Division of a Special Term judgment limits the Court of Appeals to an examination

of the correctness of the legal conclusions upon the facts found by the trial court. Kissam v. United States Printing Co. (1910), 199 N. Y. 76.

Burden of proving unanimity of decision.— The burden of proving that the decision of the Appellate Division that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court was unanimous, in order to deprive the Court of Appeals of power to review questions of law as to the sufficiency of the evidence, on appeal from a final judgment of affirmance, rests upon the party asserting it, and the fact should appear in the record. Laidlaw v. Sage (1899), 158 N. Y. 73.

Finding of fact.— Since the adoption of the present Constitution, the question whether a finding of fact is sustained by evidence, though one of law, is not reviewable by the Court of Appeals, when the Appellate Division has affirmed the judgment by an unanimous decision. Marden v. Dorthy (1899), 160 N. Y. 39.

When findings of fact have been affirmed by the Appellate Division in an unanimous decision, the Court of Appeals must accept them as they are in their fair scope and meaning, without adding to or taking anything from them, and, applying them to the case, the only question that can arise is whether they support the legal conclusions drawn from them by the courts below. Marden v. Dorthy (1899), 160 N. Y. 39.

The provision, that no unanimous decision of the Appellate Division that there is evidence supporting or tending to sustain findings of fact shall be reviewed by the Court of Appeals, applies not only to the facts affirmatively stated in favor of the successful party, but to those expressly or impliedly negatived against the party appealing. Marden v. Dorthy (1899), 160 N. Y. 39.

Finding involving stipulated facts.— The principle that a finding, although unanimously affirmed by the Appellate Division, is not conclusive upon the Court of Appeals when it involves issuable or traversable facts stipulated by the parties, cannot apply when the stipulated facts are evidentiary merely. Continental Ins. Co. v. N. Y. & Harlem R. R. Co. (1907), 187 N. Y. 225.

Jurisdiction.— The purpose and effect of the present Constitution is to prohibit the Court of Appeals from in any case re-

viewing the question whether there is any, or sufficient, evidence to sustain a decision or undirected verdict, where there was an unanimous affirmance by the Appellate Division. Reed v. McCord (1899), 160 N. Y. 330.

The provision of the Constitution prohibiting the review of a unanimous decision of the Appellate Division that there is evidence supporting or tending to sustain a verdict not directed by the court has the effect of withdrawing from the jurisdiction of the Court of Appeals, in case of such unanimous decision, the question of law whether there is any evidence tending to prove a fact. Meserole v. Hoyt (1899), 161 N. Y. 59.

The question of law, whether there is any evidence supporting or tending to sustain a finding or verdict on a question of fact, is not reviewable in the Court of Appeals, when the judgment has been affirmed unanimously by the Appellate Division, whatever may be the form of the exception. Cronin v. Lord (1899), 161 N. Y. 90.

Unanimous affirmance by the Appellate Division of the award by the trial court of fee and rental damages, in an action against an elevated railroad company, precludes the Court of Appeals from questioning the amounts allowed. Kernochan v. Manhattan Ry. Co. (1900), 161 N. Y. 339.

Where the Appellate Division has unanimously affirmed a judgment on an undirected verdict, and subsequently allows an appeal upon a question of law, the Court of Appeals has no power to examine or determine whether there is any or sufficient evidence to sustain the verdict. Lewis v. Long Island R. R. Co. (1909), 162 N. Y. 52.

Findings of fact which have been unanimously affirmed by the Appellate Division cannot be questioned in the Court of Appeals as against evidence or without evidence. Lawrence v. Congregational Church (1900), 164 N. Y. 115.

This restriction applies to a unanimous order of affirmance in a statutory proceeding to review an assessment in which a trial *de novo* has been had at Special Term, upon new evidence, as to the value of the relator's property, resulting in an affirmance of the assessment and a dismissal of the writ of certiorari. The effect of such an order is a determination that the finding of fact as expressed or necessarily implied in the decision of the Special

Term is supported by evidence, and, therefore, is not the subject of review in the Court of Appeals. People ex rel. Sands v. Teitner (1903), 173 N. Y. 647.

A judgment founded wholly upon immaterial evidence, every part of which was duly objected to and the objection fortified by an exception, is not protected by an unanimous affirmance, so as to preclude the Court of Appeals from considering the questions raised by the exceptions. Woods Motor-Vehicle Co. v. Brady (1905), 181 N. Y. 145.

Review of denial of nonsuit.— The Court of Appeals is precluded from examining the correctness of the denial of a motion for a nonsuit, made at the close of the evidence, by an unanimous affirmance of the Appellate Division, which imports that there was evidence sufficient to sustain the verdict. Jones v. Reilly (1903), 174 N. Y. 97.

Short form decision.— The rule, that where a judgment entered upon a short decision (Code, § 1022, before amendment of 1903), has been unanimously affirmed by the Appellate Division, the Court of Appeals is bound to assume that the trial court found all the facts warranted by the evidence and necessary to support the judgment (Amherst College v. Ritch [1897], 151 N. Y. 282; People ex rel. Manhattan Ry. Co. v. Barker [1897], 152 N. Y. 417), has no application where the judgment is unwarranted by any aspect of the finding contained in the decision. Miller v. N. Y. & N. S. Ry. Co. (1905), 183 N. Y. 123.

Refusal to find.— The Court of Appeals will not review a refusal by the trial court to find a fact, requested to be found under section 1023 of the Code, where such fact is directly in conflict with a fact actually found by the trial court as the basis of its decision, or would necessarily nullify such finding, and where the finding as made has the support of an unanimous affirmance by the Appellate Division. Le Gendre v. Scottish Ins. Co. (1906), 183 N. Y. 392.

Where the affirmance of a judgment by the Appellate Division is not unanimous, exceptions to refusals of the trial court to make certain findings of fact as requested by the appellant may be considered by the Court of Appeals; and where the proposed findings are sustained by uncontradicted evidence, and the facts embodied therein are sufficient to relieve the appellant from lia-

bility, the judgment should be reversed and a new trial granted. Arnot v. Union Salt Co. (1906), 186 N. Y. 501.

Pleadings.— Under this inhibition it is the evidence and the proceedings on the trial that the Court of Appeals will not examine to ascertain whether there are facts not found which rest on undisputed evidence or facts found which are unsupported by any evidence. But the pleadings being part of the judgment-roll and there being no constitutional prohibition of an examination thereof to ascertain what facts are admitted nor any statutory requirement that the findings shall include such facts they may and should be read by the court, in connection with a decision upon the issues, to ascertain whether the facts admitted and found sustain the judgment. Jacobson v. Brooklyn Lumber Co. (1906), 184 N. Y. 152.

Effect of unanimous affirmance as to finding of fraud.— The unanimous affirmance by the Appellate Division, of that part of a judgment which sets aside certain confessions of judgment and transfers as fraudulent, is conclusive upon the Court of Appeals that a finding, that the creditors so preferred participated in the debtor's fraud is sustained by the evidence. Metcalf v. Moses (1900), 161 N. Y. 587.

Unanimous decision of city court.— This provision applies only to a unanimous decision of the Appellate Division of the Supreme Court, and has no application to a unanimous decision of the General Term of the City Court of New York; and hence a unanimous affirmance by such General Term does not limit the review by the Court of Appeals. Klein v. East River Elec. Light Co. (1905), 182 N. Y. 27.

Effect of unanimous affirmance of general decision.—A general decision on the merits in favor of the plaintiff, is equivalent to a general verdict, and where the judgment entered thereon is unanimously affirmed by the Appellate Division, the Court of Appeals is precluded from examining the evidence as to its sufficiency, either to sustain the material facts alleged by the plaintiff, or to negative those alleged by the defendant in defense or by way of counterclaim. Consolidated Elec. Storage Co. v. Atlantic Trust Co. (1900), 161 N. Y. 605.

Exception surviving unanimous affirmance.—An exception to the denial of a motion to dismiss the complaint, made on the

pleadings and hence involving no consideration of the sufficiency of the evidence, survives an unanimous affirmance by the Appellate Division of a judgment for the plaintiff. Sanders v. Saxton (1905), 182 N. Y. 477.

Unavailing exception.—An exception to a finding of fact unanimously affirmed by the Appellate Division presents no question reviewable by the Court of Appeals, and where the facts as found justify the conclusions of law, and no other exceptions appear which present any questions of law, the judgment must be affirmed (Krekeler v. Aulbach [1902], 169 N. Y. 372); and even if the error in the decision of the case upon which the appellant relies is predicated upon undisputed evidence, which is not contained within a finding of fact, it cannot be considered by the Court of Appeals. McManus v. McManus (1904), 179 N. Y. 338.

Sufficiency of evidence.—Where there has been an unanimous decision by the Appellate Division, upon a question of fact, the sufficiency of the evidence to sustain the judgment does not present a question of law reviewable by the Court of Appeals. Kennedy v. Mineola H. & F. Traction Co. (1901), 178 N. Y. 508, citing Szuchy v. Hillside C. & I. Co., 150 N. Y. 219; Amherst College v. Ritch, 151 N. Y. 282; People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 417; People ex rel. Broadway Improvement Co. v. Barker, 155 N. Y. 322; Marden v. Dorthy, 160 N. Y. 39; Reed v. McCord, 160 N. Y. 330; Lewis v. Long Island R. R. Co., 162 N. Y. 52; Meserole v. Hoyt, 161 N. Y. 59; Cronin v. Lord, 161 N. Y. 90; Hilton v. Ernst, 161 N. Y. 226; Hutton v. Smith, 175 N. Y. 375.

Order of dismissal.—An appeal cannot be taken to the Court of Appeals from an "order" of the Appellate Division dismissing an appeal from a judgment below, but a judgment of dismissal must be entered and an appeal taken from such judgment. Stevens v. Central Nat. Bank (1900), 162 N. Y. 253. See, also, Village of Champlain v. McCrea, 165 N. Y. 264.

Verdict against evidence.— In no case tried before a jury in which a motion for a new trial has been made, on the ground that the verdict is against the evidence, can the Court of Appeals entertain an appeal from an order of reversal, unless it affirmatively appears that the Appellate Division had affirmed the facts.

Allen v. Corn Exchange Bank, 181 N. Y. 278. See, also, Matter of Jones, 181 N. Y. 389.

Jurisdiction in criminal appeals.

The Code of Criminal Procedure provides as follows:

Appeal in criminal case.

§ 517. When the judgment is of death the appeal must be taken direct to the Court of Appeals, and, upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section 485, may be reviewed.

Appeal in other cases.

§ 519. An appeal may be taken from a judgment or order of the Appellate Division of the Supreme Court to the Court of Appeals in the following cases and no other: 1. From a judgment affirming or reversing a judgment of conviction; 2. From a judgment affirming or reversing a judgment for the defendant on a demurrer to the indictment, or from an order affirming, vacating or reversing an order of the court arresting judgment; 3. From a final determination affecting a substantial right of the defendant.

Stay upon appeal; reversal; judgment of death.

§ 528. An appeal to the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court, affirming a judgment of conviction, stays the execution of the judgment appealed from, upon filing, with the notice of appeal, a certificate of a judge of the Court of Appeals, or of a justice of the Appellate Division of the Supreme Court, that, in his opinion, there is reasonable doubt whether the judgment should stand, but not otherwise. When the judgment is of death, an appeal to the Court of Appeals stays the execution, of course, until the determination of the appeal. When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.

Technical errors disregarded.

§ 542. After hearing the appeal, the court must give judgment, without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.

Appeal from courts of special sessions, etc.

§ 771. The judgment of the Appellate Division of the Supreme Court upon the appeal [from minor courts] is final: except that where the original appeal was from a judgment of commitment of a child, either party may appeal to the Court of Appeals in like manner as a defendant under section 519 of this Code.

Appeal from New York Special Sessions.

If any judgment or determination made by the said Court of Special Sessions [in the city of New York] on or after the said [first day of July, 1895] shall be adverse to the defendant, he may appeal therefrom to the Supreme Court in the same manner as from a judgment in an action prosecuted by indictment and may be admitted to bail upon an appeal in like manner, and if the judgment of the Supreme Court upon such an appeal shall be adverse to the defendant, he may appeal therefrom to the Court of Appeals, as prescribed in section 519 of the Code of Criminal Procedure. In case of any such appeal to the Supreme Court or to the Court of Appeals, the procedure in, and the jurisdiction of, the said courts respectively, shall be the same as upon an appeal thereto from a judgment of conviction after indictment.— [Laws of 1895, chap. 601, § 20.]

Right of appeal.— There is no right of appeal in criminal actions except as conferred by statute. People v. Johnston (1907), 187 N. Y. 319.

Review of settlement of case.— The action of the trial justice in settling the case on an appeal from a judgment of death is reviewable by the Court of Appeals on an appeal by the defendant from an order of Special Term denying a motion for a resettlement, although there is no express statutory provision authorizing such review, since the power to hear and determine an appeal in the first instance in a capital case, conferred upon the Court of Appeals by section 517 of the Code of Criminal Procedure, necessarily implies the right to settle the preliminary practice so far as it is not fixed by statute. People v. Priori (1900), 163 N. Y. 99.

Review of order denying new trial on newly-discovered evidence.—An order denying a motion for a new trial upon the ground of newly-discovered evidence, made after a judgment of death and an appeal therefrom by the defendant and in time to include the proceedings in the case is, at his instance, reviewable by the Court of Appeals as an incident to the appeal, under section 517 of the Code of Criminal Procedure. *Id.*

Review of order of reversal.— The Court of Appeals has no power to review a judgment of reversal in a criminal case unless it appears affirmatively in the body of the order that the court below has exercised its power and discretion to review the facts, and that, being satisfied with the judgment in that respect, the reversal was ordered for error of law only; and an order of re-

versal that does not, upon its face, exclude the possibility that it was based upon an examination of the facts or made as matter of discretion presents no reviewable question of law. People v. O'Brien (1900), 164 N. Y. 57.

Jurisdiction.—The limitations of the Code of Civil Procedure upon the jurisdiction of the Court of Appeals have no application to criminal appeals, which are authorized by section 519 of the Code of Criminal Procedure, enacted since the present Constitution went into effect. By force of this section an appeal lies to the Court of Appeals as matter of right from a judgment affirming or reversing a judgment for the defendant on a demurrer to the indictment, notwithstanding the order is interlocutory. People v. Drayton (1901), 168 N. Y. 10.

As a general rule, the Court of Appeals has no jurisdiction to hear an appeal from a judgment rendered by the Appellate Division in a criminal action which originated in a Court of Special Sessions. People v. Johnston (1907), 187 N. Y. 319.

Exception essential.— The fact that the Appellate Division certifies that a judgment convicting the defendant of the crime of assault in the first degree, under an indictment for manslaughter in the first degree, was reversed "upon questions of law only," for the reason indicated in its opinion that the facts did not constitute the crime for which a conviction was had, does not enable the Court of Appeals to pass upon the question, in the absence of any exception taken upon the trial raising it. No court can create an error of law by certifying that there is one, and a question of law in a criminal case can be raised only by an exception; the Appellate Division itself had no power to pass upon the question and its order must be reversed and the judgment of conviction affirmed. People v. Huson (1907), 187 N. Y. 97.

In a criminal case, except where the judgment is of death, the Court of Appeals is limited to the review of questions of law, and can take notice only of legal errors appearing in the record or raised by exceptions on the trial. Section 527 of the Code of Criminal Procedure applies only to the Appellate Division and section 528 only to appeals from judgments of death. People v. Grossman (1901), 168 N. Y. 47; People v. Sherlock (1901), 166 N. Y. 180; People v. Shattuck (1909), 194 N. Y. 424.

The power conferred by section 528 may be properly exercised when it is apparent that the defendant has suffered gross injustice

by the admission of incompetent evidence upon the main and vital issue, even though his counsel failed to object to its reception; but the provision of the Code was not intended to relieve counsel of the duty of objecting, and, in case their objection is overruled, of taking an exception, to the admission of incompetent evidence. The power is one to be exercised or withheld in the court's discretion, and where it is satisfied that the accused has had a fair trial and that he is guilty of the crime charged, a new trial will not be granted. People v. Kennedy (1900), 164 N. Y. 449.

See further under Rule VIII.

Loss of exhibits.— Where during the preparation of the record on appeal from a conviction of murder in the first degree it is discovered that the original handwriting exhibits are lost and a search for the missing papers is without result, the Court of Appeals, in the exercise of the discretionary power to disregard errors or defects which do not affect the substantial rights of the defendant, conferred upon it by sections 528 and 542 of the Code of Criminal Procedure, will uphold the judgment and deny a new trial where the evidence without the writings in question is sufficient to support the verdict, and translations of such writings, none of which are attacked for incorrectness, are printed in the record, and are either established by defendant's admissions, duly proven, or are corroborated by circumstances of irresistible cogency. People v. Strollo (1908), 191 N. Y. 42.

Appeal for clemency.— The fact that circumstances in a capital case, while not controlling the legal character of the crime, tend to diminish the defendant's moral fault, cannot be considered by the Court of Appeals; and an appeal for clemency by reason thereof, must be addressed, not to the court, but to the Governor of the State. People v. Broncado (1907), 188 N. Y. 150.

RULE II.

Further Return may be Ordered.

If the return made by the [Clerk of the] court below shall be defective, either party may, on an affidavit, specifying the defect, and on notice to the opposite party, apply to one of the judges of this court for an order, that the clerk make a further return without delay.

Amending return.

The Code of Civil Procedure provides as follows:

§ 725. A court to which a return is made by a sheriff or other officer, or by a subordinate court or other tribunal, may, in its discretion, direct the return to be amended, in matter of form, either before or after judgment.

§ 1303. Where the appellant, seasonably and in good faith, serves the notice of appeal, either upon the clerk or upon the adverse party, or his attorney, but omits, through mistake, inadvertence, or excusable neglect, to serve it upon the other, or to do any other act, necessary to perfect the appeal, or to stay the execution of the judgment or order appealed from; the court in or to which the appeal is taken, upon proof, by affidavit, of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

Defective return.

Omitted papers.— The court may, without dismissing the appeal, allow the appellant to supply requisite papers omitted from the return. Beecher v. Conradt (Ct. App. 1885), 11 How. Pr. 181. But where the defect has originated from the misconduct of the appellant, the court may dismiss the appeal, instead of allowing an amendment. McGregor v. Comstock (1859), 19 N. Y. 581.

Exhibits.—An appellant is not bound to print matter proposed by the respondent as an amendment to the case, but disallowed by the trial judge. Hence, where the trial judge refused to direct certain exhibits to be printed entire, but required appellant to paste them in the appeal-book, if copies were furnished, or, in lieu thereof, directed that either party might refer to the originals on the argument, it was held that this direction held good until the final determination of the action, and that appellant should not be compelled to print such exhibits as part of the return to the Court of Appeals; but such a practice is not to be encouraged. Kilmer v. N. Y. C. & H. R. R. R. Co. (1884), 94 N. Y. 495.

The Court of Appeals has no jurisdiction to compel an appellant to attach to the return copies of documents which were not part of the record in the court below. If, for any reason, they ought to be made part of the record, a motion for that purpose should be made in the court below. States v. Cromwell (1887), 104 N. Y. 664.

Papers improperly inserted.— When a return contains papers which were not before the general term, a motion to correct the

return and to require the appellant to print a case containing the return as so amended, is proper. Hobart v. Hobart (1881), 85 N. Y. 637.

(As to defective return, see also under Rule I.)

Amending the record.

Must be by court below.— The Court of Appeals has no power to amend a record transmitted to it for review, and any amendment must be sought in the court below (Kenyon v. N. Y. C. & H. R. R. R. Co. [1879], 76 N. Y. 607); even although the stenographer of the trial court submits an affidavit stating that his notes of the trial were incorrectly printed. People v. Hoch (1896), 150 N. Y. 291, 566.

In Hoffman v. Manhattan Ry. Co. (1896), 149 N. Y. 599, the Court of Appeals denied, for want of power, a motion to amend a notice of appeal from a final judgment by inserting a statement of intention to review an interlocutory judgment, where the time for appealing had expired. See Lavelle v. Skelley, 90 N. Y. 546; Fejdowski v. D. & H. C. Co. (1901), 168 N. Y. 500.

Where the Court of Appeals can see that the failure of the return to show the court in which judgment was rendered, or to show such a judgment as is set forth in the notice of appeal, is probably a clerical error and that in fact a right of appeal exists, it may allow the return to be withdrawn with a view to the correction of the record in the court below. Lahens v. Fielden (Ct. App. 1862), 15 Abb. Prac. 177.

Resettlement of case.— The review in the Court of Appeals must be upon the same case as that upon which the cause was decided below, and therefore there cannot be a general resettlement of the case for the purpose of appeal to the Court of Appeals, although it seems that a specific error, such as the omission of a word, or an exception to a decision or to some separate proposition in the charge, may be corrected and the omission supplied. Catlin v. Cole (Supr. Ct. 1860), 19 How. Prac. 82; 10 Abb. Prac. 387 and note.

The settlement of the case is matter of practice over which the court below has entire control and on which the Court of Appeals will make no order. That court may, however, decline to dismiss the appeal, where it seems to have merits, and give leave to the

appellant to apply to the court below for a resettlement of the case, and to so amend the record as to bring up a case on which the Court of Appeals can examine the merits. Westcott v. Thompson (1858), 16 N. Y. 613. And when, through the inadvertence of counsel, the facts are so presented that it is impossible, without violating well-settled rules of practice, to do justice between the parties, the Court of Appeals has power to suspend judgment in order to enable the party, whose rights might otherwise suffer, to apply to the court below for a resettlement of the case (Rice v. Isham [1863], 1 Keyes, 44); and the return, after amendment by resettlement, will be allowed to retain its original date of filing. Livingston v. Miller (Ct. App. 1852), 7 How. Prac. 219.

But after argument and judgment, the Court of Appeals will not set aside the judgment and stay proceedings for an application to the court below to alter the statement of exceptions taken at the trial. Fitch v. Livingston (Ct. App. 1853), 7 How. Pr. 410.

While the Court of Appeals cannot and will not dictate to the trial court how a case should be settled, it was held that it might reverse an order of general term affirming an order of special term refusing a resettlement, and grant motion for resettlement, in order that the trial judge might have an opportunity to resettle the case in accordance with the facts, so that the Appellate Court could decide the case upon a record which was absolutely correct. N. Y. Rubber Co. v. Rothery (1889), 112 N. Y. 592.

Amendment to show reversal on facts.— It has been held that judgment would not be suspended after argument, for the purpose of applying to the general term for an order showing that its reversal was upon the facts as well as the law; a motion for that purpose should be made before argument or submission. Hamlin v. Sears (1880), 82 N. Y. 327. It has been held, however, that the general term had power, after appeal to the Court of Appeals, to make its record declare the truth as to its judgment, and so might amend an order of reversal by inserting a statement that its decision was made upon questions of fact (Guernsey v. Miller [1880], 80 N. Y. 181); and that the order as amended might be attached to the return (Nat. City Bank v. N. Y. Gold Ex. Bank [1884], 97 N. Y. 645; Rass v. Gleason [1888], 111 N. Y.

683); but the return could not be so amended until the general term had amended its original order. Shultz v. Hoagland (Ct. App. 1880), 11 Wkly. Dig. 294.

Power of Appellate Division to amend General Term order of reversal.— The Appellate Division of the Supreme Court has jurisdiction to so amend, in accordance with the facts, an order of reversal made by the late general term of that court as to render the decision of the general term reviewable by the Court of Appeals. Judson v. Central Vermont R. R. Co. (1899), 158 N. Y. 597. And see Ryder v. Brooklyn El. R. R. Co. (1899), 158 N. Y. 707.

The Appellate Division has power, even after sending down its remittitur of an order of reversal and while an appeal therefrom is pending in the Court of Appeals, to amend the order by inserting that the reversal was on a question of fact, and the exercise of that power is not reviewable by the Court of Appeals. Health Dept. v. Dassori (1899), 159 N. Y. 245.

The pendency of an appeal in the Court of Appeals is no bar to a motion in the Appellate Division for the amendment of its order of reversal so as to show that the reversal was upon the facts as well as upon the law, and, therefore, an application to the Court of Appeals for an order directing the transmission of the return on appeal to the Supreme Court, so that such motion may be made, is unnecessary and should be denied. Birnbaum v. May (1902), 170 N. Y. 314.

Power of court below as to amendments.

The court below has power to correct any mistake in the record and to conform it to the facts. Baker v. Home Life Ins. Co. (1875), 63 N. Y. 630.

The court below, while an appeal is pending in the Court of Appeals, has still control over the judgment in regard to making amendments, and the judgment is regarded as remaining there for all purposes of amendment. Judson v. Gray (Ct. App. 1859), 17 How Pr. 289.

Remitting return for amendment.—A motion to remit the return for the purpose of permitting the court below to amend the record, if it should desire to do so, is unnecessary and should be denied, since that court may make such amendment as it sees fit, and order it to be filed with the original return in the Court

of Appeals, and on such filing it is regarded as a part of the original return. Peterson v. Swan (1890), 119 N. Y. 662; Birnbaum v. May (1902), 170 N. Y. 314, and cases there cited.

The court below has power to correct errors in a record, after appeal to the Court of Appeals, and return it as corrected, without first applying to the Court of Appeals to remit it for correction. Rew v. Barker (1823), 2 Cow. 408; Luysten v. Sniffen (1847), 1 Barb. 428, 3 How. Prac. 250; Witbeck v. Waine (Supr. Ct. 1853), 8 How. Prac. 433. But it was held in Adams v. Bush (Supr. Ct. 1865), 2 Abb. Prac. (N. S.) 118, that after appeal taken to the Court of Appeals and case made and returned to the clerk of that court, the court below would not entertain a motion to correct the case, unless it had been sent back to it for that purpose.

Statement of events of trial.— It has been held that a case on appeal from a decision at circuit should be a transcript of the proceedings upon the trial, and that the General Term had no power to direct such an alteration of the record as would cause it to state untruly the events of the trial. Carter v. Beckwith (1880), 82 N. Y. 83.

Change in composition of court.— It has been held that a General Term might amend the record of its decision, so as to conform to the decision actually made, although there had been in the meantime a change in the justices composing the General Term. Buckingham v. Dickinson (1874), 54 N. Y. 682. And, so also, with the Appellate Division. MacArdell v. Olcott (1907), 189 N. Y. 368.

Power of Court of Appeals to make amendments, under § 723 of Code.

Section 722 of the Code of Civil Procedure provides as follows:

Each of the omissions, imperfections, defects and variances, specified in the last section, and any other of like nature, not being against the right and justice of the matter, and not altering the issue between the parties, or the trial, must, when necessary, be supplied, and the proceeding amended, by the court wherein the judgment is rendered, or by an appellate court.

Section 723 of the Code of Civil Procedure is as follows:

The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms

as it deems just, amend any process, pleading or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved. And, in every stage of the action, the court must disregard an error or defect in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. When amending a pleading or permitting the service of an amended or supplemental pleading in a case which is on the general calendar of issues of fact, the court may direct that the case retain the place upon such calendar which it occupied before the amendment or new pleading was allowed, and that the proceedings had upon the amendment or supplemental pleadings shall not affect the place of the case upon such calendar, or render necessary the service of a new notice of trial.

Under this section, an amendment of a pleading may be allowed in the Court of Appeals, to sustain the judgment (Bate v. Graham [1854], 11 N. Y. 237; Pratt v. Hud. Riv. R. R. Co. [1860], 21 N. Y. 305; Haddow v. Lundy [1874], 59 N. Y. 320; Reeder v. Sayre [1877], 70 N. Y. 180); but not to reverse it. Volkening v. De Graaf (1880), 81 N. Y. 268. But in Fitch v. Mayor of N. Y. (1882), 88 N. Y. 500, the court says that if the section applies to the Court of Appeals, the power should not be exercised unless it is plain that no substantial right of the adverse party would be affected.

In Bank of Havana v. Magee (1859), 20 N. Y. 355, 360, it is said that the provision that in every stage of the action the court must disregard an error or defect in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party, was addressed to the Court of Appeals equally with the court of original jurisdiction; and in Cardell v. McNeill (1860), 21 N. Y. 336, 341, that the Court of Appeals does not reverse judgments upon an objection based upon a variance between the complaint and the proof which might have been amended if necessary.

In Reeder v. Sayre (1877), 70 N. Y. 180 (*supra*), it is said that the power to amend the pleadings given by section 723 is great, and that the real limitation seems to be that the amendment shall not bring in a new cause of action.

In Martin v. Home Bank (1901), 160 N. Y. 190, it is held that in an action to recover on a bank check court may permit complaint to be amended to conform to proof.

In Smith v. Mayor of N. Y. (1868), 37 N. Y. 518, 521, an action brought to recover fees claimed to be attached to a municipal office, it was suggested on argument that the complaint might then be so amended as to change the form of the action to one for money had and received; but the court said that it had never known the exercise of such a power by the Court of Appeals, and it was not aware of any authority for it, and that in no event could such amendment be granted except on motion upon notice, on which terms could be imposed.

In Montgomery v. Buffalo Railway Co. (1899), 158 N. Y. 708, the Court of Appeals granted an unopposed motion to amend the return on appeal from an order of reversal, by inserting in the notice of appeal the words " as amended by the Appellate Division," and a stipulation for judgment absolute.

In Ackley v. Tarbox (1864), 31 N. Y. 564, the Court of Appeals amended the record by striking out the name of an unnecessary plaintiff.

Whether an Appellate Court can amend a bill of exceptions even in matter of form, is doubted in Onondaga County Mut. Ins. Co. v. Minard (1848), 2 N. Y. 98, and the Court of Appeals cannot correct an improper insertion of findings in the original case on appeal. Binghamton Opera House Co. v. City of Binghamton (1898), 156 N. Y. 651.

Records not in return.

Record evidence not in the return may be considered by the Court of Appeals to sustain a decision under review, but not to reverse it. Wines v. Mayor of N. Y. (1877), 70 N. Y. 613; Matter of Cooper (1883), 93 N. Y. 507; Day v. Town of New Lots (1887), 107 N. Y. 148; Dunham v. Townshend (1890), 118 N. Y. 281; Atlantic Ave. R. R. Co. v. Johnson (1892), 134 N. Y. 375; People ex rel. Warschauer v. Dalton (1899), 159 N. Y. 235; Stemmler v. Mayor of N. Y. (1904), 179 N. Y. 473.

Amending return in criminal cases.

Application to amend return should be made to the court where the judgment was rendered (Rew v. Barker [1873], 2 Cow. 408); on order of a judge of the Court of Appeals, under Rule II. People v. McTameney (1883), 30 Hun, 505.

RULE III.

Attorneys and Guardians Below to Continue to Act.

The attorneys and guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties respectively, in this court, until others shall be retained or appointed, and notice thereof shall be served on the adverse party.

Authority of attorney.

The authority of an attorney who is employed to prosecute or defend a suit, in the absence of special circumstances, continues, by virtue of his original retainer, until it is finally determined; and in the absence of proof to the contrary, the presumption is that it continues until the litigation has ended. Bathgate v. Haskin (1875), 59 N. Y. 533.

Death of client.— The death of the client revokes the authority of the attorney, and he is not required or authorized to do anything further in the action except upon the retainer of the legal representative. Adams v. Nellis (Supr. Ct. 1880), 59 How. Prac. 385; Lapaugh v. Wilson (1887), 43 Hun, 619. The attorney for the ancestor does not become the attorney for the heir without a new appointment. Putnam v. Van Buren (Supr. Ct. 1852), 7 How. Prac. 31.

Where, after the death of a party, notice of appeal from an order is served upon his attorney, the appellant cannot object, on motion by such attorney to dismiss the appeal, that he has no standing in court because of the death of his client. Having called the attorney into court as the proper representative of the deceased, the appellant may not object to his being heard. Matter of Beckwith (1882), 90 N. Y. 667.

Unauthorized appearance.—An unauthorized appearance by an attorney will not bind the party so as to deprive him of his right to appeal. Bates v. Voorhees (1859), 20 N. Y. 525.

Appeal by new attorney.

There are decisions to the effect that an appeal is in the nature of a new action and may be taken and prosecuted by a new attorney without an order of substitution. McLaren v. Charrier

(1836), 5 Paige, 530; Pratt v. Allen (Supr. Ct. of Buffalo, 1858), 19 How. Prac. 450, 456; Ward v. Sands (Sup. Ct. 1881), 10 Abb. N. C. 60; Webb v. Milne (N. Y. Supr. Ct. 1886), 10 Civ. Proc. R. 27. The contrary view as to the nature of an appeal is, however, maintained in Seely v. Prichard (N. Y. Supr. Ct. 1854), 12 Legal Obs. 245; Fry v. Bennett (N. Y. Supr. Ct. 1858), 7 Abb. Prac. 365; Miller v. Shall (1875), 67 Barb. 446; Theirry v. Crawford (1884), 33 Hun, 366, and Shuler v. Maxwell (1885), 38 Hun, 240 — in the last of which cases, in commenting upon this rule of the Court of Appeals (then Rule IV), it is said that the rule declares, in effect, that on appeal to the Court of Appeals from another court the power of the attorney continues although judgment below has been entered, and, therefore, that another attorney than the attorney of record at the time of the recovery of judgment cannot serve a notice of appeal until he has been substituted.

In Pensa v. Pensa (N. Y. Supr. Ct. 1893), 3 Misc. Rep. 417, it is said, overruling Webb v. Milne (*supra*), that an appeal from a judgment is not to be regarded as a new action or proceeding to enforce the judgment within the meaning of the decisions to the effect that in such a case a new attorney, duly authorized for the purpose, may appear without formal substitution, but it is a proceeding in the action for the correction of errors alleged to have been committed and to effect, if possible, the reversal of the judgment for error, and that the clear weight of authority is that the appeal cannot be taken by an attorney who has not been substituted in place of the attorney who appeared in the action.

See Magnolia M. Co. v. Sterlingworth Co. (1899), 37 App. Div. 366, where it was held that under this rule a party who contemplates an appeal to the Court of Appeals may, without obtaining an order of substitution from that court, retain a new attorney and upon such retainer the authority of the former attorney ceases.

Substitution of attorneys; order.

To make a substitution of attorneys effective, an order should be entered and notice thereof served on the opposite attorney. Robinson v. McClellan (Supr. Ct. 1845), 1 How. Prac. 90; Dorlon v. Lewis (Supr. Ct. 1852), 7 How. Prac. 132; Bogardus v. Richtmeyer (Supr. Ct. 1856), 3 Abb. Prac. 179; Parke v. City of Wil-

liamsburgh (Supr. Ct. 1856), 13 How. Prac. 250; Miller v. Shall (1875), 67 Barb. 446; Krekeler v. Thaule (N. Y. Com. Pr. 1875), 49 How. Prac. 138.

Order should be obtained in Court of Appeals.—After the filing of the return on appeal, a substitution of attorneys for a party should be made by an order of the Court of Appeals, not of the court below. Squire v. McDonald (1893), 138 N. Y. 554.

The fact, however, that an attorney for a respondent, who has been authorized to appear for him, has failed to proceed in a regular manner to cause his substitution by order of the Court of Appeals, does not preclude that court from acting on a motion made by him on behalf of the respondent to dismiss the appeal. *Id.*

Laches.

In McElwain v. Erie Railway Co. (1877), 71 N. Y. 600, where an appeal brought in 1864 had been dismissed in 1874 for want of prosecution, under chapter 9 of Laws of 1873, and the appellant's attorney of record had died in 1866, and no attempt was made to substitute another attorney until 1877, it was held that the laches of the appellant presented an insuperable obstacle to granting a motion to vacate the dismissal of the appeal.

Death, disability or removal of attorney, etc.

The Code of Civil Procedure provides as follows:

Death or disability of attorney; proceedings thereupon.

§ 65. If an attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding shall be taken in the action, against the party for whom he appeared, until thirty days after notice to appoint another attorney, has been given to that party, either personally or in such other manner as the court directs.

Proceedings, if attorney or party not found.

§ 1302. If the attorney for the adverse party is dead; or if he has been removed, and notice of the removal has been served upon the appellant's attorney, and another attorney has not been substituted in his place; or if, for any reason, service of a notice of appeal, upon the proper attorney for the adverse party, cannot, with due diligence, be made within the State, the notice of appeal may be served upon the respondent in the manner prescribed by law for serving it upon an attorney. If personal service upon the respondent cannot, with due diligence, be so

made within the State, the notice of appeal may be served upon him, and notice of the subsequent proceedings may be given to him, as directed by a judge of the court, in or to which the appeal is taken.

Proceedings stayed.— Where, under section 65, notice to appoint another attorney is served upon a party whose attorney has died, all proceedings are stayed for thirty days, and a motion to dismiss an appeal for failure to appoint an attorney, made within that time, is premature. Hickox v. Weaver (1878), 15 Hun, 375.

Removal from the State.— Papers cannot be served upon an attorney after he has become a resident of another State [except where residence in another State is permitted to an attorney practicing in this State by section 60 of the Code] (Diefendorf v. House [Supr. Ct. 1854], 9 How Pr. 243), and his name can no longer be used in conducting the suit, even by his law partner. Chautauqua County Bk. v. Risley (Supr. Ct. 1844), 6 Hill, 375.

Notice to party personally.— Where the appellant's attorney has removed from the State and notice has been given to the party to appoint another attorney, a motion to dismiss the appeal cannot be made without notice to the appellant personally. Jewell v. Schouten (1848), 1 N. Y. 241.

Where the attorney for a party has died, and due notice has been given to such party to appoint a new attorney, which he neglects to do, notice of any proceeding in the action is properly given to the party personally. Hoffman v. Rowley (Supr. Ct. 1862), 13 Abb. Prac. 399; Chilson v. Howe (Supr. Ct. 1889), 17 Civ. Proc. R. 86.

Application of section 1302 to respondent.— It seems that where, after an appeal, the attorney for the appellant dies, the respondent may proceed in the same manner in which it is provided in section 1302 that the appellant may proceed. Hickox v. Weaver (1878), 15 Hun, 375.

Substitution of parties on appeal.

The Code of Civil Procedure provides as follows:

When a person entitled to become a party may appeal.

§ 1296. A person aggrieved, who is not a party, but is entitled by law to be substituted, in place of a party; or who has acquired since the making of the order, or the rendering of the judgment appealed from, an interest which would have entitled him to be so substituted, if it had been previously acquired, may also appeal, as prescribed in this chapter, for an appeal by a

party. But the appeal cannot be heard, until he has been substituted in place of the party; and if he unreasonably neglects to procure an order of substitution, the appeal may be dismissed, upon motion of the respondent.

Appeal when adverse party has died.

§ 1297. Where the adverse party has died, since the making of the order, or the rendering of the judgment appealed from, or where the judgment appealed from was rendered, after his death, in a case prescribed by law, an appeal may be taken, as if he was living; but it cannot be heard, until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent. In such a case, an undertaking required to perfect the appeal, or to stay the execution of the judgment or order appealed from, must recite the fact of the adverse party's death; and the undertaking enures, after substitution, to the benefit of the person substituted.

Proceedings, when party dies pending appeal.

* § 1298. Where either party to an appeal dies, before the appeal is heard, * * * if an order, substituting another person in his place, is not made, within three months after his death, * * * the court, in which the appeal is pending may, in its discretion, make an order, requiring all persons interested in the decedent's estate, to show cause before it, why the judgment or order appealed from should not be reversed or affirmed, or the appeal dismissed, as the case requires. The order must specify a day, when cause is to be shown, which must be not less than six months after making the order; and it must designate the mode of giving notice to the persons interested. Upon the return day of the order, or at a subsequent day, appointed by the court, if the proper person has not been substituted, the court, upon proof, by affidavit, that notice has been given, as required by the order, may reverse or affirm the judgment or order appealed from, or dismiss the appeal, or make such further order in the premises, as justice requires.

Order of substitution.

§ 1299. Where the appeal is from one court to another, an application for an order of substitution, as prescribed by the last three sections, must be made to the appellate court. Where personal service of notice of application for an order has been made, within the State, upon the proper representative of the decedent, an order of substitution may be made, upon the application of the surviving party.

Order of substitution.— Before the enactment of section 1299 requiring the application for order of substitution to be made to the appellate court, it was held that where a party in a cause died after the return had been filed in the Court of Appeals, that court, having obtained jurisdiction, had the power to allow his legal representative to be substituted. Hastings v. McKinley

* See also sections 757 and 758.

(Ct. App. 1853), 8 How. Prac. 175, citing Rogers v. Patterson (1834), 4 Paige, 413.

Section 1299 is broad enough to permit a surviving adverse party to enforce substitution thereunder, when it has not been procured at the instance of the personal representative of the deceased party himself, or of a party associated in interest with the decedent, if there be one. Reed v. Farrand (1910), 198 N. Y. 207.

An improper order of revival made by the Court of Appeals cannot be collaterally attacked, but can be remedied only by an application to vacate the order. Riley v. Gitterman (Supr. Ct. 1889), 10 N. Y. Supp. 38.

Death between hearing and decision.— To make applicable the provisions of section 1297 of the Code in regard to appeals from orders where a party "has died since the making of an order," it is necessary for the party moving under that section to treat the order appealed from as made before the death; and where the subject of the order was argued before the death of the party, but decided thereafter, the court may amend the date of its order *nunc pro tunc* so as to make it bear date as of a day prior to the death. Carter v. Beckwith (1880), 82 N. Y. 83; Matter of Beckwith (1882), 87 N. Y. 503; Layton v. Kraft (1909), 195 N. Y. 525; Adams v. Bristol (1909), 196 N. Y. 510. And see Blake v. Griswold (1887), 104 N. Y. 613.

Instances of granting and of refusing substitution.— Substitution will not be ordered in the Court of Appeals merely on the ground that the party asking it has obtained a judgment of the court below, in a cross-action, declaring him entitled to be substituted as plaintiff and to control the action — while an appeal is pending from such judgment. Glenville Woolen Co. v. Ripley (Ct. App. 1870), 11 Abb. Prac. (N. S.) 87.

Where a motion was made to substitute the personal representative of a surety on a joint promissory note against whom and his principal a joint judgment had been obtained, as defendant in his stead, he having died after affirmance by the General Term and during the pendency of appeal to the Court of Appeals, upon which appeal an undertaking staying execution had been given, it was held that the motion must be denied; that there could be no propriety in the substitution, as the judgment could

never be enforced or properly affirmed (since the estate of the surety was, on his death, discharged from payment of the note); that the appeal could not be continued simply for the purpose of enabling the plaintiff, in case of affirmance, to bring an action upon the undertaking, as there could be no liability upon the undertaking after the judgment had been discharged, either by act of the parties or operation of law. Risley v. Brown (1876), 67 N. Y. 160.

In an action for a penalty under the General Manufacturing Act of 1848, it seems that, until the substitution of plaintiff's representative on his death, an appeal from judgment may not be heard. Where, however, an appeal to the Court of Appeals was heard without knowledge of the death and the judgment was affirmed, it was held that on granting a motion for substitution the court could affirm the judgment in favor of the substituted representative. Blake v. Griswold (1887), 104 N. Y. 613.

It seems that in case the death of a party in an action for a penalty under the General Manufacturing Act occurs while an appeal is pending to the Court of Appeals from an order reversing the judgment, and the legal representatives of the decedent are not substituted, the Court of Appeals must take action as prescribed by section 1298 of the Code. Carr v. Rischer (1890), 119 N. Y. 117.

On the death of the appellant in an action to recover chattels before argument of the appeal, the Court of Appeals may revive the action in the name of appellant's assignee for the benefit of creditors. Riley v. Gitterman (Supr. Ct. 1889), 10 N. Y. Supp. 38.

An executor of an assignee for the benefit of creditors is not entitled to be substituted as plaintiff in an action pending in the Court of Appeals, brought by the decedent as such assignee unless the executor has been substituted as assignee. Steinhouser v. Mason (1892), 135 N. Y. 635.

Substitution below; objection to.— It is too late to first object in the Court of Appeals to a substitution of parties made in the court below and recognized by the objector by his having appealed the case as against the substituted party. Griffin v. Helmbold (1878), 72 N. Y. 437.

Practice of clerk's office as to substitutions.

After an appeal to the Court of Appeals has been perfected, all orders of substitution, both of attorneys and of parties, should be obtained from that court. When an application for substitution of attorneys is on consent, the consent should be signed by the original attorney and signed and acknowledged by the party. When an application for substitution of parties is on consent, the consent should be signed by all the attorneys in the action and signed and acknowledged by the party to be substituted. The order of substitution, when made, can then be attached to the record, and be properly entered in the register of the cause, which is opened on the receipt of the return.

If order of substitution is obtained in the court below before appeal perfected, a copy should be transmitted to the Court of Appeals with the return.

It sometimes happens that after the appeal has been perfected and return transmitted, orders of submission are obtained in the court below and a copy sent to the clerk of the Court of Appeals. An order so obtained is not considered a part of the record of the cause, and is not noted in the remittitur, as are orders of substitution obtained in the Court of Appeals after return filed.

On receipt of consents for substitution, properly signed, orders are entered accordingly, by the clerk, as of course.

RULE IV.

Appellant to Make a Case — Its Form.

In all calendar causes a case shall be made by the appellant, which shall consist of a copy of the return, and the reasons of the court below for its judgment, or an affidavit that the same cannot be procured, together with an index to the pleadings, exhibits, depositions and other principal matters. Every opinion in the cause at [the] special term, as well as at the Appellate Division of the Supreme Court, relating to the questions involved in the appeal is included by the foregoing provision.

Case, copy of return.

The "case" in the Court of Appeals being a copy of the return, with opinions and index added, its form and contents are determined by those of the return, as to which see under Rules I and II.

Complete copy required.— If the return is certified by the clerk of the court below, the printed case is defective if it does not contain a copy of the certificate contained in the return; a statement, "return certified as required by law," cannot be accepted as a substitute. Matter of Bailey (1881), 85 N. Y. 629.

Where, however, nothing was omitted from what purported to be a copy of the certificate printed in the case but the word "copy" and the name of the clerk, the cases were allowed to be amended, in Farmers' L. & T. Co. v. Carroll (1850), 2 N. Y. 566.

A reference to an opinion in the action, as reported in the Supreme Court Reports, is not a substitute for compliance with the rule requiring the printing in a case of every opinion of the court below. Bastable v. City of Syracuse (1878), 72 N. Y. 64.

Opinion of court below.

Facts in, not regarded.— Facts stated in the opinion of the court below or elsewhere, not found in the return, cannot be regarded. McGregor v. Buell (1864), 1 Keyes, 153.

Recourse cannot be had to the opinion of the Appellate Division to establish the fact that an affirmance was by a unanimous decision. Kaplan v. N. Y. Biscuit Co. (1896), 151 N. Y. 171.

The general rule.— Opinions of courts form no part of the record (Rosenstein v. Fox [1896], 150 N. Y. 354); and statements therein as to what the courts below did or did not pass upon cannot be considered by the Court of Appeals, unless the judgment appealed from so refers to the opinion as to make it a part of the record. Koehler v. Hughes (1896), 148 N. Y. 507.

The Court of Appeals does not look to the opinions below for the purpose of determining the contents of an order, finding or judgment, or its meaning. It only examines such opinions for the purpose of ascertaining the arguments made and the reasons

given in support of the rulings and determinations made by the court whose order or judgment is under review. Morehouse v. Brooklyn Heights R. R. Co. (1906), 185 N. Y. 520.

The opinion of the court below cannot be looked into by the Court of Appeals to ascertain the reasons or grounds of the decision appealed from (Snebley v. Conner [1879], 78 N. Y. 218; Clarke v. Lourie [1880], 82 N. Y. 580; People ex rel. Bdway. Imp. Co. v. Barker [1898], 155 N. Y. 322); nor to determine whether a reversal was solely upon questions of law (Harris v. Burdett [1878], 73 N. Y. 136; People v. Boas [1883], 92 N. Y. 560; Spence v. Ham [1900], 163 N. Y. 220; Hinckel v. Stevens [1900], 165 N. Y. 171); nor to alter the discretionary character of an order dismissing a writ of certiorari (People ex rel. Coler v. Lord [1898], 157 N. Y. 408); nor to discover the ground upon which a mandamus was refused. People ex rel. Jacobus v. Van Wyck (1899), 157 N. Y. 495.

Where an order and judgment of affirmance below are silent as to their grounds, the opinions of the courts below cannot be considered by the Court of Appeals for the purpose of determining them. Randall v. N. Y. Elevated R. R. Co. (1896), 149 N. Y. 211.

When a record, on appeal to the Court of Appeals, contains proposed findings, marked "found," or "refused," respectively, without any statement of the ground or reason, followed by an order and judgment of unqualified affirmance by the General Term containing no reference to any opinion, the state of the case is not affected by the fact that an opinion of the trial judge states that he refused certain findings because he deemed them immaterial, and the opinion of the General Term states that, owing to a defective certificate to the case, as settled, it was precluded from reviewing the questions of fact. Koehler v. Hughes (1896), 148 N. Y. 507.

The opinion of the General Term is not conclusive in the Court of Appeals on the question as to whether the former court refused to review the facts upon appeal from a judgment entered upon the report of a referee. Verplanck v. Member (1878), 74 N. Y. 620.

A statement in the opinion of the Appellate Division of the ground of its decision is controlled by the statement in its order

of reversal, in case of a conflict or inconsistency between them. Spies v. Lockwood (1901), 165 N. Y. 481.

It has been held that where, from the evidence appearing in the record, on appeal from an order denying an application for a writ of mandamus, the court below might have refused the application in the proper exercise of its discretion, the Court of Appeals would not look into the opinion of the General Term to ascertain if the writ was refused on a question of law only. People ex rel. Durant Land Improvement Co. v. Jeroloman (1893), 139 N. Y. 14.

It was held that when on appeal to the Court of Appeals from an order of General Term affirming an order of Special Term which denied a motion for a bill of particulars, the order did not state the ground for the denial, the opinion of the General Term could not be looked to to ascertain the ground. Cohn v. Baldwin (1894), 141 N. Y. 563.

Exceptions to the general rule.— While the Court of Appeals does not refer to the opinion of the court below, as a general rule, to learn what is the judgment of the court, as the Court of Appeals must act upon the record and the opinion forms no part of the record proper, still in a case which involves an inquiry into the power of the court below to correct its records so that they may express its purpose, the Court of Appeals will look at the opinion so as to learn what such purpose was. Salmon v. Gedney (1878), 75 N. Y. 479.

Notwithstanding the general rule that an Appellate Court is not to look beyond the order appealed from to ascertain the ground of judgment, it has been held that it may look into the opinion of the court below when the terms of the order are ambiguous (Townsend v. Nebenzhal [1880], 81 N. Y. 644); or when the order itself refers to the opinion and thus makes it, in effect, a part of the record. Tolman v. S., B. & N. Y. R. R. Co. (1883), 92 N. Y. 353; Snyder v. Snyder (1884), 96 N. Y. 88; and when an order certifying a question for review expressly refers to the opinion of the Appellate Division, the opinion becomes a part of the record and can be resorted to by the Court of Appeals for the purpose of ascertaining the ground of the decision appealed from. Pringle v. Long Island R. R. Co. (1898), 157 N. Y. 100, but this practice is now discountenanced. Matter of

Sandy (1896), 148 N. Y. 403; Townsend v. Bell (1901), 167 N. Y. 462.

Opinion embodied in order.—A certificate of the General Term stating that a reversal was upon the grounds stated in its opinion, is not a compliance with the requirement of section 1338 of the Code of the statement, in the order of reversal, that the reversal was upon the facts (Matter of Sandy [1896], 148 N. Y. 403); nor is the embodiment of the opinion of the Appellate Division in the order of reversal a compliance with that section. Townsend v. Bell (1901), 167 N. Y. 462.

While, on appeal from an order which expresses the grounds upon which it was put, but the expression is coupled with phrases that make doubt, the opinion may be referred to (Tilton v. Beecher [1874], 59 N. Y. 176, 182); yet where no ground appears in the order it cannot be qualified in its operation and effect by reference to the opinion. Fisher v. Gould (1880), 81 N. Y. 228, citing Hewlett v. Wood (1876), 67 N. Y. 394, and disapproving *dictum* in Tracy v. Altmyer (1871), 46 N. Y. 598. In that case (Tracy v. Altmyer), where an order denied a motion for a new trial, upon the ground of surprise and newly discovered evidence, and from the Special Term opinion it appeared that the motion was denied solely upon the ground that it could not be made after the entry of judgment, it had been said: "This may, by this court, be taken as sufficient evidence that the merits of the application were not considered by the Special Term."

Wrong reason for correct decisions.— The fact that the judgment of the Trial Court was sustained by the Appellate Division on a different theory than that adopted by the Court of Appeals is no obstacle to its affirmance there; for a correct decision will not be reversed on appeal because founded upon a wrong reason, at least unless where the ground of decision can be seen to have misled party to his injury. Ward v. Hasbrouck (1902), 169 N. Y. 407.

Attorney's lien on cases.—An attorney has a lien on the printed cases on appeal in his hands for legal services in the action, although his client had paid the printing disbursements. Matter of Hollins (1910), 197 N. Y. 360.

Case in capital causes.

The Code of Criminal Procedure provides as follows:

§ 458. When a party intends to appeal from a judgment rendered after the trial of an issue of fact he must, except as otherwise prescribed by law, make a case and procure the same to be settled and signed, by the judge or justice, by or before whom the action was tried, as prescribed in the general rules of practice; or, in case of the death or disability of such judge or justice, in such manner as the appellate court directs. The case must contain so much of the evidence, and other proceedings upon the trial, as is material to the questions to be raised thereby, and also the exceptions taken by the party making the case; and in a case where a special question is submitted to the jury, such exceptions taken by any party to the action as shall be necessary to determine whether there should be a new party, if the judgment be reversed. If it afterwards becomes necessary to separate the exceptions, the separation may be made and the exceptions may be stated with so much of the evidence, and other proceedings as is material to the questions raised by them, in a case prepared and settled as directed by the general rules of practice, or in the absence of directions therein, by the court, upon motion. [Amended by chap. 427 of 1897.]

§ 485, sub. 8. When the judgment is of death, the clerk, upon the settling and filing of the case, must forthwith cause to be prepared and printed, and forwarded to the clerk of the Court of Appeals, the number of copies of the judgment-roll which are required by the rules of the Court of Appeals, which shall form the case and exceptions upon which the appeal shall be heard, and three copies shall also be furnished to the defendant's attorney, three to the district attorney, and one to the governor of the State, and the remainder shall be distributed according to the rules of the Court of Appeals. * * * [Amended by chap. 427 of 1897.]

Upon appeal in a case where the indictment was found after chapter 427 of the Laws of 1897 went into effect, a case should be made, settled and signed, containing only so much of the evidence and proceedings as is material to the questions to be raised and it is improper to bring up a transcript of the stenographer's minutes. People v. Barone (1900), 161 N. Y. 475.

Case part of judgment-roll; review of settlement.—A case on appeal from a judgment of death, whenever filed, even if after a judgment-roll has been made up in the first instance, becomes, by operation of law, a part thereof and should be attached thereto in accordance with the general practice; and the action of the trial justice in settling the case on appeal from a judgment of death is reviewable by the Court of Appeals on an appeal by the defendant from an order of Special Term denying a motion for a resettlement. People v. Priori (1900), 163 N. Y. 99.

Insertion of motion papers.— The affidavits and proceedings on a motion for a new trial upon the ground of newly-discovered evidence, made after a judgment of death and an appeal by the defendant therefrom, which have been struck out of the proposed case on appeal, on the settlement thereof, by the allowance of an amendment prepared by the district attorney, should be restored on a motion for its resettlement by disallowing such amendment and inserting the affidavits and proceedings in the case. Id.

RULE V.

Cases and Points to be Printed — Mode of Printing.

All cases and points, and all other papers furnished to the court in calendar causes, shall be printed on white paper as provided in section 796 of the Code of Civil Procedure, [and if bound, the covers shall be of light-colored paper which can be legibly written upon]. The folio numbering from the commencement to the end of the case, shall be printed on the outer margin of the page. Small pica, leaded, or ten point, leaded with 4-to-pica leads, is the smallest letter and most compact mode of composition which is allowed. No charge for printing the papers mentioned in this rule shall be allowed as a disbursement in a cause, unless the requirements of the preceding sentence shall be shown, by affidavit, to have been complied with in all papers printed.

The Code.

Section 796 of the Code of Civil Procedure provides as follows:

* * * All cases, briefs, points or other papers required or used on an appeal from any judgment, determination or order of any court or board shall be printed (when required to be printed by the rules of any court) on paper of a uniform size, as follows: The paper must be ten and one-half inches by eight inches, and bound on the edge of the greatest length.

RULE VI.

Appellant to Serve Copies of Case — Effect of His Default.

Within forty days after the appeal is perfected, the appellant shall serve three printed copies of the case on the

attorney of the adverse party. If he fail to do so, the respondent may, by notice in writing, require the service of such copies within ten days after the service of the notice, and if the copies be not served in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit proving the default and the service of such notice, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal.

When appeal perfected.

The appeal is perfected and the forty days within which copies of the case must be served, begin to run when the requisite undertaking for costs is given and copy served. Code Civ. Proc., § 1326; see, also, under Rule I.

Failure to serve cases; dismissal of appeal.

Return not filed.— It is no excuse for nonservice of copies of the case as required by the rule, that the appellant has not caused the return to be made and filed. The respondent is not required to proceed under Rule I for a dismissal on failure to file return, but may wait until the time for serving cases has expired and then proceed for a dismissal of the appeal under Rule VI. Sage v. Volkening (1871), 46 N. Y. 448.

Default; opening.—Where the proceedings on the part of the respondent in dismissing an appeal under this rule are regular, the default ought not to be opened as matter of favor, unless there is some reason to think that the judgment so obtained is not in strict conformity with the real merits and equity of the case. Keuka Nav. Co. v. Holmes (1885), 98 N. Y. 655.

Unless the respondent can show some delay or inconvenience from failure to serve copies of the case, a default taken therefor under the rule should be relieved against upon terms, where it appears the appeal is brought in good faith. Waterman v. Whitney (Ct. App. 1853), 7 How. Pr. 407.

Laches.— For circumstances which were held to show such delay and acquiescence as to call for a denial of a motion to set

aside an order dismissing an appeal for failure to serve printed papers, see Matter of Boston (Ct. App. 1884), 19 Wkly. Dig. 470.

Remittitur, when to issue.— On the dismissal of an appeal under this rule, after the return has been filed, a remittitur should issue. Dresser v. Brooks (1850), 2 N. Y. 559.

Relief, after remittitur sent down.—When an appeal is regularly dismissed under this rule and the remittitur sent down and judgment thereon perfected in the court below, the Appellate Court loses all power over the case; but if the order of dismissal was irregularly obtained, it seems that the Court of Appeals may grant relief by vacating the order of dismissal. But so long as the order of the Court of Appeals stands, the court below is bound by it and has no power to make any order impairing its force. Newton v. Harris (1850), 8 Barb. 306.

Where an appeal to the Court of Appeals has been dismissed for failure to serve copies of case, and the remittitur has been sent down, judgment entered thereon and execution issued, a motion will not be entertained to reinstate the appeal. It seems that in such case the appellant should move in the court below to have the proceedings there vacated, and the remittitur returned to the Court of Appeals, to the end that he may then make his motion for relief. Jones v. Anderson (1877), 71 N. Y. 599.

(As to return of remittitur to enable the Court of Appeals to resume control of the cause so as to entertain motions therein, see, also, under Rules XI and XVI.)

Imperfect case.

A dismissal under this rule, by *ex parte* order, can only be had where there is a total failure to serve any case within the time prescribed. Where an imperfect case has been served, the respondent must make a motion, on notice, to have the case corrected and proper copies served or the appeal dismissed. Bowers v. Tallmadge (1861), 23 N. Y. 166; Bliss v. Hoggson (1881), 84 N. Y. 667.

(See under Rule XI, motions to dismiss appeal.)

Practice of clerk's office.

On receipt of an affidavit from the respondent's attorney, proving the default and service of notice, as prescribed by the rule, the clerk will enter the proper order (which need not be drafted

by the attorney), dismissing the appeal, with costs, and will transmit a certified copy thereof to the respondent's attorney. The fee for such order and copy is one dollar.

If the return has been filed, a remittitur will be issued and transmitted with the order. The fees for remittitur is two dollars.

RULE VII.

Copies of Cases and Points.

At least twenty days before a cause is placed on the day calendar, the appellant shall file with the clerk *eighteen** printed copies of the case; and shall at the same time file with the clerk *eighteen** printed copies, and serve on the attorney or counsel for the respondent three printed copies, of the points to be relied on by him, with a reference to the authorities to be cited. Within ten days after such service the respondent shall file with the clerk *eighteen** printed copies, and serve on the attorney or counsel for the appellant three printed copies, of the points to be relied on by him, with a reference to the authorities to be cited.

If the appellant desires to present points or authorities in reply, he shall file with the clerk *eighteen** printed copies thereof and serve three printed copies on the attorney or counsel for respondent, within five days after receipt of the respondent's points; and no supplemental points will be allowed from either side unless specially requested by the court.

No points will be received by the court on argument or submission unless they shall have been filed and served as above provided [except that in appeals under Rule XI noticed for the first Monday of a session, and in causes upon a new general calendar to be heard during the first two weeks of any session at which such new calendar is taken up, the parties shall file the printed cases and file and serve or exchange the printed points, at least two days before the commencement of the session].

The cases and points filed with the clerk shall be disposed

* Substituted for sixteen, by order of October 13, 1910.

of as follows: One copy shall be furnished to each of the judges; one copy shall be kept by the clerk, with the records of the court; one copy shall be deposited in the State Library; one copy shall be deposited in each branch of the library of the Court of Appeals; one copy shall be deposited in the library of the New York Law Institute; one copy shall be deposited in the Law Library of Brooklyn; one copy shall be deposited in the Law Library of the Eighth Judicial District, and one copy shall be delivered to the reporter.

Points.

Definition.— Under the rules of the Court of Chancery in reference to costs, it was said that the heads of an argument, together with the authorities cited, but not the argument at length, are embraced under the term "points." Gray v. Schenck (Supr. Ct. 1848), 3 How. Prac. 231. But, in applying Rule VII, the entire printed argument is included in the word "points"— *i. e.*, all matter, which is intended to be presented to the court in print, must be filed and served.

Replying points.— Under a similar rule to this, the Appellate Division, First Department, has held that, although rejoinder briefs to replying briefs are not authorized, where an appellant omits vital points from his original brief and puts them in his replying brief so as to place the respondent at a disadvantage, the replying brief will be stricken from the files. Ardslino v. Reinhardt (1908), 128 App. Div. 339.

Exceptions relied on.— Counsel should aid the court by selecting from the case the exceptions upon which he relies, and stating in his points the grounds of his claim to have them sustained. A mere reference to a mass of exceptions to rulings on evidence, by folios of the case, is not sufficient. Hebbard v. Haughian (1877), 70 N. Y. 54, 60; Nelson v. Village of Canisteo (1885), 100 N. Y. 89. See, also, Jewell v. Van Steenburgh (1874), 58 N. Y. 85.

Exception not noticed.— It is the ordinary rule that an exception not noticed in the appellant's points (Pratt v. Strong [1866], 3 Keyes, 53), nor raised on argument, is to be deemed abandoned.

Rogers v. Laytin (1880), 81 N. Y. 642; Sutherland v. Rose (1866), 47 Barb. 144.

Point not raised below.—A question not presented on the trial cannot be heard in the Court of Appeals (Salisbury v. Howe [1881], 87 N. Y. 128; Werner v. City of Rochester [1896], 149 N. Y. 563); nor can a claim not made below be granted in the Court of Appeals (Quinby v. Carhart [1892], 133 N. Y. 579); and, in a civil action, no objection not taken upon the trial and saved by an exception can be considered in the Court of Appeals. Hecla Powder Co. v. Signa Iron Co. (1898), 157 N. Y. 437.

An objection that the summing up of counsel upon the trial was improper in that it was not confined to the evidence, but was an inflammatory appeal to the passions and sympathies of the jury, which resulted in an excessive verdict, cannot be considered on appeal to the Court of Appeals where the record presents no proper exception raising it. Dimon v. N. Y. C. & H. R. R. R. Co. (1903), 173 N. Y. 356, 635.

The objection that the contract in suit contravened federal legislation not made below, cannot be raised in the Court of Appeals for the first time. N. Y. Bank Note Co. v. Hamilton B. N. Co. (1905), 180 N. Y. 280.

A defense which was not pleaded and was not raised in any way in the courts below cannot be presented for the first time in the Court of Appeals. Dr. David Kennedy Corp'n v. Kennedy (1901), 165 N. Y. 353; National Revere Bank v. National Bank of Republic (1902), 172 N. Y. 102.

The question whether or not a former judgment is a bar to a subsequent action between the same parties cannot be considered by the Court of Appeals upon an appeal from an order reversing a judgment therein, upon questions of law and granting a new trial, where, although it was read in evidence upon the trial without objection, it was not pleaded as a bar and the trial court made no finding of fact or conclusion of law concerning the same. Fritz v. Tompkins (1901), 168 N. Y. 524.

Where it is assumed upon a trial for murder that the venue was laid in the proper county, and the testimony clearly imports that the crime was committed in that county, the objection that it was not so proven cannot be considered on appeal. People v.

Pugh (1901), 167 N. Y. 524. See, also, Daley v. Brown (1901), 167 N. Y. 381.

An objection to evidence not raised below cannot be considered on appeal. People v. Holmes (1901), 166 N. Y. 540.

Question of constitutionality.— The objection that a statute or a contract contravenes the Constitution will not be considered in the Court of Appeals when it was not raised below. Purdy v. Erie R. R. Co. (1900), 162 N. Y. 42; Corcoran v. N. Y. C. & H. R. R. R. Co. (1900), 164 N. Y. 587; Dodge v. Cornelius (1901), 168 N. Y. 242; Paul v. D., L & W. R. R. Co. (1903), 175 N. Y. 478; Matter of Anderson (1904), 178 N. Y. 416.

Constitutional question raised by exception.—An objection by the appellant that the constitutionality of a statute under which he claims office cannot be attacked for the first time in the Court of Appeals is without force, where an exception was taken to the decision of the trial judge that he was lawfully appointed, and the constitutional question was the only one discussed in the opinion of the Appellate Division. People ex rel. Bush v. Houghton (1905), 182 N. Y. 301.

Question of public policy.—Where an appeal involves a question of grave public policy, the people are indirectly parties to it, and their interests should be looked after by the courts even when the party who might have objected is silent. On this ground, a question as to the violation of the constitutional provision against leases of agricultural land for a longer period than twelve years, though not presented by the pleadings, or at the trial, or on the intermediate appeal, ought to be decided by the Court of Appeals, when it is covered by an exception, although not specifically mentioned. Massachusetts Nat. Bank v. Shinn (1900), 163 N. Y. 360.

New objection to evidence.—An objection to the admission of evidence not made at the trial cannot be invoked on appeal to uphold the erroneous exclusion of such evidence and sustain the judgment. Seidenspinner v. Metropolitan Life Ins. Co. (1903), 175 N. Y. 95.

Where, by his acts, a party has recognized the validity of a statute, and may be deemed to have waived objection to its constitutionality by failing to allege it by answer or on the trial, it seems that such objection cannot be made in the Court of Appeals for the first time. Vose v. Cockroft (1871), 44 N. Y. 415.

Citation of authorities; scope of opinions.— In applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. Crane v. Bennett (1904), 177 N. Y. 106. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance. Colonial City Traction Co. v. Kingston City R. R. Co. (1897), 154 N. Y. 493.

The Court of Appeals has no jurisdiction to consider a matter or subject that has not been presented for adjudication to the subordinate court; and this exclusion covers a question as to the constitutionality of a law or as to the sufficiency of a pleading, and such questions cannot be raised for the first time in the Court of Appeals. Delaney v. Brett (1872), 51 N. Y. 78.

An objection that the court had no jurisdiction of the subject-matter of the action may be insisted upon in the Court of Appeals and prevail there, although not raised below, if the ground of the objection is such that it could not have been obviated in the court of original jurisdiction, had it been made there. Cook v. Whipple (1873), 55 N. Y. 150, 157, citing Delafield v. State of Illinois (Ct. of Er. 1841), 2 Hill, 159. See, also, Dr. David Kennedy v. Kennedy (1901), 165 N. Y. 353; Dodge v. Cornelius (1901), 168 N. Y. 242.

The right to object in the Court of Appeals to the failure of the adverse party to take an exception to the decision of the trial court is not waived by failing to make it the subject of a distinct point in the Appellate Division or to make the specific claim that the latter court had no jurisdiction to review the decision, and by stating in such court that the sole question in the case was one relating to the merits, where the brief in such court called attention to the lack of exceptions. Ross v. Caywood (1900), 162 N. Y. 259.

Point raised at trial, but not at General Term.— It has been held that a party was not prevented from urging in the Court of Appeals a point distinctly made and presented on the trial, because it was not made at General Term. Cohn v. Goldman (1879), 76 N. Y. 284. And it seems that objections which are in the case, arising upon the evidence and involved in the contro-

versy, as distinguished from mere preliminary objections to the proceedings, are available to the unsuccessful party, on appeal, although they may not have been considered in the lower court. Cowenhoven v. Ball (1890), 118 N. Y. 231.

On appeal from order granting new trial.— Upon appeal to the Court of Appeals from an order granting a new trial, the appellant takes the risk, not only of the questions considered by the court below, but of every other exception appearing on the record; the respondent may sustain the order upon showing any legal error, whether noticed by the court below or not. Mackay v. Lewis (1878), 73 N. Y. 382.

New theory of case.— It has been held that the Court of Appeals would not, for the purpose of sustaining a judgment reversed by the General Term, permit counsel to shift his ground after the theory on which the case had been tried and decided had been upset by the General Term, and adopt a theory not set up in the complaint or broached upon the trial. Stapenhorst v. Wolff (1875), 65 N. Y. 596. See, also, Salisbury v. Howe (1881), 87 N. Y. 128, supra; Heimburg v. Manhattan Ry. Co. (1900), 162 N. Y. 352.

And where, so far as appears from the record, the appellant from a judgment entered on a verdict acquiesced in the submission of all the issues to the jury, he cannot be heard in the Court of Appeals to claim that the evidence does not warrant the verdict. Hecla Powder Co. v. Sigua Iron Co. (1898), 157 N. Y. 437.

When an action has been tried by the unsuccessful party upon the theory that an instrument required reformation, and his effort to reform the instrument has failed, he cannot change his theory of the case in the Court of Appeals and is not entitled to invoke a judicial construction that, as originally drawn, the contract needed no reformation and could be read as if reformed. Greene v. Smith (1899), 160 N. Y. 533.

A party who has acquiesced in the trial of an action upon a certain theory will not be heard to assert for the first time on appeal that there was error in adopting the theory he assisted in establishing as the law of the case. Caponigri v. Altieri (1901), 165 N. Y. 255.

Where an action has been brought as an action at law, and tried and determined throughout on that theory, the claim that

the evidence was sufficient to support a bill in equity is not available in the Court of Appeals as an answer to the objection that the plaintiff had mistaken his remedy. Stevens v. Meriden Britania Co. (1899), 160 N. Y. 178.

The defense that an abutter cannot recover damages from an elevated railroad because the premises were in possession of tenants, will not be considered for the first time in the Court of Appeals, when such defense was not pleaded or the question in any manner raised upon the trial. Post v. Manhattan Ry. Co. (1890), 125 N. Y. 697.

Where a proceeding by a street railroad company to cross the tracks of a steam railroad company has been tried upon the theory that the applicant must comply with the Condemnation Law (L. 1890, ch. 95) in procuring consents of the property owners and the local authorities, an appeal by it from a denial of its application must stand or fall upon that theory, and it cannot successfully urge on appeal that such consents were unnecessary. G. & W. Ry. Co. v. N. Y. C. & H. R. R. R. Co. (1900), 163 N. Y. 228.

An appellant will not be permitted to claim that an erroneous rule of damages was followed, where both sides tried the case upon the theory in question, and no question as to its correctness was raised at the trial. Woolsey v. N. Y. Elevated R. R. Co. (1892), 134 N. Y. 323; Mitchell v. Met. Elevated Ry. Co. (1892), 132 N. Y. 552.

Assumption as to theory of recovery.— Where a plaintiff seeks to recover upon one of two theories, and the amount of the verdict depends upon which theory the jury finds to be in accord with the facts, their verdict for the plaintiff in one of the amounts is to be taken as establishing the theory which would entitle the plaintiff to that amount, and the questions to be decided upon appeal are those which depend upon that assumption. Lowenstein v. Sombard (1900), 164 N. Y. 324.

Scope of argument.— Upon the certified question whether the defense contained in the answer is insufficient in law upon the face thereof to constitute a defense, the arguments of counsel should include a discussion of the sufficiency of the complaint. Baxter v. McDonnell (1897), 154 N. Y. 432.

It is not the practice of the Court of Appeals to search the complaint on a motion apparently not involving the merits with the

care used on demurrer, but where an order for the publication of a summons has been reversed upon the ground that the complaint fails to state facts sufficient to constitute a cause of action the court will determine that question. Grant v. Cobre Grande Copper Co. (1908), 193 N. Y. 306.

Proof of service of points.

Service of points on the attorney or counsel for the opposite side should be proved, in each instance, by filing with the clerk an affidavit or admission of service with the copies of the respective points required to be filed with him. Such proof of service is requisite to entitle the points to be received by the court, in view of the provision of the rule, that "no points will be received by the court on argument or submission unless they shall have been filed and served as above provided."

There seems to be no objection to attorneys waiving, as between themselves, the requirements in reference to service of the printed papers upon each other; but no stipulation of attorneys is permitted to affect the requirements of the rule as to the time within which papers must be filed with the clerk of the court.

It is understood that, after the appellant's points have been filed, they cannot be withdrawn and new points substituted, without leave of the court and consent of the respondent.

In Turvoshke v. Friederich (1898), not reported, the court imposed the payment of ten dollars upon the appellant on his failure to file and serve cases and points, and on giving him time to submit the same after the case was reached for argument.

Libraries.

The libraries, in which copies of cases and points are deposited under the rule, are located as follows:

1. State Library, the Capitol, Albany.
2. Court of Appeals Library, courthouse, Syracuse.
3. Court of Appeals Library, courthouse, Rochester.
4. Court of Appeals Library, courthouse, Binghamton.
5. New York Law Institute Library, post-office building, New York.
6. Law Library of Brooklyn, courthouse, Brooklyn.
7. Law Library of the Eighth Judicial District, city and county hall, Buffalo.

RULE VIII.

Statement and Discussion of Facts — Absent Judges.

In all causes each party shall briefly state upon his printed points, in a separate form, the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found. And the court will not hear an extended discussion upon any mere question of fact.

Every cause shall be deemed to be submitted to such judges as may be absent at the time of the argument, unless objection to such submission by counsel arguing the cause be then made.

Application of the rule.

The requirement of the rule, that the facts shall be "briefly" stated, necessarily excludes lengthy quotations from the evidence, particularly in a case of unanimous affirmance where the Constitution prohibits a review of the facts. The rule calls for the facts, not the evidence. Even in stating the facts deemed established, except in two classes of cases, only those facts should be mentioned which are either specifically found, or are presumed to have been found, according to the rules governing appeals to the Court of Appeals. The excepted cases, are first, where there is a reversal by the court below; second, where there is an affirmance, but it is not unanimous and it is claimed that there is no evidence whatever to support a fact which is necessary to sustain the judgment. In all cases, every fact stated should be fortified by a reference to the folios of the appeal book where the evidence to support it may be found, for the rule so requires, and unless it is complied with the statement is of such slight value that the judges are frequently compelled to disregard it and laboriously discover the facts for themselves. Even when the affirmance is not unanimous, counsel should not state, as established facts, whatever allegations they may think are supported by the weight of evidence, provided there is some evidence which, when reasonably considered, would support the opposite view and from the

form of the decision the presumption is that the trial tribunal found accordingly. Extended quotations from authorities have no place in the points which, after stating the facts fairly, should set forth the positions insisted upon by counsel, the heads of the argument and the authorities relied upon to support it. Stevens v. O'Neil (1902), 169 N. Y. 375.

Statement of facts.—A fair statement of the facts is essential to a proper presentation of an appeal. An unfair statement is certain to be discovered, and when discovered affects the force of the entire brief. When the facts are not open to review they should be stated as found, or as presumed to have been found. When the facts are to be reviewed it is proper for counsel to state them as he claims they should have been found in accordance with the weight of evidence, citing the folios where the evidence appears in the record, but on the crucial points he should also state the testimony opposed to his theory, so that the court may have before it a faithful picture of the whole case. A failure to observe these rules increases the labor of the court and reflects upon the integrity of the brief. People v. White (1903), 176 N. Y. 331.

Consideration of facts, on appeal from General Term.

While the consideration of facts by the Court of Appeals in reviewing determinations of the Appellate Division of the Supreme Court is regulated by the amendments to the Constitution and to sections 191, 1337 and 1338 of the Code of Civil Procedure, which went into effect January 1, 1896, the pre-existing practice relating to appeals from orders made or judgments rendered by a late General Term before the last day of December, 1895 (Const., art. 6, § 9), continues to be of interest in construing and applying the recent amendments. Sections 1337 and 1338, of the Code of Civil Procedure, which controlled the former practice, are therefore now given in the form in which they existed prior to January 1, 1896, together with decisions illustrating their application.

§ 1337. An appeal to the Court of Appeals from a final judgment, or from an order granting or refusing a new trial in an action, or from a final order affecting a substantial right, made, either in a special proceeding, or upon a summary application after judgment in an action, brings up for review,

in that court, every question affecting a substantial right, and not resting in discretion, which was determined by the General Term of the court below, in rendering the judgment or making the order, from which the appeal is taken; except that a question of fact, arising upon conflicting evidence, cannot be determined upon such an appeal, unless where special provision for the determination thereof is made by law. An exception to the finding of a fact unsupported by any evidence shall be deemed to present a question of law upon an appeal to the Court of Appeals, and in any action on an appeal to that court the court may, in its discretion, either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to. [As originally enacted in 1876 (except the last sentence, which was added by chap. 688 of 1894) and in force until December 31, 1895.]

§ 1338. Upon an appeal to the Court of Appeals from a judgment, reversing a judgment entered upon a referee's report, or a decision of the court, upon a trial without a jury; or from an order granting a new trial, upon such a reversal; it must be presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears in the body of the judgment or order appealed from. In that case, the Court of Appeals must review the determination of the General Term of the court below, upon the questions of fact, as well as the questions of law. [As originally enacted in 1876 and in force until December 31, 1895.]

Amended sections 1337 and 1338 of the Code, which apply to appeals from the Appellate Division of the Supreme Court, are as follows:

§ 1337. An appeal to the Court of Appeals from a final judgment, or from an order, granting or refusing a new trial in an action, where the appellant stipulates that upon affirmance judgment absolute shall be rendered against him, brings up for review in that court only questions of law; but where the justices of the Appellate Division from which an appeal is taken are divided upon the question as to whether there is evidence supporting or tending to support a finding or verdict not directed by the court, a question for review is presented. In any action on an appeal to the Court of Appeals, the court may either modify or affirm the judgment order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to. [As amended by chap. 946 of 1895, which took effect January 1, 1896.]

§ 1338. Upon an appeal to the Court of Appeals from a judgment reversing a judgment entered upon the report of a referee, or a determination in the trial court; or from an order granting a new trial, upon such a reversal; it must be presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from. [As amended by chap. 946 of 1895, which took effect January 1, 1896.]

Section 1022, Code of Civil Procedure, provides as follows:

The decision of the court or the report of a referee, upon the trial of the whole issues of fact, must state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment-roll. In an action where the costs are in the discretion of the court, the decision or report must award or deny costs, and if it awards costs, it must designate the party to whom the costs to be taxed are awarded.

Review of disputed facts not contemplated.— The general statutory scheme for the distribution of judicial powers, does not contemplate the review by the Court of Appeals of disputed questions of fact, and it will not entertain such questions in the absence of express legislative authority. People ex rel. Murphy v. French (1883), 92 N. Y. 306.

The doctrine that it is not the function of an appellate court to determine controverted questions of fact applies to an appeal from a final order in a special proceeding as well as to an appeal from a judgment. Matter of Fitzsimmons (1903), 174 N. Y. 15.

The Court of Appeals has no power to review the facts found by the Supreme Court on certiorari for the review of a tax assessment. (People ex rel. Cornell Steamboat Co. v. Dederick (1899), 161 N. Y. 195.

Unanimous affirmance below on disputed facts.— Upon appeal from a unanimous affirmance by the Appellate Division of a judgment recovered upon a verdict, the disputed facts must be deemed, in the Court of Appeals, to be settled in the respondent's favor. National Revere Bank v. National Bank of Republic (1902), 172 N. Y. 102.

General exception to conclusion of law.—A general notice of exception to conclusions of law, in an action tried by a referee or by the court without a jury, is insufficient to raise any question of law. To be effective, the notice must contain a specific exception to the ruling sought to be reviewed. Drake v. N. Y. Iron Mine (1898), 156 N. Y. 90; Colby v. Town of Day (1904), 177 N. Y. 548.

Conflicting evidence.— It seems that, unless special provision authorizing it can be found in the law, there can be no review in the Court of Appeals of questions of fact, depending upon conflicting evidence in any case. Matter of Ross (1882), 87 N. Y. 514.

The provision of the Code relating to appeals from decrees of surrogates (§ 2586), that "where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact which the surrogate had," etc., applies exclusively to appeals to the Supreme Court. Id.

Code of Civil Procedure, section 993:

Upon the trial of an issue of fact by a referee or by a court without a jury, a finding of fact without any evidence tending to sustain it, is a ruling upon a question of law * * * * Added by ch. 85, Laws of 1903.

Short-form decision.— The difference, both in form and effect, between the short form of decision permitted by section 1022 of the Code from the amendment of 1894 to that of 1903, and the long form then also permitted, and now and prior to 1894 required, by that section, is discussed in Jefferson County Nat. Bk. v. Dewey (1905), 181 N. Y. 98, where it is held that a general exception to a short-form decision raises every question of law in the case.

Under the short form of decision allowed by section 1022 of the Code prior to its amendment by chapter 85 of the Laws of 1903, the Court of Appeals was required, upon review, to assume that the necessary facts to support the judgment were found, treating the decision similar to that of a verdict of a jury; under a long form of decision, where all of the material facts have been specifically found and the judgment entered upon the decision has been unanimously affirmed in the Appellate Division, the facts, as found are established, and the question with reference thereto for the determination of the Court of Appeals is whether such facts authorize the judgment that has been entered. Ide v. Brown (1904), 178 N. Y. 26.

When the report of a referee is general, without finding the facts in detail, a general exception filed thereto is sufficient to authorize a review of the referee's decision by the appellate courts; and the presumption in support of the judgment rendered by him is that all the facts, warranted by the evidence and necessary to support his judgment, were impliedly found by him. Petrie v. Hamilton College (1899), 158 N. Y. 458.

Where a judgment entered upon a decision in the short form is unanimously affirmed by the Appellate Division, the Court of

Appeals is concluded thereby and, whatever the views of the court may be, it must assume that facts sufficient to sustain the decision were necessarily found by the trial court. Hutton v. Smith (1903), 175 N. Y. 375.

The referee's omission in a short-form decision under section 1022 of the Code, to find a material fact, pleaded and conclusively proved on the trial, does not constitute an error of law, which the Court of Appeals can review. National Harrow Co. v. Bement (1900), 163 N. Y. 505.

Facts involved in a motion.— While, when there is conflicting evidence with respect to a disputed fact arising upon a motion, the court in which the motion is made has power to settle the conflict, and the Court of Appeals may not interfere with the result, when the affidavits upon the one side contain positive proof, and upon the other merely statements of persons who cannot possibly know the facts, and whose statements, therefore, are mere expressions of opinion, and the decision below is based upon these statements, it is reviewable in the Court of Appeals. Taylor v. Granite State Provident Association (1893), 136 N. Y. 343.

If there is conflicting evidence as to whether the examination of a long account will be involved, the decision of the court below, ordering a reference, will not be reviewed in the Court of Appeals. Welsh v. Darragh (1873), 52 N. Y. 590. But where there is an entire failure of proof upon the point, it becomes purely a question of law for the consideration of the Court of Appeals. Cassidy v. McFarland (1893), 139 N. Y. 201, 207.

Weight of evidence.— The Court of Appeals has no jurisdiction, under any circumstances, to review the weight of evidence on a jury trial (Finney v. Gallaudet [1890], 119 N. Y. 661; 23 N. E. 1113); or on a trial by the court or a referee, sustained at General Term. Healy v. Clark (1890), 120 N. Y. 642.

But, where the evidence, which appears to be in conflict, is nothing more than a mere scintilla or where it is met by well known and recognized scientific facts, about which there is no conflict, the Court of Appeals will exercise jurisdiction to review and to reverse if justice requires. Hudson v. Rome, W. & O. R. R. Co. (1895), 145 N. Y. 408; Matter of Harriot (1895), 145 N. Y. 540.

Facts on appeal from board of claims.— Under the provisions of the act which formerly authorized appeals to the Court of Appeals "upon questions of law only," from a final award of the board of claims, and declared that the practice upon the hearing of such appeals should conform as near as might be, to that prevailing upon appeals from a court of record, it was held that the facts were not reviewable when there was a conflict of evidence, or any evidence to support the determination of the board. Bower v. State of New York (1892), 134 N. Y. 429.

Cases tried by jury.— The Court of Appeals has no jurisdiction to entertain an appeal from an order granting or refusing a new trial upon the facts, in a case tried by a jury. Baldwin's Bank v. Butler (1892), 133 N. Y. 564. But where, in such a case, the General Term reverses the judgment, but instead of granting a new trial directs judgment absolute, its decision is reviewable in the Court of Appeals. Goodwin v. Conklin (1881), 85 N. Y. 21; followed in Gawthrop v. Leary (1882), 89 N. Y. 622.

An appeal to the Court of Appeals from an order of General Term granting a new trial, in a case tried by a jury, will not be entertained if any material and controverted question of fact was involved, and the General Term might have granted the new trial upon such question of fact (Harris v. Burdett [1878], 73 N. Y. 136; Snebley v. Conner [1879], 78 N. Y. 218; but see Matter of Mosher [1906], 185 N. Y. 435; Williams v. D., L. & W. R. R. Co. [1891], 127 N. Y. 643; Chapman v. Comstock [1892], 134 N. Y. 509); and the same rule prevails on appeal from the Appellate Division. Caponigri v. Atheri (1900), 164 N. Y. 476.

In a case tried by a jury, it is not necessary that an order of reversal by the General Term should state whether the reversal was on questions of law or fact; and where it does not state that the reversal was upon questions of fact, if the facts were properly before the court for review, it is not to be presumed that the reversal was upon questions of law only. The rule applicable to cases tried by a referee or by the court without a jury (§ 1338) does not apply to cases tried by a jury. Goodwin v. Conklin (1881), 85 N. Y. 21, *supra*.

In an order of the General Term reversing, upon the law only, a judgment entered on a verdict, and an order denying a motion for a new trial which raised the question whether the verdict was

against the weight of evidence, a statement that the court "examined the facts and found no error therein" is sufficient to authorize a review of the decision of the General Term. Judson v. Central Vermont R. R. Co. (1899), 158 N. Y. 597.

Affirmance of reversal on facts.— Upon appeals from orders of the Appellate Division reversing judgments upon the facts as well as the law, if the evidence raises a question of fact the judgments will be affirmed in all cases except in rare instances where peculiar circumstances require the dismissal of the appeal in order to prevent injustice. Crooks v. People's Nat. Bank (1903), 177 N. Y. 68.

Order must show reversal on facts.— Under section 1338, where an order of General Term reversing a judgment in an action tried by the court or a referee does not state that it was made on questions of fact, it will be deemed to have been made on questions of law only (Weyer v. Beach [1880], 79 N. Y. 409; Ward v. Craig [1882], 87 N. Y. 550; Hannigan v. Allen [1891], 127 N. Y. 639; Reed v. McConnell [1892], 133 N. Y. 425); and this, although the opinion of General Term shows that it was upon the facts (Cudahy v. Rhinehart [1892], 133 N. Y. 248); and the only inquiry in the Court of Appeals is whether the reversal rests upon any error of law. Davis v. Leopold (1881), 87 N. Y. 620. It has been held, however, that a statement in the order that the reversal was "upon the law and the facts" satisfied the requirement that it must have been "upon a question of fact." Van Wyck v. Watters (1880), 81 N. Y. 352.

Although a review of the opinion of the General Term may indicate that a reversal of a judgment by it was based upon the facts, the presentation of a certificate of the General Term stating that its reversal was upon "the ground stated in the opinion" is not a proper mode of informing the Court of Appeals that the reversal was upon a question of fact. Matter of Laudy (1896), 148 N. Y. 403.

Where the General Term, upon reversing a judgment, specifies in the order that the reversal was upon both the law and the facts, and the conclusion involves a different view of both the facts and the law from that adopted by the trial court, the facts are open to review; and, to sustain the reversal, the Court of Appeals must be satisfied that one or more of the findings of the

trial court are against the weight of evidence or that the proofs clearly preponderate in favor of a contrary result. Higgins v. Crouse (1895), 147 N. Y. 411; Barnard v. Gantz (1893), 140 N. Y. 249; Baird v. Mayor, etc. (1884), 96 N. Y. 567; Aldridge v. Aldridge (1890), 120 N. Y. 614; Devlin v. Greenwich Savings Bank (1891), 125 N. Y. 756.

On appeal from a reversal by the General Term upon the law only, in an action tried by the court, the inquiry for the Court of Appeals is whether, under the most favorable view of the evidence upon which the trial court based its judgment, it can be supported; and for that purpose the evidence most favorable to the party who prevailed on the trial must be accepted as true. Canda v. Totten (1898), 157 N. Y. 281.

Presumption.— The presumption that the General Term proceeded upon questions of law (Hannigan v. Allen [1891], 127 N. Y. 639), applies to appeals from reversals only; it does not preclude the Court of Appeals from presuming that an affirmance was upon the facts. Cudahy v. Rhinehart (1892), 133 N. Y. 248, *supra.*

But the rule, that all facts warranted by the evidence and necessary to support a judgment rendered on a decision in the short-form will on appeal be presumed to have been found, is not applicable to that part of a judgment dismissing the complaint as to one defendant, since as to that defendant the plaintiff has no judgment to be supported by such a presumption. Deering v. Schreyer (1902), 171 N. Y. 451.

The legal presumption is that the General Term, on appeal from a judgment entered upon the report of a referee, considered and reviewed the facts and to rebut this presumption, so as to present the point on appeal to the Court of Appeals that the General Term refused so to do, the refusal must clearly appear by the record. Verplanck v. Member (1878), 74 N. Y. 620.

When, on appeal from a judgment and order of a General Term reversing a judgment entered upon a decision of the court on a trial without a jury, and granting a new trial, neither the judgment nor the order states that the reversal was based upon the facts, the Court of Appeals must presume that the reversal was based upon the law; and if no error of law appears upon the record, the judgment and order must be reversed. Parker v. Day (1898), 155 N. Y. 383.

Facts on appeal from nonsuit.— On appeal from a judgment dismissing the complaint on the plaintiff's opening, every material fact in issue will be resolved or found in his favor. Hoffman House v. Foote (1902), 172 N. Y. 348.

On reviewing the judgment upon a nonsuit, the plaintiff is entitled to the benefit of any fact that the jury could have found and to all inferences warranted thereby. Thedford v. Herbert (1909), 195 N. Y. 63.

Facts presumed found.— Where the decision of a trial court or referee does not state the facts found (Code Civ. Pro., § 1022), and the judgment entered thereon has been affirmed by the General Term, upon an appeal to the Court of Appeals, all the facts warranted by the evidence and necessary to support the judgment are presumed to have been found; and the Court of Appeals in such case has no more control over the facts than when specific findings have been made and affirmed. Amherst College v. Ritch (1897), 151 N. Y. 282.

Finding without evidence.—An exception to a finding material to the judgment, unsupported by any evidence, presents a question of law, reviewable in the Court of Appeals (Pollock v. Pollock [1877], 71 N. Y. 137; Sickles v. Flanagan [1879], 79 N. Y. 224; Israel v. Manhattan Ry. Co. [1899], 158 N. Y. 624); and so it is for that court to determine as to whether there is any such evidence (Hannigan v. Allen [1891], 127 N. Y. 639, *supra*), although the order of reversal of the General Terms fails to state the reversal was upon the facts (Todd v. Nelson [1888], 109 N. Y. 316); but an exception is necessary to enable an appellant to present the question in the Court of Appeals that a finding is unsupported by evidence. Turner v. Weston (1892), 133 N. Y. 650. So, also, an exception to a refusal to make a finding established by undisputed proof presents a question of law. Kennedy v. Porter (1888), 109 N. Y. 526; Bedlow v. N. Y. Dry Dock Co. (1889), 112 N. Y. 263. But a judgment will not be reversed because a finding of fact is without evidence to support it, unless it is a material fact and to some extent at least gives support to the judgment. Wetmore v. Bruce (1890), 118 N. Y. 319.

In order to sustain in the Court of Appeals a reversal by a General Term of a decision of a referee upon the facts, it must

appear that his findings are against the weight of evidence, or that the proofs so clearly preponderated in favor of a contrary result that it can be said with a reasonable degree of certainty that his conclusions were erroneous. Sanger v. French (1898), 157 N. Y. 213.

Finding, with some evidence.— If there is any evidence to support a finding sustained by the General Term, it is a ruling upon a question of fact, to which no exception lies (Healy v. Clark [1890], 120 N. Y. 642); it is conclusive and cannot be reviewed by the Court of Appeals (Van Gelder v. Van Gelder [1879], 77 N. Y. 446; Derham v. Lee [1882], 87 N. Y. 599; White v. Benjamin [1896], 150 N. Y. 258); and this applies to actions in equity as well as to actions at law. Stilwell v. Mutual L. Ins. Co. (1878), 72 N. Y. 385.

Finding conclusive.— When a finding upon a question of fact, made upon conflicting testimony has been affirmed by the General Term, it is final and conclusive upon the parties and precludes any review of that issue by the Court of Appeals. Eames Vacuum Brake Co. v. Prosser (1898), 157 N. Y. 289.

Conflicting findings of fact.— Where findings of fact are irreconcilably conflicting, the defeated party is entitled, in the Court of Appeals, to the benefit of those most favorable to him, in aid of his exceptions to the conclusions of law (Bonnell v. Griswold [1882], 89 N. Y. 122; Israel v. Manhattan Ry. Co. [1899], 158 N. Y. 624; Parsons v. Parker [1899], 159 N. Y. 16; Nickell v. Tracy [1906], 184 N. Y. 386; Whalen v. Stuart [1909], 194 N. Y. 495); but it is the duty of the court to reconcile the findings, and give each some office to perform, and it is only when this cannot, by a reasonable construction, be accomplished that the above rule has effect (Redfield v. Redfield [1888], 110 N. Y. 671; Green v. Roworth [1889], 113 N. Y. 462; Wahl v. Barnum [1889], 116 N. Y. 87; Traders' Nat. Bank v. Parker [1892], 130 N. Y. 415); and the prevailing party is entitled to the most favorable construction of the findings to uphold the judgment. Waugh v. Seaboard Bank (1889), 115 N. Y. 42.

Finding as to foreign law.—A finding as to the law of a foreign State upon a given subject is a finding of fact, and if unanimously approved by the Appellate Division is conclusive upon the Court of Appeals. Spies v. National City Bank (1903), 174 N. Y. 222.

Weight of evidence.—A contention that a finding is against the weight of evidence cannot be considered by the Court of Appeals, that court being confined to the question of law as to whether a material finding of fact is without any evidence to support it. Fritz v. Tompkins (1901), 168 N. Y. 524.

The short form of decision, allowed by section 1022 of the Code, is to be treated as a general verdict, and when unanimously affirmed by the Appellate Division, the Court of Appeals is not permitted to look into the record to determine whether there is any evidence to support it. City of Niagara Falls v. N. Y. C. & H. R. R. R. Co. (1901), 168 N. Y. 610.

Where the order of the Appellate Division reversing a judgment upon a short form of decision is silent as to its grounds, the review by the Court of Appeals is confined to the question whether in any view of the facts proved, the judgment can be sustained. Dannhauser v. Wallenstein (1901), 169 N. Y. 199.

Findings of fact.— The Court of Appeals is confined to the findings of fact as made and is not permitted to look into the record for additional facts. Sween v. Henry (1903), 175 N. Y. 268; Ransom v. Cutting (1907), 188 N. Y. 447.

Duty to harmonize findings.— It is the duty of the Court of Appeals to harmonize findings of fact so as to arrive at the real intention, if it can be done; and an intention to reverse a deliberate finding will not be imputed because of collateral findings in which an inadvertent or immaterial expression is used. Bennett v. Bates (1884), 94 N. Y. 354.

Omission to find.—An omission to find facts claimed by the unsuccessful party to be warranted by the evidence can only be taken advantage of by an exception to a refusal to so find upon request duly made as required by the Code. Travis v. Travis (1890), 122 N. Y. 449. The Court of Appeals cannot look into the evidence for facts to reverse the judgment, except to see whether there is any evidence to support a finding, although it may to sustain it. Ostrander v. Hart (1892), 130 N. Y. 406. No fact can be considered by the Court of Appeals for the purpose of reversing a judgment, unless it appears in the findings or is requested to be found upon uncontroverted evidence. Koehler v. Hughes (1896), 148 N. Y. 507. But where the trial court, instead of finding either way upon the crucial question of fact in

the case, simply found the evidence as given by the witnesses upon that question and then drew a conclusion which, upon the record as it stands, is unsupported by any finding of fact, the judgment entered thereon must be reversed. Dougherty v. Lion Fire Ins. Co. (1905), 183 N. Y. 302.

Assumption of fact.— While in some cases the Court of Appeals may assume the existence of any needed fact warranted by the evidence in order to affirm a judgment, this cannot be done when the evidence in regard to it is conflicting and no finding on such fact has been requested. Hollister v. Mott (1892), 132 N. Y. 18; nor can it assume a fact, or amplify the findings of fact in order to reverse a judgment. Ostrom v. Greene (1900), 161 N. Y. 353; Hilton v. Ernst (1900), 161 N. Y. 226; Hunt v. Hunt (1902), 171 N. Y. 396.

Inference.— In Clemens v. Supreme Assembly Royal Society of Good Fellows (1892), 131 N. Y. 485, where the judgment below was not rendered on the ground of fraud and the evidence thereof was conflicting, the Court of Appeals refused to draw the inference of fraud in order to support the judgment.

Facts on review of directed verdict.— On appeal from an affirmance of a judgment entered upon a verdict directed by the court, where each party had requested the direction of a verdict in his favor and neither asked to go to the jury, all the controverted facts and all inferable facts in support of the judgment will be deemed conclusively established in favor of the party for whom the verdict was directed. Smith v. Weston (1899), 159 N. Y. 194.

But where a verdict was directed by the court, although the unsuccessful party asked to go to the jury, all the facts warranted by the evidence must be assumed for the purpose of an appeal by the unsuccessful party, as settled in his favor. Bank of Monongahela Valley v. Weston (1899), 159 N. Y. 201; Becker v. City of N. Y. (1902), 170 N. Y. 219.

Reversal of reversal on facts.—A reversal by the General Term upon the facts cannot be reversed by the Court of Appeals, unless it appears that there was no evidence to sustain it or that there was such a preponderance of evidence in favor of the conclusions of the trial court that it would have constituted error of law for it to have found otherwise. Nostrand v. Knight (1890), 123

N. Y. 614; Phœnix Iron Co. v. Vessel "Hopatcong" (1891), 127 N. Y. 206.

(See under Rule II, as to amendment of General Term order so as to show reversal on question of fact; and under Rule IV, that opinion of General Term cannot be looked to, to learn that reversal was on a question of fact.)

On appeal from Appellate Division.

Conclusiveness of findings.— Findings of fact are conclusive upon the Court of Appeals where an order of reversal in the Appellate Division was not made upon the facts, but upon the law. Smith v. Syracuse Improvement Co. (1900), 161 N. Y. 484.

Order of reversal.—An order of the Appellate Division reversing upon the law and facts a judgment entered upon a verdict and an order denying a motion for a new trial, and awarding a new trial, is not reviewable by the Court of Appeals, and in no case tried before a jury in which a motion for a new trial has been made on the ground that the verdict is against the evidence can that court entertain an appeal from an order of reversal unless it affirmatively appears that the Appellate Division has affirmed the facts. Allen v. Corn Exchange Bank (1905), 181 N. Y. 278 (overruling Reich v. Dyer, 180 N. Y. 107).

Action for injunction.— Upon an appeal from an order reversing a judgment dismissing the complaint upon the merits in an action for an injunction, the Court of Appeals has power to review the action of the trial court where the facts proved raise reviewable questions of law; and it is not precluded therefrom by a statement in the order that the reversal was upon the law and the facts, where an examination of the record shows that there are no disputed facts and no conflicting inferences to be drawn from them. Penrhyn Slate Co. v. Granville Elec. L. & P. Co. (1905), 181 N. Y. 80.

Question of fact.— The insertion in an order of reversal that it is upon the facts does not raise a question of fact unless an examination of the record confirms it. Penrhyn Slate Co. v. Granville Elec. L. & P. Co. (1905), 181 N. Y. 80.

Where, on appeal from a reversal by the Appellate Division in an action tried by the court, it appears that the decision of the

trial court did not separately state the facts found, and the decision of the Appellate Division does not state that the reversal was upon a question of fact, it must be presumed that all the facts warranted by the evidence and necessary to support the judgment were found by the trial court, and that the reversal by the Appellate Division was based wholly upon errors of law, the facts standing approved by that court. People v. Adirondack Ry. Co. (1899), 160 N. Y. 225.

Order granting new trial solely upon questions of law.— Where a new trial is granted by the Appellate Division upon a question of fact, the Court of Appeals has no power to review even rulings duly excepted to, provided there was a question of fact; but if it is granted solely upon questions of law, that is, in the language of the Constitution, "on exceptions," that court may review the questions of law raised by exceptions, and if it is found that no exception was well taken, the order must be reversed and the judgment reinstated. Vollkommer v. Cody (1904), 177 N. Y. 124; Cooper v. N. Y., O. & W. Ry. Co. (1904), 180 N. Y. 12.

Where a judgment of the trial term was reversed by the Appellate Division on "questions of law only," and none of the exceptions presents reversible error, the order of the Appellate Division must be reversed and judgment of the trial term affirmed. Reehil v. Fraas (1909), 197 N. Y. 64.

Evidence supporting verdict.— The unanimous affirmance by the Appellate Division of a judgment entered upon a verdict directed by the court on uncontroverted evidence, does not preclude the Court of Appeals from considering whether the evidence justified the direction of the verdict. Second Nat. Bank v. Weston (1902), 172 N. Y. 250.

But after unanimous affirmance by the Appellate Division of a judgment entered upon a verdict not directed by the court, the question whether the verdict is supported by any evidence is not open to review by the Court of Appeals. Bank of Monongahela Valley v. Weston (1902), 172 N. Y. 259.

Review of equity case.— The fact that issues in the action were framed and submitted to the jury does not prevent the application of the rule that in an equity case the Court of Appeals will consider no exceptions either to alleged errors in the charge or to the rulings which do not affect the merits, and after the adoption of

the findings by the trial court all proceedings, including the practice upon review, are the same as if no jury had been called. Townsend v. Bell (1901), 167 N. Y. 462.

Where, on appeal from an order reversing a judgment granted at Special Term in an equity action, the order of reversal is silent as to the grounds on which it is based, the facts must be taken as found, and the case examined upon the assumption that the Appellate Division predicated its reversal solely upon questions of law; and the reversal cannot be sustained unless the legal conclusion adopted by the trial court is without support in the facts found. Ball v. Broadway Bazaar (1909), 194 N. Y. 429.

Reversal of surrogate's decree.— Where a surrogate's decree is reversed by the Appellate Division by an order which does not disclose that the reversal is upon a question of fact it must be presumed that it is upon the law and, where the surrogate's decision does not separately state the facts found, that all the facts warranted by the evidence are necessary to support the decree are found by him; and, if the record discloses no error of law, the reversal must be reversed and the decree of the surrogate affirmed. Matter of Keefe (1900), 164 N. Y. 352; Matter of Barefield (1904), 177 N. Y. 387.

Finding as to foreign law.—A referee's finding as to the law of another State when unanimously affirmed by the Appellate Division, cannot be reviewed by the Court of Appeals, since it is a finding of fact. Genet v. Del. & Hud. Canal Co. (1900), 163 N. Y. 173.

Questions of law on appeal from reversal.— On appeal from a reversal by the Appellate Division in an action tried by the court, presumed, by force of section 1338 of the Code, not to have been based on a question of fact, the question whether a fact found has the support of any evidence which, according to any reasonable view, warranted the trial judge in finding it, is a question of law for the Court of Appeals. Gannon v. McGuire (1899), 160 N. Y. 476.

Reversal not stated to be upon question of fact.— When, on appeal from a reversal by the Appellate Division in an action tried by a referee, it does not clearly appear in the body of the judgment or order appealed from that the reversal was upon a

question of fact, the Court of Appeals, by force of section 1338 of the Code, must treat the decision of the Appellate Division as one not interfering with the facts found on the trial. Lannon v. Lynch (1899), 160 N. Y. 483.

Reversal upon questions of law must show examination of questions of fact.—An order of the Appellate Division, reversing a judgment entered upon a verdict solely upon specified questions of law and granting a new trial, which recites that that court examined the questions of fact as to the other issues in the case and found no error therein, but fails to show that the questions of fact as to the issues specified were examined and the verdict thereon approved, is not appealable to the Court of Appeals. Albring v. N. Y. C. & H. R. R. Co. (1901), 166 N. Y. 287.

The provision of section 1337, that where the justices of the Appellate Division are divided as to whether there is evidence supporting or tending to support a finding or verdict not directed by the court a question for review is presented, in no way relieves the party who asserts it from the burden of establishing the unanimity of the decision. Laidlaw v. Sage (1899), 158 N. Y. 73.

An order of the Appellate Division reversing a judgment upon a verdict "upon questions of law only, the facts having been examined and on error found therein," is appealable and the Court of Appeals may review any of the questions of law that were before the Appellate Division. Albring v. N. Y. C. & H. R. R. R. Co. (1903), 174 N. Y. 179; Serano v. N. Y. C. & H. R. R. Co. (1907), 188 N. Y. 156.

Review of sufficiency of evidence.— Upon an appeal from a nonunanimous affirmance by the Appellate Division the record may be examined in order to ascertain whether there is any evidence which, upon any reasonable view, will sustain the verdict, and when the undisputed facts in connection with the testimony of the plaintiff, when supported by every inference that can be drawn therefrom, do not warrant a verdict in his favor, a question of law arises reviewable by the Court of Appeals. Jerome v. Queen City Cycle Co. (1900), 163 N. Y. 351.

Only questions raised by the exceptions to the charge of the trial judge as made, or to his refusal to charge as requested, are presented by an appeal from a judgment entered upon a verdict

unanimously affirmed by the Appellate Division; the sufficiency of the evidence to support a party's theory of the facts cannot be considered. Rider v. Syracuse R. T. Ry. Co. (1902), 171 N. Y. 139.

Reversal upon facts.— Where the Appellate Division reverses upon the facts and grants a new trial, the Court of Appeals has no jurisdiction to review the order, and when, upon appeal from a reversal stated to be upon the facts, an inspection of the record shows that a question of fact was involved in the case, the appeal must be dismissed. Bini v. Smith (1899), 161 N. Y. 120.

The Court of Appeals has no jurisdiction to review an order of the Appellate Division reversing a judgment on the law and the facts and granting a new trial if there is any question either of fact, or of credibility of witnesses involved. That court can only review a reversal by the Appellate Division upon the law and the facts and the granting of a new trial, in a case where a party is entitled, as a matter of law, to a direction of a verdict in his favor. Reich v. Dyer (1904), 180 N. Y. 107; and see Allen v. Corn Exchange Bank (1905), 181 N. Y. 278.

Questions of law on appeal from reversal on law.— On appeal from a judgment and order of the Appellate Division reversing a judgment entered upon a report of a referee or a determination in the trial court and ordering a new trial, without stating that the reversal was upon the facts, and hence presumed to have been upon the law, the Court of Appeals can consider only three questions of law, namely: whether a material error was committed in receiving or rejecting evidence; whether the conclusion of law is supported by the facts found; and whether any material finding of fact is without any evidence to support it. National Harrow Co. v. Bement (1900), 163 N. Y. 505.

Where the unanimous order of the Appellate Division, reversing a judgment rendered at Special Term on questions of law only, affirmatively declares that the facts have been examined and no error found therein, the facts found by the trial court are conclusive on the Court of Appeals and the only question that can be determined by the latter court is whether those facts justified or required a reversal of the judgment rendered thereon by the Special Term. American Guild v. Damon (1906), 186 N. Y. 360.

Misnomer of question involved.— When an Appellate Division order reversing a judgment and granting a new trial states that the reversal was upon questions of law only, the facts having been examined and no error found therein, the Court of Appeals will reverse the reversal and affirm the judgment of the trial court, when it appears that the question involved was really one of fact and not of law. Clark v. N. Y. C. &. H. R. R. R. Co. (1908), 191 N. Y. 416.

Reviewable order of reversal.—An appeal from an order of the Appellate Division reversing a judgment upon questions of fact and law and ordering a new trial is reviewable in the Court of Appeals, when there is no controverted fact upon which the decision of the question of law depends and there are no questions of fact to be resettled upon a new trial of the case to affect the question of law involved. Erie R. R. Co. v. Steward (1902), 170 N. Y. 172.

An order of the Appellate Division, reversing a judgment of the Special Term and granting a new trial, which does not state that the reversal was upon the facts, must be presumed to have been made on questions of law; and where the record discloses no errors in the reception or rejection of evidence, or in material findings of fact unsupported by any evidence or in conclusions of law not sustained by the facts found, it must be reversed, and the judgment of the Special Term affirmed. Neuman v. N. Y. Mut. S. & L. Assn. (1900), 164 N. Y. 248; Dunlap Co. v. Young (1903), 174 N. Y. 327.

To sustain, in the Court of Appeals, the reversal by the Appellate Division of the judgment below, the respondent must show that some error of law is involved in such judgment, where the order does not state that the reversal is upon the facts. Metcalf v. Moses (1900), 161 N. Y. 587.

An order of reversal of the Appellate Division, stating that the reversal was upon the facts and the law, is conclusive upon the Court of Appeals that a question of fact is actually involved, except when the record discloses that there are neither facts, nor inferences from conceded facts, in opposition to the decision of the trial court. Livingston v. City of Albany (1900), 161 N. Y. 602.

The Court of Appeals has no jurisdiction to review an order of reversal of the Appellate Division, stating that the reversal was upon the facts and the law, when the record discloses any controversy whatever as to material facts. Livingston v. City of Albany (1900), 161 N. Y. 602.

Section 1338 of the Code has no application to a judgment entered upon a verdict, and the Court of Appeals has no jurisdiction to review an order of the Appellate Division reversing a judgment entered upon a special verdict and granting a new trial, when it does not appear that the facts as found by the verdict were affirmed or approved by the Appellate Division. Schryer v. Fenton (1900), 162 N. Y. 444.

An order of the Appellate Division, reversing a decision on a motion to reduce an award for alimony, must be presumed by the Court of Appeals, under section 1338 of the Code, to have been made upon the law, where the order does not contain any statement that the reversal was upon the facts. Wetmore v. Wetmore (1900), 162 N. Y. 503.

Question of fact possibly involved.—An appeal from an order of the Appellate Division of reversal upon the law and the facts will be dismissed where it appears from the record that a question of fact might be involved in a decision upon the merits. India Wharf Brewing Co. v. Brooklyn Wharf Co. (1903), 173 N. Y. 167.

Presumption as to reversal.— The Court of Appeals is compelled to presume that a judgment was not reversed by the Appellate Division upon a question of fact, when the order of reversal is silent upon the subject, although the opinion of the Appellate Division shows an intention to reverse upon the facts as well as the law. Spence v. Ham (1900), 163 N. Y. 220.

Reversal upon law and facts.—A judgment declared in an order of the Appellate Division to have been reversed upon the law and the facts, is reviewable as to the law, by the Court of Appeals, where there is no dispute as to the facts and they are not open to different inferences. O'Brien v. East River Bridge Co. (1900), 161 N. Y. 539.

Presumption as to reversal upon questions of law.—A reversal of a judgment of the trial court by the Appellate Division must be presumed under section 1338 to have been made upon questions

of law, when the order of reversal contains no statement that the judgment was reversed upon the facts. Van Beuren v. Witherspoon (1900), 164 N. Y. 368.

Where an order of the Appellate Division, in reversing a judgment of the Special Term and granting a new trial, fails to state that the reversal was upon the facts, the Court of Appeals is compelled to assume that the judgment was reversed for errors of law alone, although a reference to the opinion indicates that the contrary is the fact. Hinckel v. Stevens (1900), 165 N. Y. 171.

The form of an order of the Appellate Division reversing a judgment and granting a new trial is not material with respect to showing whether or not the reversal was upon the facts, where there are no disputed questions of fact. Buffalo & L. Land Co. v. Bellevue L. & I. Co. (1901), 165 N. Y. 247.

Findings conclusive.— It will be presumed that the Appellate Division reversed a judgment of the Special Term upon the law where its order does not state that the reversal was upon a question of fact, and in such case the Court of Appeals will consider whether the findings are supported by the evidence, and if the record so discloses they are conclusive upon it. Village of Champlain v. McCrea (1901), 165 N. Y. 264.

Finding in certiorari proceeding.— If a finding of fact by the Special Term in certiorari proceedings to review an assessment has support in the evidence, it cannot be reviewed by the Court of Appeals upon appeal from an order of the Appellate Division reversing the order of the Special Term upon the law and not upon the facts. People ex rel. Manhattan Ry. Co. v. Barker (1901), 165 N. Y. 305.

Reversal in certiorari proceeding.— The Court of Appeals, on appeal from an order of the Appellate Division reversing a final order of the Special Term in a proceeding by certiorari to review an assessment, which involved a trial of an issue of fact, is required by sections 1338, 1361 of the Code, to assume that the reversal was not upon the facts, but upon some error of law, unless the contrary clearly appears in the record body of the order appealed from. People ex rel. Manhattan Ry. Co. v. Barker (1901), 165 N. Y. 305.

It seems that section 1338 does not apply to the reversal, on certiorari, of the determination of a town board on a claim pre-

sented to it for audit, since such a board is not a court, nor are its members referees. People ex rel. Village of Brockport v. Sutphin (1901), 166 N. Y. 163.

An order of the Appellate Division reversing upon the law and the facts where questions of law are involved which that court has the power to review, is not reviewable by the Court of Appeals, and, although there may be an apparent conflict between the order and the opinion below, the order is controlling. Spies v. Lockwood (1901), 165 N. Y. 481.

Unanimous reversal.— Upon an appeal from an unanimous decision of the Appellate Division, reversing on certiorari the determination of a town board disallowing a claim presented for audit, when the record is silent as to the grounds of reversal the Court of Appeals is simply required to assume, under section 1338 of the Code, that the reversal was not founded upon a question of fact so as to enable it to review the questions of law, and is not required to assume that the Appellate Division actually decided that there was evidence to support the facts found, and so be deprived of jurisdiction. People ex rel. Village of Brockport v. Sutphin (1901), 166 N. Y. 163.

The rule that upon an appeal from an order of the Appellate Division reversing a judgment upon the facts and granting a new trial, the Court of Appeals will presume that the reversal was not upon the facts, unless the contrary clearly appears in the body of the order, is or ought to be familiar to counsel, and the failure of the respondent to have the order truly express the decision of the Appellate Division is at his peril. Queen v. Weaver (1901), 166 N. Y. 398.

Where such an appeal has been taken, although it is apparent that the reversal was upon the facts, if the order contains no statement to that effect it will be presumed to have been upon the law, and if the record discloses no errors of law, the reversal, although properly directed, cannot be sustained and the judgment of the trial court must be affirmed. *Id.*

Embodiment of opinion in order of reversal.—An order of the Appellate Division reversing a judgment and granting a new trial upon the grounds stated in the opinion "delivered herein and which is hereby made a part of the order," cannot be considered a statement that the reversal was upon the facts, and is not a com-

pliance with section 1338 of the Code, especially where the opinion is susceptible of different constructions, and it is a matter of doubt whether the reversal was upon the law or the facts, or both. The reversal must, therefore, be presumed to have been upon questions of law only. Townsend v. Bell (1901), 167 N. Y. 462.

Presumption of question of law.— Where, in an action tried by the court or a referee, the decision did not state separately the facts found (Code Civ. Pro., § 1022), whether the Appellate Division reverses and orders a new trial, or grants a final judgment to either party, if its order is silent as to its grounds section 1338 controls and requires the presumption that the reversal was upon a question of law. Bomeisler v. Forster (1897), 154 N. Y. 229.

Application of presumption.— Where, on reversal of a judgment in an action tried by the court, the order of the Appellate Division states that one of the justices concurred on the ground that the judgment was against the weight of evidence, the other justices not placing their determination upon that ground, the Court of Appeals is bound to presume that the judgment was not reversed upon a question of fact. Lenox v. Lenox (1909), 195 N. Y. 359.

When appeal from reversal on facts not dismissed; judgment absolute.— Where, upon appeal to the Court of Appeals from an order of the Appellate Division reversing a judgment upon the facts or on the law and the facts and granting a new trial, it is found that questions of fact are involved, upon which the reversal could properly have been based, the appeal will not ordinarily be dismissed, but the order of reversal will be affirmed and judgment absolute awarded against the appellant upon the stipulation with costs in all courts, since it is necessary to restrain its practice of taking such reckless appeals by the most repressive form of judgment. Matter of Mosher (1906), 185 N. Y. 435; Van Slyck v. Woodruff (1908), 192 N. Y. 547; Tousey v. Hastings (1909), 194 N. Y. 79.

Appeal from reversal of judgment on verdict.—An appeal does not lie to the Court of Appeals from a judgment of the Appellate Division reversing a judgment and order and granting a new trial, when the appeal to the Appellate Division was not only from a

judgment entered upon the verdict of a jury, but also from an order denying a motion for a new trial upon the ground that the verdict was against the weight of evidence, and the order of reversal does not state whether it was upon the law or facts, or both. Henavie v. N. Y. C. & H. R. R. R. Co. (1897), 154 N. Y. 278.

Where, in the trial of an action before a jury, after the granting of a motion dismissing the complaint at the close of plaintiff's case, to which no exception was taken, a motion for a new trial, made without specifying any grounds, was denied, but no order was entered and no foundation laid for an appeal therefrom, the Appellate Division, upon an appeal from the judgment dismissing the complaint, has no power to review or reverse upon the facts, and where there are no exceptions taken to rulings relating to the admission or exclusion of evidence that would authorize the reversal of the judgment of the trial court, the Court of Appeals must reverse the order of the Appellate Division and affirm the judgment of the trial court. Collier v. Collins (1902), 172 N. Y. 99.

The substitution of the words "a determination in the trial court" for the words "a decision of the court upon a trial without a jury," in section 1338 of the Code of Civil Procedure, by the amendment of 1895, did not extend the right of review by the Court of Appeals of a reversal of a judgment entered upon the verdict of a jury. Henavie v. N. Y. C. & H. R. R. R. Co. (1897), 154 N. Y. 278.

Where an order states that reversal is upon law and facts, if there is no dispute as to the facts, judgment is reviewable upon questions of law. O'Brien v. East River Bridge Co., 161 N. Y. 539; Buffalo & L. S. Co. v. Bellevue L. & I. Co., 165 N. Y. 247.

(See, also, under Rule I, as to the jurisdiction of the Court of Appeals as affected by the amendments to the Constitution and to section 191 of the Code of Civil Procedure, restricting the court to the review of questions of law, and providing that no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals.)

Review of facts in capital cases.

The provision of section 528 of the Code of Criminal Procedure, that —

> when the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below —

requires the Court of Appeals to review the facts in every capital case, and to determine whether, upon all the evidence, there is, in its opinion, good and sufficient reason for setting aside the verdict of the jury and granting a new trial. People v. Driscoll (1887), 107 N. Y. 414.

The above provision does not authorize a review of findings of fact of a jury, founded on sufficient evidence, or a reversal simply because of a difference of opinion on the facts between the court and the jury; it simply invests the court with power to order a new trial, where, upon a consideration of the whole case, it is manifest injustice has been done, although the question has not been properly raised by exceptions. People v. Kelly (1889), 113 N. Y. 647.

The Court of Appeals will not, under the authority conferred upon it by section 528, interfere with a verdict supported by sufficient evidence, unless it reaches the conclusion on the whole case that there is a strong probability that injustice has been done. People v. Tice (1892), 131 N. Y. 651; People v. Rice (1899), 159 N. Y. 400.

Where the evidence is sufficient to support the verdict, the Court of Appeals has, under the statute, no power to reverse a judgment of death unless it appears that error was committed or injustice done. People v. Filipeli (1903), 173 N. Y. 509.

In exercising the jurisdiction conferred by section 528 of the Criminal Code, the Court of Appeals is to be governed by the practice regulating the review of questions of fact on appeal to the Supreme Court, and if there is a fair conflict in the evidence, or if different inferences may be drawn from it, the determination of the jury will not be interfered with, unless it is clearly against the weight of evidence, or appears to have been influenced by passion, prejudice, mistake or corruption. The fact that there is in the judgment of the court a rational doubt of the guilt of the

defendant, is not a sufficient ground for a reversal. People v. Taylor (1893), 138 N. Y. 398.

On the review of a conviction of murder in the first degree, where the defense of insanity was interposed, the verdict is conclusive upon that issue, in the absence of elements showing that the verdict was against the weight of evidence, or that it was influenced by some mistake, error or prejudice. People v. Braun (1899), 158 N. Y. 558.

On appeal from a conviction on evidence from which conflicting inferences as to premeditation and deliberation may be drawn, a new trial will not be granted by the Court of Appeals, unless it reaches the conclusion that justice has not been done. People v. Schmidt (1901), 168 N. Y. 568.

The Court of Appeals, in exercising its power in a capital case, to review the facts and grant a new trial when satisfied that the accused has not had a fair trial, or when injustice has been done, must observe the rules and principles which apply to all tribunals possessing appellate jurisdiction. People v. Kerrigan (1895), 147 N. Y. 210. And, when the jury has once determined, upon evidence which is sufficient, even though capable of diverse or opposing inferences, the questions of fact, the Court of Appeals has no more right than the trial court to substitute its own judgment in the place of that of the jury, or to usurp its legitimate functions. Id.; People v. Sutherland (1897), 154 N. Y. 345.

In determining whether a new trial should be granted in a capital case, it is not the province of the Court of Appeals to review and determine controverted questions of fact arising upon conflicting evidence, but the jury is the ultimate tribunal in such a case, and with its decision the court may not interfere, unless it reaches the conclusion that injustice has probably been done. People v. Place (1899), 157 N. Y. 584; People v. Kennedy (1899), 159 N. Y. 346.

The power conferred upon the Court of Appeals to order new trials on the review of capital cases is not called into exercise by the appearance of some error in the conduct of the trial, which no exception pointed out, unless the substantial rights of the accused can be seen to have been affected by it, and, therefore, justice demands another trial. People v. Hoch (1896), 150 N. Y. 291. But while this power should be cautiously exercised, it should be

used whenever the court is satisfied from the record that justice requires a new trial. People v. Corey (1898), 157 N. Y. 332; and an exception is always necessary to raise a pure question of law. People v. McDonald (1899), 159 N. Y. 309; People v. Tobin (1903), 176 N. Y. 278; People v. Rodawald (1904), 177 N. Y. 408.

Section 528 of the Code of Criminal Procedure was not intended to confer upon the Court of Appeals the right to disregard any valid exception taken by a defendant, or to abridge any right he formerly possessed in reviewing the rulings of a trial court; but its purpose was to throw additional safeguards around the defendant. People v. Corey (1896), 148 N. Y. 476.

The court may exercise the power under section 528 where defendant has suffered gross injustice by the admission of incompetent evidence, even though defendant's counsel made no objection thereto. People v. Kennedy (1900), 164 N. Y. 449.

Connection with section 542 of Code of Criminal Procedure.— The power of the Court of Appeals to grant new trials in capital cases must be exercised in conformity with the statutory provision (Code Crim. Pro., § 542), which requires that judgment upon an appeal must be rendered without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties. People v. Youngs (1896), 151 N. Y. 210; People v. Constantino (1897), 153 N. Y. 24; People v. Silverman (1905), 181 N. Y. 235; People v. Wenzell (1907), 189 N. Y. 275.

Homicide of lower grade than murder in first degree.— When the trial of an indictment for murder results in a verdict for a lower grade of homicide than murder in the first degree, and, consequently, the judgment is not of death, the Court of Appeals has no power to review the facts, but its jurisdiction is confined to questions of law raised by exception. People v. Ledwon (1897), 153 N. Y. 10.

Only those facts should be mentioned which are either specifically found or are presumed to have been found according to the rules governing appeals to the Court of Appeals; except, first, when there is a reversal by the court below; second, when there is an affirmance, but it is not unanimous, and it is claimed that there is no evidence whatever to support a fact which is necessary

to sustain the judgment. Stevens v. O'Neill (1902), 169 N. Y. 375.

Necessity of exceptions.— It is only when the verdict was against the weight of evidence, or against law, or justice requires a new trial, that the Court of Appeals is permitted to reverse in the absence of a valid exception; and exceptions are still necessary, notwithstanding the statute to fully protect the rights, and especially the technical rights, of a person on trial, even for a capital offense. People v. Tobin (1903), 176 N. Y. 278; People v. Ennis, Id. 289.

Judges absent from argument.

The authority for a judge of the Court of Appeals to consider and take part in the decision of a cause argued in his absence is implied by the exception of the judges of that court from the general prohibition contained in the following clause of the Judiciary Law, section 22, formerly contained in section 46 of the Code of Civil Procedure:

A judge other than a judge of the Court of Appeals, or of the Appellate Division of the Supreme Court, shall not decide, or take part in the decision of a question which was argued orally in the court, when he was not present and sitting therein as a judge.

For an instance of such submission to a judge who was absent from the argument, see Baker v. Drake (1876), 66 N. Y. 518.

RULE IX.

Criminal Causes.

Appeals in criminal cases brought after making up the calendar, or too late to be placed on said calendar, may be put upon the calendar at any time, and brought on for a hearing as preferred causes, upon a notice of ten days; and it shall be the duty of the clerk to place such causes on the calendar for the day for which they shall be noticed or upon which the cause shall be ordered by the court, or stipulated by the parties, to be heard.

Code of Criminal Procedure.

§ 536. An appeal to the Court of Appeals may, in the same manner, (as prescribed by § 535, *i. e.* on ten days' notice) be brought to argument by

either party, on any day in term, and where the judgment appealed from is of death, the appeal must be brought on for argument within six months from the taking of such appeal, unless the court, for good cause shown, shall enlarge the time for that purpose. (Amended by Laws 1902, chap. 369.)

(See, also, § 790, Code of Civil Procedure, under Rule XIV.)

Unreasonable delay in argument of capital case.—A delay of nearly two years in presenting for argument an appeal from a judgment convicting the defendant of murder in the first degree was held unreasonable in People v. Friola (1903), 174 N. Y. 324. (Judgment of conviction was rendered April 29, 1901, prior to enactment of ch. 369 of 1902.)

The refusal or omission of the official stenographer to furnish the minutes of the trial, without adequate excuse, constitutes good cause for discipline, but does not call for the enlargement of the time for bringing the appeal on for argument beyond the time which it appears, on the application, will then be required to furnish the minutes and prepare and print the case. People v. Hill (1909), 197 N. Y. 532.

Day calendar.

To insure a criminal cause being placed on the day calendar for a certain day, it is necessary, where the day has not been fixed by an order of the court, that a notice of argument (with proof or admission of service) or a stipulation, containing a statement that the cause is a criminal cause, be filed with the clerk before the day calendar for the day named for hearing, in the notice or stipulation, is made up. When a criminal cause is put on the day calendar, its preference is exhausted and it cannot be moved out of its order.

RULE X.

Submission and Reservation of Causes.

Causes will not be received upon submission until reached in the regular call of the calendar.

No reservation will be made of any of the first eight causes, unless on account of sickness, or an engagement elsewhere in the actual trial or argument of another cause commenced before the term of this court, or other inevi-

table necessity, to be shown by affidavit. Other causes may be reserved upon reasonable cause shown, or by stipulation of parties filed with the clerk; but no cause shall be so reserved by stipulation after the same has been placed upon the day calendar.

Causes reserved for a day certain by stipulation, when in order to be called, have priority among each other according to the time of filing the stipulations with the clerk, and shall follow next in order the undisposed of causes of the calendar for the day previous. Default may be taken in them.*

No reserved cause, whether reserved generally or for a particular day, will be called before its number is reached on the regular call of the calendar.

Submission of causes.

Causes, when reached on the day calendar, may be submitted without oral argument, by both parties, or may be argued by one party and submitted by the other. If it is intended to submit, the clerk should be informed of the fact; and each party who intends to submit must see to it that the requisite copies of his points (and, on the part of the appellant, of the causes also) have been duly filed with the clerk and served, as prescribed by Rule VII.

Reservation of causes.

Control of calendar.— The court has at all times control over its calendar. Matter of Reynolds (1879), 77 N. Y. 631; Crain v. Rowley (Ct. App. 1849), 4 How. Prac. 79.

The Chief Judge has control of the calendar. All propositions in reference to the arrangement or disposition of causes should be addressed to him. (See "Miscellaneous Practice, not included in the Rules," 7 How. Prac. 240.)

Reservation by stipulation; effect of.— By stipulating to set a cause down for a day certain, parties insure that the cause will

* The additional provision that "they will, if passed, go down upon future calendars, as if passed in the regular order," is stricken out by the amendments of 1906.

not be put on the day calendar before the day named. If the day calendar for that day is filled, up to the limit of eight causes, with causes having priority over a given stipulated cause, such cause will be placed on the first day calendar thereafter on which it can come in its order of priority.

After day calendar made up.— By force of the provision of this rule, that "no cause shall be reserved by stipulation after the same has been placed upon the day calendar," the clerk is without power to change the day calendar after it has been once regularly made up by him (as to when the day calendar is made up, see under Rule XII); and a stipulation of reservation received by the clerk after the day calendar has been made up is too late to affect any cause on such day calendar, but the cause will retain its place and must be disposed of if reached on the day for which the calendar is made. If not reached on that day, however, the cause may be left off, on making up the next day's calendar, and go over for the day named in the stipulation.

Court not in session on day stipulated.— When causes are stipulated for days when the court is not in session, they will, unless new stipulations for a later day are filed, be set down by the clerk for the first day thereafter on which the court is in session, and will then be placed on the day calendar in their numerical order.

New general calendar; effect of, on prior stipulations.— When a new general calendar is made up, stipulations theretofore filed, reserving causes carried over to the new calendar go for nothing; and if the hearing of such causes on the new calendar is to be reserved for days certain, new stipulations must be filed. 170 N. Y. 122; Slater v. Slater, 174 N. Y. 274.

RULE XI.

Motions and Appeals from Orders.

[Motions, appeals from final orders in special proceedings, from interlocutory judgments and from orders in actions and special proceedings, certified to this court by the Appellate Division of the Supreme Court, except orders granting a new trial, may be noticed for, and will be heard on, the first Monday of each session of the court, before

taking up the general calendar. Notices of argument of appeals within this rule must contain the claim that the appeal is one entitled to be heard under Rule XI of the Court of Appeals.

Motions will be heard orally on the first Monday of a session only; but they may be submitted without oral argument on any Monday when the court is in session; provided they are submitted by both sides and the papers are filed with the clerk on or before the preceding Friday. If either party demands an oral argument of a motion noticed for any other than the first Monday of a session, the motion will go over to the first Monday of the succeeding session.]

Where notice has been given of a motion, if no one shall appear to oppose, it will be granted as of course.

If a motion be not made on the day for which it has been noticed, the opposing party will be entitled, on applying to the court at the close of the motions for that day, to a rule denying the motion, with costs.

Motions.

Definitions.—A motion is an application for an order; section 768, Code Civ. Pro.; an order is a direction of the court or of a judge, in writing, and not contained in a judgment. Section 767, Code Civ. Pro.

A motion in general relates to some incidental question, collateral to the main object of the action; Rens. & Sar. R. R. Co. v. Davis (1873), 55 N. Y. 145, 149; it is not a remedy in the sense of the Code, but is based upon some remedy, and is always connected with and dependent upon the principal remedy. It is to furnish relief in the progress of the action or proceeding in which it is made and generally relates to matters of procedure, although it may be used to secure some right in consequence of the determination of the principal remedy. Matter of Jetter (1879), 78 N. Y. 601, 605.

An intermediate order which may be reviewed on appeal from a final judgment is one made between the commencement and termination of the action. Spencer v. Huntington (1905), 100 App. Div. 463.

Motion papers.— Motion papers must be entitled in the Court of Appeals (section 1295, Code Civ. Pro.); and papers not so entitled cannot be read. Clickman v. Clickman (1848), 1 N. Y. 611.

Upon a motion to dismiss an appeal, upon the ground that the Appellate Division unanimously decided that there was evidence supporting or tending to sustain the findings of fact, and that the exceptions taken upon the trial were frivolous, the moving party should furnish the court with at least one copy of the return or of the record in the court below, and if any reason exists why he cannot, it should be stated in the moving papers. Hutchinson v. Root (1897), 153 N. Y. 329.

Motions for leave to appeal.— For the principles governing the allowance of appeals by the Appellate Division or, on its refusal, by a judge of the Court of Appeals, from judgments of affirmance in actions for a personal injury, where the decision of the Appellate Division was unanimous (Code Civ. Pro., § 191, subd. 2), see Sciolina v. Erie Preserving Co. (1896), 151 N. Y. 50. See also, under Rule I, p. 60, etc.

Motion to compel attorney to pay costs on dismissal.—A motion to compel appellant's attorney to pay costs, personally, on dismissal of appeal, cannot be made in the Court of Appeals; it must be made in the court below after the judgment has been there entered. Struffman v. Muller (1878), 74 N. Y. 594.

Motions as to undertaking.—A motion to amend the undertaking given on appeal to the Court of Appeals may be made in the court below, when within section 722 of the Code of Civil Procedure, which allows certain amendments to be made "by the court wherein the judgment is rendered, or by an appellate court." Sullivan v. Conners (Supr. Ct. 1880), 10 Wkly. Dig. 455.

After an appeal has been perfected by giving an undertaking, as prescribed by section 1326 of the Code, a motion to compel the giving of a new undertaking (section 1308, Code Civ. Pro.), should be made in the Court of Appeals, that being "the court in which the appeal is pending," and the court below has no jurisdiction to entertain it. Parks v. Murray (1888), 109 N. Y. 646.

(See, also, under Rule I, as to when jurisdiction of Court of Appeals attaches.)

The court cannot amend an undertaking without consent of the sureties; and an appellate court ought not to encourage appeals by allowing amendments to undertakings without special reasons. Langley v. Warner (1848), 1 N. Y. 606.

Motions to dismiss appeal.— The court will entertain a motion to dismiss an unauthorized appeal, before the case is reached on the calendar. Stoughton v. Lewis (Ct. App. 1885), 2 How. Prac. (N. S.) 331.

Where an appeal to the Court of Appeals has been perfected, a motion to dismiss the same can be made only in that court. Howey v. Lake Shore R. Co. (1896), 15 Misc. Rep. 526.

The objection that the judgment or order sought to be reviewed is not appealable may be raised and decided either on the main appeal or by motion to dismiss. McKeown v. Officer (1891), 127 N. Y. 687.

It is not the practice of the Court of Appeals to entertain a motion to dismiss an appeal in part, in advance of the argument of the case on appeal. Waldo v. Schmidt (1910), 198 N. Y. 193.

A respondent, in moving to dismiss an appeal on the ground that the time for appealing had expired before service of notice of appeal, stands upon a strict right and must show a strict and technical compliance with the statute on his part to entitle him to the relief sought. Good v. Daland (1890), 119 N. Y. 153.

It is not a ground for dismissal of appeal that the appellant has failed to notice the case for argument and place it on the calendar; he is bound only to file the return and serve the printed case; if the respondent wishes to expedite the appeal he may notice. Nichols v. McLean (1885), 98 N. Y. 458.

Where, upon inspection of the record filed in the Court of Appeals, in an action tried by a jury, it appears that no question of law that can be reviewed is presented, the appeal will be dismissed on motion. Dalzell v. Long Island R. R. Co. (1890), 119 N. Y. 626.

Where questions presented by an appeal from a judgment are dependent for their solution upon a consideration of the pleadings and proofs, they will not be disposed of upon a motion to dismiss the appeal for alleged frivolousness. Hooper v. Beecher (1888), 109 N. Y. 609.

To sustain a motion to dismiss an appeal before argument, on the ground that the judgment below has been unanimously affirmed by the Appellate Division as to the facts and that the exceptions in the case are frivolous, the exceptions must be so obviously frivolous on their face as to require no argument to demonstrate it. Bachrach v. Manhattan R. Co. (1897), 154 N. Y. 178.

An objection to the entertainment of an appeal by the Court of Appeals, on the ground that it does not appear by the record that infant defendants and respondents had been served with process in the action, should be presented by a formal motion to dismiss the appeal, after notice to all parties. Allen v. Allen (1896), 149 N. Y. 280.

Where the case on appeal fails to show the court in which judgment was rendered, or to show such a judgment as is set forth in the notice of appeal, the appeal will be dismissed on motion. It is not enough that the case states facts which make it probable, merely, that an appealable judgment has been rendered. Lahens v. Fielden (Ct. App. 1862), 15 Abb. Prac. 177. But where the court can see that it is probable that the error is clerical, and that in fact a right of appeal exists, it may allow the return to be withdrawn for amendment in the court below. *Id.*

In People ex rel. Hamilton v. Police Comm'rs (1906), 183 N. Y. 566, the fact that the relator in a *habeas corpus* proceeding had not surrendered himself into custody, but had avoided the jurisdiction of the court, was held not to be a sufficient reason for dismissing his appeal from an order dismissing the writ and remanding him to custody.

A notice of motion to dismiss appeal is not fatally defective because of an omission to specify therein upon what papers the motion will be made; the nature of the motion apprises the appellant that it is based on the record. Browne v. Taylor (1877), 69 N. Y. 627.

Where a motion has been made for the dismissal of an appeal to the Court of Appeals, a subsequent motion, based upon grounds which were not brought to the attention of the court upon the first motion, must be denied, since a party may not make as many separate motions to dismiss an appeal, as he has, or supposes he has, distinct grounds therefor, but must instead assign

on his first motion all the reasons that he relies upon for a dismissal. Ferguson v. Bruckman (1900), 164 N. Y. 481.

If question certified can be correctly answered in either negative or affirmative, appeal will be dismissed. Malone v. St. Peter's & St. Paul's Church (1902), 172 N. Y. 269.

An order of the Surrogate's Court must set forth the papers upon which it was made, or if it does not, the appeal therefrom will be dismissed. Matter of Gowdey (1905), 101 App. Div. 275.

(See, also, under Rule I, pp. 30–34, under heading "Jurisdiction of Court of Appeals," as to grounds of entertainment and dismissal of appeals.)

Dismissal of appeal in criminal causes.— The Code of Criminal Procedure provides as follows:

§ 533. If the appeal be irregular in a substantial particular, but not otherwise, the court may, on any day in term, on motion of the respondent, upon five days' notice, served with copies of the papers on which the motion is founded, order it to be dismissed.

§ 534. The court may also, upon like motion, dismiss the appeal, 1. If the return be not made, as provided in section 532, unless for good cause, the time to make such return be enlarged; 2. If the appeal be not brought on for argument by the appellant as promptly after the return has been made as the circumstances of the case will reasonably admit. [As amended by chap. 427 of 1897.]

Motions to withdraw appeal.—It was held in Snebley v. Conner (1879), 78 N. Y. 218, that although an appeal from an order of General Term granting a new trial, in a case tried by a jury, which might have been decided on the facts, was not reviewable in the Court of Appeals, the order might be affirmed and judgment absolute rendered against the appellant on his stipulation, instead of permitting a dismissal of the appeal. See, also, Boyle v. N. Y., L. E. & W. R. R. Co. (1889), 115 N. Y. 636; Williams v. D., L. & W. R. R. Co. (1891), 127 N. Y. 643; Matter of Mosher (1906), 185 N. Y. 435; Cooke v. People's Nat. Bank (1903), 177 N. Y. 68; and it is intimated in Livingston v. City of Albany (1900), 161 N. Y. 602, that if appeals are taken from Appellate Division orders of reversal and new trial, stating that the reversal was upon the law and the facts, the rule of affirmance with judgment absolute against the appellant on his stipulation, adopted by Snebley v. Conner, *supra,* will be applied when the record discloses that a question of fact is actually involved.

And in such case the judgment absolute will be with costs in all courts, since it is necessary to restrain the practice of taking such reckless appeals by the most repressive form of judgment. Van Slyck v. Woodruff (1908), 192 N. Y. 547; Tonsey v. Hastings (1909), 194 N. Y. 79.

Where the complaint was dismissed at the trial and, on appeal, the General Term reversed the judgment entered thereon, and ordered a new trial, and the defendant appealed to the Court of Appeals from the order of General Term, before judgment had been rendered thereon, and stipulated for judgment absolute, and thereafter moved for leave to withdraw such appeal on the ground that, as no final judgment had been entered, the appeal was a nullity, and also because he desired to try the case on the merits, it was held that the motion should be granted, on payment of costs and disbursements on appeal to the Court of Appeals, except the fee for argument. Vernon v. Palmer (Ct. App. 1884), 5 Civ. Proc. Rep. 233.

But, where the appellant's counsel, upon the argument of an appeal, to the Court of Appeals from an order of the General Term reversing a judgment in appellant's favor and granting a new trial, was reminded of the danger to which his client was exposed by reason of his stipulation for judgment absolute in case of affirmance and an opportunity given him to withdraw his appeal, which he declined, and proceeded to argument, the appellant was not, after a decision against him, permitted to withdraw his stipulation and take a new trial. Williams v. Lindblom (1894), 143 N. Y. 675.

Where the interests of justice require the granting of a motion for leave to withdraw an appeal upon the argument of the case, it should be upon conditions that will not cast the burden thereof entirely upon the respondent. Martin v. Gavigan Co. (1906), 186 N. Y. 559.

An application for leave to withdraw an appeal to the Court of Appeals should be addressed to that court. Powell v. Schenck (1896), 6 App. Div. 130.

Laches.— For what laches were considered sufficient to deprive an appellant of the right to dismiss his appeal and so be relieved from the stipulation for judgment absolute, see Post v. Hathorn (1873), 54 N. Y. 147. For what was not considered sufficient

laches to justify a refusal to entertain a motion to dismiss appeal, see Hill v. Hermans (1874), 59 N. Y. 396. For motion to vacate a dismissal by default, refused on the ground of laches, see McElwain v. Erie Ry. Co. (1877), 71 N. Y. 600.

Motion for affirmance, on ground questions have been decided. —A motion for judgment of affirmance or dismissal of appeal, based on the ground that only questions arise in the cause which have been recently passed upon by the Court of Appeals in other causes, will not be granted where this is denied by the appellant. Clark v. Claflin (1891), 128 N. Y. 610.

Motion after jurisdiction lost.— When it is desired to make a motion after the Court of Appeals has lost jurisdiction of the cause by reason of the remittitur having gone down and been acted on in the court below, a motion should first be made to the Court of Appeals to request the court below to return the remittitur (Bliss v. Hoggson [1881], 84 N. Y. 667); or else, a motion should be made in the court below for a vacation of its proceedings on the remittitur and a return of the remittitur to the Court of Appeals. Jones v. Anderson (1877), 71 N. Y. 599.

Motions to amend return.— See Rule II.

Motions to amend remittitur.— See Rule XVI.

Motions for reargument.— See Rule XX.

Default.—A motion will not be granted by default, where its effect would be to interfere with the power of the court in controlling the calendar. Crain v. Rowley (Ct. App. 1849), 4 How. Prac. 79.

Appeals from orders, etc.

By force of the provision of section 9 of article VI of the Constitution of 1894, which declares that after the last day of December, 1895, except where the judgment is of death, appeals may be taken, as of right, to the Court of Appeals only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court finally determining actions or special proceedings, and from orders granting new trials on exceptions, the appeals from orders which were theretofore entitled to be heard as motions (Code Civ. Pro., § 192, repealed January 1, 1896, by ch. 946 of 1895) were abolished, as matter of right, except in so far as they may be covered by the proviso in the

same section which declares that the provisions of the section "shall not apply to orders made * * * by any General Term before the last day of December, 1895, but appeals therefrom may be taken under existing provisions of law."

It is also provided by the same section of article VI that "the Appellate Division in any department may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals."

In accordance with these provisions of the Constitution and the corresponding amendments of the Code of Civil Procedure (section 190), the present rule provides for the hearing of appeals from final orders in special proceedings, and such appeals from interlocutory judgments and from orders, as may be certified by the Appellate Division.

The "term final orders in special proceedings," as used in this rule, is the equivalent of the term "orders finally determining special proceedings," employed in the Constitution and Code. As to the construction and application of the term, see heading "Jurisdiction of Court of Appeals," under Rule I, pages 30–51.

Mandamus.— While there may be a question as to whether an appeal from a final order upon an alternative mandamus does not, by force of section 2087 of the Code, belong upon the regular calendar as an appeal from a judgment, such appeals have been permitted to go upon the order calendar under Rule XI in People ex rel. Hoefle v. Cahill (1907), 188 N. Y. 489; People ex rel. McGinley v. Cahill (1907), 188 N. Y. 623; People ex rel. Powers & Mansfield Co. v. Schneider (1908), 191 N. Y. 523.

Appeals from interlocutory judgments.—An appeal by leave of the Appellate Division from an interlocutory judgment of any kind is an appeal from an order in an action which should not go on the regular calendar, but either party has the right to notice it for argument and place it upon the order calendar at his convenience. It was not the intention of the rule to restrict the right conferred by it to appeals from interlocutory judgments upon demurrers only. Slater v. Slater (1903), 174 N. Y. 264.

Control of calendar.— The court has control of the calendar so that, after hearing on the merits an appeal placed on the order calendar, it will not transfer it to the general calendar to be again argued, although it may be technically entitled to go on that calendar. Matter of Reynolds (1879), 77 N. Y. 631.

Procedure in court and practice of clerk's office.

Notice of motion; motion calendar.— Motions, other than *ex parte,* should be on notice of at least eight days (Code Civ. Pro., § 780), unless the time is shortened by an order to show cause, or unless notice is waived or short notice accepted. It is well to file the notice, with proof of service, with the clerk by the Friday preceding the motion day, when a calendar of motions, although not printed, is made up, designated as the "Motion Calendar." At the same time, a printed calendar is made of appeals from orders, etc., covered by this rule, and known as the calendar of appeals from orders, or the "Order Calendar."

Motion papers; motions for reargument.— Motion papers need not be printed (except briefs on motions for reargument), and, as well as the notice of motion, should be filed with the clerk by the Friday preceding the day for which noticed. This is prescribed by the rule, in motions to be submitted without oral argument. One set of motion papers is all that is required and a copy for each member of the court is not necessary; except in motions for reargument, where eighteen printed copies of the briefs on each side should be filed with the clerk, and also, although not required by Rule XX, eighteen printed copies of the notice of motion and of the customary accompanying affidavit.

Argument of motions.— Counsel will be heard briefly on motions, made on the first Monday of a session, except on motions for reargument, which must be submitted. (See Rule XX.)

Notice of argument of appeal from order.— To entitle an appeal from an order to be placed on the order calendar, a notice of argument for the first Monday of a session must be served at least eight days before the day named therein for the hearing (unless service is waived or short notice accepted), and must be filed with the clerk on or before Friday next preceding the Monday named therein. The notice should so describe the appeal as to show that it is within the rule.

Order calendar.— The clerk prepares and prints a calendar (known as the order calendar) of appeals under this rule, for the first Monday of each session, or, if a session begins on a day other than Monday, then for the first day of the session, on which are placed all causes entitled to go thereon, in which returns and notices of argument have been filed as above. Causes are placed

thereon according to priority of filing notices of argument, and are given consecutive numbers, following the last number on the general calendar. A copy of the order calendar is mailed to each attorney having a case thereon, on the Friday preceding the commencement of the session.

Copies of case and points.— Copies of the case, in appeals from orders covered by this rule, must be served within forty days after the appeal is perfected, as required by Rule VI, but by Rule VII, the printed cases need not be filed or the printed points be filed or served or exchanged until at least two days before the commencement of the session.

Order of business on motion day.— On motion day (the first Monday of each session) the following order of business is observed:

1. The motion calendar.
2. Other motions, if any.
3. The order calendar.

As a rule, the order calendar occupies several days, and the general calendar is not taken up until the order calendar is disposed of.

RULE XII.

Call of Calendar.

Eight causes only will be called on any day, but after such call causes ready on both sides will be heard in their order. Any cause which is regularly called and passed, without postponement by the court for good cause shown at the time of the call, [shall be stricken from the calendar.]

Causes upon the calendar may be exchanged one for another [as] of course, on filing with the clerk a note of the proposed exchange, with the numbers of the causes, signed by the respective attorneys or counsel. Upon all the subsequent calendars each of said causes will take the place due to the date of the filing of the return in the other.

In like manner, a cause not upon the calendar in which an appeal to this court has been perfected and the return duly filed with the clerk, may be exchanged, [as] of course,

for another cause upon the calendar, on filing with the clerk a note of the proposed exchange, with the number of the cause on the calendar, and the date of filing return in the cause not upon the calendar, signed by the respective attorneys or counsel, and also a stipulation of the attorneys or counsel in the cause not on the calendar, setting down the same for argument in place of the calendar cause when reached, with the same effect as if duly noticed. Upon all subsequent calendars, each of said causes will take the place due to the date of filing the return in the other.

Postponement of causes on call of calendar.

Reasons for postponement.— If it appears by affidavit, on a cause coming on for argument, that a party is dead, the argument will be postponed to enable a motion for substitution to be made. Shaler Quarry Co. v. Brewster (1865), 32 N. Y. 472.

When a cause is upon the day calendar and reached, it will not be postponed merely for the convenience of a party. Bank of Salina v. Alvord (1865), 32 N. Y. 684.

Suspending argument.— In the following cases, argument was suspended for the purpose of applying to the court below for an amendment of the record: Livingston v. Miller (Ct. App., 1852), 7 How. Pr. 219; Westcott v. Thompson (1858), 16 N. Y. 613; and in Rice v. Isham (1863), 1 Keyes, 44, the power of the court to suspend judgment for that purpose was asserted.

Day calendar.

When made up.— The day calendar of eight causes, for each day the court is in session, is made up by the clerk at 6 P. M. on the preceding day, and is then telegraphed to the New York Law Institute and the Association of the Bar of the City of New York, and furnished to the newspapers throughout the State. It cannot thereafter be changed or a cause removed therefrom, except by direction of the court; and stipulations for the reservation of a cause, received by the clerk after the cause has gone upon the day calendar, are of no effect, and will not prevent the cause being called for argument, if reached on the day for which the calendar has been made up. (See Rule X.)

Call of calendar.— The day calendar is not called through at the opening of court, but the causes thereon are called one at a time, in their order — no cause being called or taken up until the preceding cause (if any there be) has been disposed of.

Exchanging causes.

The exchange of causes by stipulation provided for by the rule has reference to the general calendar and can only be effected before either of the causes has been placed on the day calendar. After that, an exchange for the purpose of altering the order in which causes shall be called for argument, can only be had by leave of the court.

RULE XIII.

Time of Argument.

In the argument of a cause not more than two hours shall be occupied by counsel on either side, except by the express permission of the court.

In the argument of an appeal [within Rule XI], not more than thirty minutes shall be occupied by the appellant's counsel, nor more than twenty-five minutes by the respondent's counsel, [unless express permission be given by the court and the cause placed at the foot of the order calendar].

Procedure on arguments.

The court sits to hear arguments on each week day, except Saturday, the sessions being from 2 P. M. to 6 P. M., except Friday, when the hours are from 10 A. M. to 2 P. M.

When a cause is called for argument, the counsel for appellant opens, counsel for respondent answers, and the appellant may, if he desires, reply briefly.

Only one counsel is heard on each side, unless the court otherwise directs.

The reading by counsel, of opinions at length from reports is not encouraged.

Criminal causes.

Number of counsel to be heard, etc.— The Code of Criminal Procedure provides as follows:

§ 540. Upon the argument of the appeal, if the crime be punishable with death, two counsel on each side must be heard if they require it. In any other case, the court may, in its discretion, restrict the argument to one counsel on each side. The counsel for the defendant is entitled to the closing argument.

Assignment and compensation of counsel.

§ 308. If the defendant appear for arraignment without counsel he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. When services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment is punishable by death, or on an appeal from a judgment of death, the court in which the defendant is tried or the action or indictment is otherwise disposed of, or by which the appeal is finally determined, may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with the clerk of such court, and also reasonable compensation for his services in such court, not exceeding the sum of five hundred dollars, which allowance shall be a charge upon the county in which the indictment in the action is found, to be paid out of the court fund, upon the certificate of the judge or justice presiding at the trial or otherwise disposing of the indictment, or upon the certificate of the Appellate Court, but no such allowance shall be made unless an affidavit is filed with the clerk of the county by or on behalf of the defendant, showing that he is wholly destitute of means.

Continuance of assignment.— Counsel assigned to a defendant at the time of his arraignment continues until the disposition of an appeal, unless such counsel voluntarily withdraw from the case or the relations as counsel are otherwise terminated. A new assignment of counsel on appeal is not ordinarily necessary. People v. Strolla (1906), 186 N. Y. 526.

Revocation of assignment of counsel.—When counsel assigned in a criminal case indulge in unreasonable delay, without excuse, and thus place the defendant in default, they should not be retained in that position or thereafter assigned by the court in other criminal actions. People v. Nelson (1907), 188 N. Y. 234.

Allowance to counsel in capital case.—The failure of counsel for the defendant, on appeal in a capital case, to aid the court by causing a case to be made so as to simplify and shorten the examination of the record, may properly be considered in passing

upon his application for compensation; but the application will not be denied where it appears that he was misled by a misunderstanding, shared in the trial court and the district attorney, as to when the change of procedure effected by chapter 427 of the Laws of 1897, amending section 458 of the Code of Criminal Procedure, went into effect. People v. Barone (1900), 161 N. Y. 475.

An allowance of compensation to counsel for services rendered on appeal, in pursuance of an assignment in a capital case, is proper although the sum of five hundred dollars has been allowed by the trial court for services rendered at the trial, as section 308 of the Code of Criminal Procedure, limiting such compensation to that amount, applies to the trial and Appellate Courts separately and not collectively. People v. Ferraro (1900), 162 N. Y. 545.

An application to the Court of Appeals under section 308 of the Code of Criminal Procedure, to fix the compensation of counsel for services rendered on appeal in a capital case, will be denied where the sole object of the appeal was to secure delay for the defendant (People v. Friola [1903], 175 N. Y. 407); and where there is unreasonable delay in bringing the appeal to argument, no allowance will be made to counsel until a satisfactory excuse is presented to the court. People v. Hampartjoomian (1909), 196 N. Y. 77, 198 N. Y. 515.

RULE XIV.

Preferred Causes.

No causes are entitled to any preference upon the calendar except such as is given by law or the special order of the court.

Any party claiming a preference must so state in his notice of argument to the opposite party and to the clerk; and he must also state the ground of such preference, so as to show to which of the preferred classes the cause belongs.

A preferred cause being once passed loses its preference.

Preferences given by law.

The Revised Constitution of the State of New York, adopted November 6, 1894, contains the following provision:

Causes involving an apportionment.

An apportionment by the Legislature, or other body, shall be subject to review by the Supreme Court, at the suit of any citizen, under such reasonable regulations as the Legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session, it shall convene promptly for the disposition of the same. (Article III, section 5.)

The Code of Civil Procedure contains the following provisions regulating the preference of causes on court calendars:

Preference of certain actions by the people.

§ 789. A trial, motion, appeal, or hearing in an action by the people to recover money, funds, credits, or other property held or owned by the State or held or owned, officially or otherwise, for, or in behalf of, a public or governmental interest, by a municipal or other public corporation, or by a board, officer, custodian, agency or agent of the State, or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of; or to recover damages, or other compensation, for so obtaining, receiving, paying, converting, or disposing of the same; or the aiding or abetting thereof; is entitled, on the application of the attorney-general, to a preference over any other business, at a term or sitting of any court of the State, irrespective of its place upon the calendar.

Preference of criminal actions.

§ 790. A criminal action, including an appeal or other proceeding in a criminal cause, is entitled, under the direction of the court, to preference in the trial or hearing thereof, over all civil actions, and special proceedings, except as prescribed in the last section. [See Rule IX.]

Preference among civil actions.

§ 791. Civil causes are entitled to preference among themselves, in the trial or hearing thereof, in the following order, next after the causes specified in the last section but one:

1. An action or special proceeding brought by or against the people of the State, or brought by the people of the State on the relation of a party, or brought by or against any State officer or board of State officers as such; where the attorney of the said people, State officer or board of State officers, or attorney for the plaintiffs in such action or special proceeding has given notice, at the time of the service of the notice of trial or argument, of a particular day in the term at which he will move it. If the

action or special proceeding is not moved by said attorney for trial or argument on that day, or as soon thereafter in the same term as the court can hear it, the other party may then move the trial or argument; otherwise it shall not be moved out of its order at that term, except by the special order of the court.

2. An action or special proceeding in which The City of New York or a board of officers, exercising powers conferred by a statute for the protection of public health or public or private property, or for the prevention or punishment of violations of a statute relating to either of those subjects, or the commissioners of pilots in The City of New York, are parties; where a notice, similar to the notice prescribed in the last subdivision, has been served by their attorney, at the time of service of the notice of trial or argument. The provisions of the last subdivision, relating to moving the trial or argument, apply to a cause within this subdivision.

3. In the Court of Appeals or the Supreme Court an appeal taken by either party, in an action or special proceeding other than as specified in subdivision first of this section, where the people of the State, or a board of State officers, are sole parties, or a State Officer is sole party, plaintiff or defendant.

3a. In the Court of Appeals or the Supreme Court, an appeal taken by either party in an action or special proceeding from a judgment or order declaring a legislative enactment unconstitutional, is entitled on motion of the appellant, to a preference over any business irrespective of its place on the calendar, except as to preferences provided for in sections seven hundred and eighty-nine, seven hundred and ninety and the preceding subdivisions of this section.

4. In the Court of Appeals, an action, a party to which has died, pending the action, where the pendency of the action prevents a final settlement of the estate of the deceased party.

5. In any court, an action or special proceeding in which an executor or an administrator, or testamentary trustee, or an infant, or a trustee of a fund for the support and maintenance of an infant, or a receiver appointed by the court, or by the comptroller of the currency of the United States, or a trustee in bankruptcy, or a general assignee for the benefit of creditors, or the committee of a lunatic or an idiot, or a creditor of a deceased insolvent debtor suing for the benefit of himself and other creditors interested in the estate or property of such deceased debtor where a right of action is given by express provision of law, is the sole plaintiff or sole defendant; an action or special proceeding for the construction of, or an adjudication upon or to determine the validity of the probate of a will, in which the administrator, with the will annexed, or the executor of the will is joined, as plaintiff or defendant, with one or more other parties, and an appeal from the judgments or decision in any of the foregoing actions or proceedings, and in the Court of Appeals or the Supreme Court, an appeal from the decree or decision of a Surrogate's Court, determining a will to be valid and admitting it to probate, or determining an instrument offered for probate as a will to be invalid or not entitled to probate as such, or granting general

letters of administration or directing the distribution of a fund or payment of money by an executor or an administrator, in pursuance of an order or decree made on an intermediate, final or judicial accounting or otherwise, by an administrator or an executor.

6. An action for dower, where the plaintiff makes proof by affidavit, to the satisfaction of the court, or a judge thereof, that she has no sufficient means of support, aside from the estate in controversy; an action for the partition of real property.

7. An action against a corporation or joint-stock association, issuing bank notes or any kind of paper credits to circulate as money, or by or against a receiver of such corporation or association. An action in which a county or town is sole plaintiff or defendant.

8. An action against a corporation founded upon a note or other evidence of debt for the absolute payment of money. An action upon an undertaking given upon an appeal to the Court of Appeals or to stay the execution on an appeal to the Court of Appeals.

9. An action against a sheriff, in his official capacity, or an action by a sheriff or late sheriff, to recover for a breach of the obligation of a bond or an instrument or instruments of indemnity, or an undertaking or undertakings given to him in his official capacity.

10. A cause entitled to preference by the general rules of practice, or by the special order of the court in the particular case.

11. In any court an action for libel or slander. (Added by Laws 1898, chap. 136.)

12. In the Court of Appeals, all appeals from judgment of affirmance rendered by the Appellate Division of the Supreme Court in cases enumerated in subdivision two of section one hundred and ninety-one of this act, where the decision of the Appellate Division has been unanimous and an appeal has been taken or allowed as in said subdivision of said section provided.

13. An action for absolute divorce in which an order has been made granting temporary alimony.

Where an issue of law and an issue of fact, or two or more other questions of different natures, come before the same term of the court for trial or hearing the preference given by this section affects only the order, in which the issues or questions of the same nature are to be disposed of.

Preference in mandamus or prohibition.

§ 792. Where a writ of mandamus or of prohibition has been issued from the Appellate Division of the Supreme Court to a Special Term, or a judge of the same court, the cause may, in the discretion of the court, or, where an appeal is taken therein to the Court of Appeals, in the discretion of that court, be preferred over any of the causes specified in the last section.

When an order necessary.

§ 793. Where the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court or a judge thereof upon notice to the adverse party. A copy of the order must be served with or before the notice or trial or argument. Such an order is not appealable, but it may be vacated by the judge or judges holding the term at which the preferred cause is noticed for trial or hearing, or by such other justice, or at such other term of court, or at such other time as shall be prescribed by the general or special rules of practice. But a preliminary order is not requisite in a case embraced within subdivision first or second of the last section but one, and the order in a case embraced within subdivision six thereof may be made *ex parte*, and is conclusive. * * *

Second and subsequent appeals.

§ 195. Upon a second and each subsequent appeal, including a case where a former appeal has been dismissed for a defect or irregularity, the time of filing the return, upon the first appeal, determines the place of the cause upon the calendar.

Case involving title to office.

§ 229. An appeal from a judgment or decree in any case in which the question of the title to a public office is directly or collaterally at issue or in any manner involved, may be placed on the calendar and noticed for hearing on any day in the Appellate Division of the Supreme Court, in the first department, or in the Court of Appeals, and shall be heard on said day.

Other statutory provisions concerning preferred causes are as follows:

Review of assessments for taxation.

Section 295 of the Consolidated Tax Law, in the article relating to the review of assessments by certiorari, provides as follows: "An appeal may be taken by either party from an order, judgment or determination under this article as from an order, and it shall be heard and determined in like manner as appeals in the Supreme Court from orders. All issues and appeals in any proceeding under this article shall have preference over all other civil actions and proceedings in all courts."

Preference in action or proceedings by or against receiver of insolvent corporations.

Section 316 of the General Corporation Law is as follows: "All actions or other legal proceedings and appeals therefrom or therein brought by or against a receiver of any of the insolvent corporations referred to in this chapter, shall have a preference upon the calendars of all courts next in order to actions or proceedings brought by the people of the State of New York."

Actions affecting New York City Rapid Transit Commission.

Section 9 of chapter 4, Laws of 1891, as amended by section 5 of chapter 519, Laws of 1895, is as follows:

Every action or proceeding brought by the said board and every action or proceeding in which an injunction is had or sought against the board or the said city, or against any corporation or person who or which shall have entered into a contract under the provisions of this act or any act supplementary thereto, or amendatory hereof, by reason of any act or thing done, proposed or threatened under or by virtue of any provision of this act, or any act supplementary hereto, or amendatory hereof, or is sought against any corporation or person claiming or claiming to act under any grant or franchise under this act, or any act supplementary hereto, or amendatory hereof, and every action or proceeding in which the constitutionality of any part of this act or of any act supplementary hereto, or amendatory hereof, shall or may be brought in question, shall have a preference above all causes not criminal on the calendar of every court, and may be brought on for trial or argument upon notice of eight days for any day of any term on which the court shall be in session.

Actions under Public Service Commissions, or Railroad Law.

Section 21 of the Public Service Commissions Law is as follows:

Court proceedings; preferences.

All actions and proceedings under this act, and all actions and proceedings commenced or prosecuted by order of either commission, and all actions and proceedings to which either commission or the people of the State of New York may be parties, and in which any question arises under this act or under the Railroad Law, or under or concerning any order or action of the commission, shall be preferred over all other civil causes except election cases in all courts of the State of New York, and shall be heard and determined in preference to all other civil business pending therein, excepting election cases, irrespective of position on the calendar. The same preference shall be granted upon application of counsel to the commission, in any action or proceeding in which he may be allowed to interfere.

Preference, in general.

Inherent power to grant.— Courts have an inherent power to control their own calendars, and on that ground alone may grant orders giving causes a preference on the calendar. Smith v. Keepers (Supr. Ct. 1884), 5 Civ. Proc. R. 66.

Statutory right to, cannot be abridged.— Where a right to preference is given by the Code absolutely, without any qualification or condition, being given by statute it cannot be limited or

abridged by the court, by rules or otherwise. McArthur v. Commercial Fire Ins. Co. (N. Y. City Ct. 1884), 67 How. Prac. 510.

Must be claimed in notice of argument.— Notwithstanding the provisions of the Code giving preferences among civil causes, a party claiming a preference in the Court of Appeals must comply with the direction of its rule, that such claim, and the grounds thereof, must be stated in his notice of argument. Taylor v. Wing (1881), 83 N. Y. 527.

Appeal from order in preferred cause.— Where an appeal in an action entitled to a preference under one of the general statutory provisions is also entitled to be heard on a motion day under Rule XI, it should go upon the order calendar and not upon the general calendar. Slater v. Slater (1903), 174 N. Y. 264.

Preference, in particular cases.

Section 791, *subdivision* 1.— Where, in an action in which the people were parties, and appeared by the Attorney-General, the latter did not, at the time of serving notice of argument, give notice of a particular day in the term on which he would move it, but served with the notice of argument, notice of motion that the cause be set down for a day named, which motion failed because the court adjourned before the day specified for making it, — it was held that the action was not entitled to a preference. People ex rel. Augerstein v. Kinney (1883), 92 N. Y. 647.

Section 791, *subdivision* 4.— To entitle an action to the preference given by subdivision 4 of section 791 of the Code of Civil Procedure where a party to an action in the Court of Appeals has died pending the action and its pendency prevents a final settlement of his estate, the deceased party must have been, and his substituted personal representative must be, the sole plaintiff or sole defendant in the action. Colton v. N. Y. Elevated R. R. Co. (1896), 151 N. Y. 266.

Section 791, *subdivision* 5.— To entitle a cause to a preference as "an action for the construction of, or an adjudication upon, a will" it must be expressly brought for that purpose; it is not enough that the construction of a will is incidentally involved. Peyser v. Wendt (1881), 84 N. Y. 642.

A sole plaintiff who does not sue as executor is not entitled to have his cause put upon the calendar of preferred causes in the

Court of Appeals, on the ground that he brought the action in that capacity; the court cannot make the inference from what is contained in the record. Seymour v. Spring Forest Cemetery Association (1893), 139 N. Y. 645.

An action by a creditor of a deceased insolvent debtor on behalf of himself and others to set aside a transfer, is entitled to a preference. Rottle v. Mut. Life Ins. Co., 67 App. Div. 12.

The right to a preference, given by subdivision 5 of section 791 of the Code of Civil Procedure, when a person in one of the capacities specified is the sole plaintiff or sole defendant, does not extend to a case where the same person is joined as a party in his individual capacity as well as in the prescribed capacity. Haux v. Dry Dock Savings Inst. (1896), 150 N. Y. 581.

The right to the preference applies to cases in which there are several plaintiffs or defendants, where all the parties on the same side are such in representative capacities within this subdivision, and in no other capacity. See Milligan v. Cottle (1897), 152 N. Y. 644.

Section 791, *subdivision* 6.—A preference under this subdivision can be claimed only when the proof required, *i. e.,* that the plaintiff "has no sufficient means of support, aside from the estate in controversy," has been made and an order allowing the preference obtained as required by section 793, before the notice of argument was served. Bartlett v. Musliner (1883), 92 N. Y. 646.

Section 791, *subdivision* 7.— When a preference is claimed on the ground that the action is one against a corporation "issuing bank notes, or any kind of paper credits, to circulate as money," and this fact does not appear in the pleadings or other papers on which the appeal is to be heard, the party desiring the preference must procure an order therefor under section 793. Bank of Attica v. Metropolitan Nat. Bank (1883), 91 N. Y. 239.

A case in which a village is sole plaintiff or defendant is not entitled to a preference under the last sentence of this subdivision. Keane v. Village of Waterford (Ct. App. 1891), 26 N. E. 759.

Section 791, *subdivision* 8.—An action on an insurance policy is not an action founded upon an "evidence of debt for the absolute payment of money," within the meaning of the Code. This expression is to be confined strictly to instruments which admit on their face an existing debt, payable absolutely, and is not

applicable to a contract payable only upon certain specified conditions. N. Y. Life Ins. Co. v. Universal Life Ins. Co. (1882), 88 N. Y. 424, overruling Studwell v. Charter Oak Ins. Co. (1879), 19 Hun, 127, which had been dissented from in Wells v. Watertown Fire Ins. Co. (1880), 21 Hun, 409.

A lease of wharf property for a term of years at a yearly rent is not to be regarded as an obligation for the absolute payment of money, so as to entitle to a preference an action against a corporation thereon. Philadelphia S. S. Dock Co. v. Lorillard S. S. Co. (Supr. Ct. 1878), 54 How. Pr. 508.

An action against a corporation to recover the amount of interest coupons upon bonds issued by another corporation, based upon an agreement between the two corporations, by which defendant had become liable for their payment, being in reality an action on the agreement and not an action on the bonds, is not an action "founded upon a note or other evidence of debt, for the absolute payment of money," within the meaning of the provision of the Code giving to such an action against a corporation a preference upon the calendar. Polhemus v. Fitchburg R. R. Co. (1889), 113 N. Y. 617.

Section 791, *subdivision* 10.— By force of section 3347 of the Code of Civil Procedure, regulating the application of certain portions of that Code, section 791 is not made applicable to the Court of Appeals except where that court is designated in a particular provision; the provision in subdivision 10, for a preference in the case of "a cause entitled to preference by the general rules of practice," that is, by the rules of courts other than the Court of Appeals, does not designate, and therefore does not apply to, the Court of Appeals. Therefore, to obtain a preference upon the calendar of that court, in a case where it is not designated by the Code, or in its rules, the application must be addressed to the discretion of the court. Nichols v. Scranton Steel Co. (1892), 135 N. Y. 634.

The mere showing in a case that certain certificates of stock belonging to defendant, and in possession of another, were levied on and were still held under an attachment, does not justify the giving of preference to the hearing of the appeal therein. *Id.*

The fact that two corporations differ in the construction of a mutual agreement, and in the meantime neither fulfils its obliga-

tion to the holders of its securities, furnishes no reason for giving a cause a preference by the court, in the exercise of its discretion. Polhemus v. Fitchburg R. R. Co. (1889), 113 N. Y. 617.

Section 791, *subdivision* 12.— This provision applies only to appeals taken after its enactment took effect (September 1, 1899), and not to appeals then pending. Coxhead v. Johnson (1899), 160 N. Y. 369.

Section 793.— It is no excuse for a failure to procure an order for preference under this section, that there was no term of the Court of Appeals at which a motion for the order could be made. Such a motion may be made before any judge of the court, at his residence or office, or at any place which the judge on application of the moving party may name. Bank of Attica v. Metropolitan Nat. Bank (1883), 91 N. Y. 239.

A party entitled to a preference may withdraw former notice and serve new one. Gilbert v. Finch, 46 App. Div. 75.

Where a party has neglected to procure the proper order for preference, under this section, the court will not, after the calendar is made up, make an order *nunc pro tunc* giving the preference, where no good reason appears for giving that particular case a preference over other causes on the calendar, but will, if it has been placed on the preferred calendar, strike it therefrom and place it in its proper order on the general calendar. *Id.*

Review of assessments.—Appeals in certiorari proceedings to correct tax assessments, under chapter 269, Laws of 1880, were, by force of section 7 of that act, now embodied in section 255 of the Tax Law (L. 1896, chap. 908), deemed "appeals from orders entitled to be heard as motions," when the provision of the Code of Civil Procedure authorizing such classification of appeals (section 192, repealed by chap. 946 of 1895) was in force. People ex rel. Walkill Valley R. R. Co. v. Keator (1885), 101 N. Y. 610; People ex rel. West. U. Tel. Co. v. Dolan (1891), 126 N. Y. 166.

Preferred calendar; practice of clerk's office.

Causes belonging to the same preferred class are placed on the preferred calendar of such class in the order of date of filing returns, and are called for argument in that order, no other preference being recognized among them than that arising from priority in date of filing return.

RULE XV.

Defaults.

Judgments of reversal by default will not be allowed. When a case is called in its order on the calendar, if the appellant fails to appear and furnish the court with the papers required, and argue or submit his cause, judgment of affirmance by default will be ordered on motion of the respondent. If the appellant only appears, he may either argue or submit the cause.

When any cause shall be regularly called for argument, and no other disposition shall be made thereof, the appeal shall be dismissed without costs, and an order shall be entered accordingly, which shall be absolute unless upon application made and good cause shown, upon notice to the opposite party within ten days, if the court is in session, and if not, on the first motion day of the next session, the court shall revoke said order and restore said appeal.

Judgments by default.

This rule is based, as to subject-matter, upon a Rule XXV, which was in force from 1862 to 1870. That rule provided that no judgments by default should be allowed, but that, when a caused was reached on the calendar, it must be argued, submitted or passed, and that if either party appeared, he should deliver a copy of his brief to the clerk, to be delivered when called for, to the opposite party, who might at any time, within twenty days after the hearing, furnish to each member of the court, and serve upon the opposite party a printed answer to such brief, which might be replied to in like manner at any time within fifteen days after such service.

That rule, it was said by the court, was not intended to impose upon the judges the duty of acting as counsel for the party who did not appear to prosecute or defend, but was intended to save to parties acting in good faith a further opportunity to present a printed brief, and save the court the loss of time formerly consumed in hearing motions to open defaults. Maher v. Carman (1868), 38 N. Y. 25.

It was held, while the rule was in that form, that if the appellant failed to appear when the cause was reached, or to submit a brief afterwards, as then permitted, the judgment appealed from should be affirmed of course. Kelly v. McCormick (1863), 28 N. Y. 318; Smith v. Martin (1867), 3 Keyes, 373; Lyman v. Wilber (1867), 3 Keyes, 427.

Conditions imposed on opening a default.— Prior to 1862, the rules permitted judgments, both of affirmance and reversal, by default. In that state of the rules, a motion to open a default taken on the failure of the appellant to appear when the case was reached for argument, when the respondent's counsel attended prepared to argue the cause, was granted, on excuse, on payment of the taxable costs of the term and of opposing the motion and a counsel fee of fifty dollars, in Slade v. Warren (1848), 1 N. Y. 431. The same counsel fee and costs of the term were imposed as a condition of opening, on what may be considered ordinary excuses, a default on the part of the respondent, in Conant v. Vedder (Ct. App. 1849), 4 How. Prac. 141. In Jorgensen v. Squires (1894), 142 N. Y. 643, a motion to vacate an affirmance by default, entered on the appellant's failure to appear when the case was called on the day calendar, was granted on payment of fifty dollars, within fifteen days after service of notice of the entry of the order.

Practice of the clerk's office.

Affirmance by default.— On an affirmance by default under the rule, the clerk drafts and enters the proper order and furnishes a certified copy thereof to the respondent's attorney, who should thereupon serve notice thereof upon the appellant's attorney, as required by Rule XVII before remittitur can issue, unless the court shall otherwise direct. The fee for certified copy of the order is one dollar.

Dismissal on call of calendar.—When an appeal is dismissed under this rule, on the call of the calendar, the clerk drafts and enters the proper order and makes up a remittitur, which, together with a certified copy of the order, is transmitted to the respondent's attorney, if he so requests; if not, the papers are transmitted to the appellant's attorney. The fee for remittitur and certified copy of order is three dollars.

Dismissal by consent.—An appeal may be dismissed by consent at any time, by filing with the clerk a stipulation to that effect, signed by the respective attorneys for the several parties, and stating whether the dismissal is to be with or without costs. On the receipt of such stipulation, the clerk drafts and enters the proper order, and, if a return has been filed, makes up a remittitur, which, with a certified copy of the order, is transmitted as may be directed by the stipulation. If the stipulation contains no direction on the subject, the papers are sent to the respondent's attorney, if he so requests; if not, they are sent to the appellant's attorney. The fee for remittitur and certified copy of order is three dollars. If no return has been filed, only a certified copy of the order is sent down, the fee for which is one dollar.

Criminal causes.

The Code of Criminal Procedure provides as follows:

Papers, by whom furnished, etc.

§ 538. When the appeal is called for argument, the appellant must furnish the court with copies of the notice of appeal and judgment-roll, except where the judgment is of death. [See Rule IV.] If he fail so to do, the appeal must be dismissed, unless the court otherwise direct.

Judgment of affirmance may be without argument, if appellant fails to appear; reversal only upon argument, though respondent fail to appear.

§ 539. Judgment of affirmance may be given, without argument, if the appellant fail to appear, or where the judgment appealed from is of death and it shall not have been brought on for argument within six months from the taking of such appeal, unless the court, for good cause shown, shall have enlarged said time. But judgment of reversal can only be given upon argument, though the respondent fail to appear. (Amended by Laws 1902, chap. 369.)

Negligence of counsel.—An affirmance of judgment in a capital case without argument, on account of the negligence and default of the defendant's counsel, is a most severe penalty which the court will hesitate to impose. People v. Nelson (1907), 188 N. Y. 234.

RULE XVI.

Remittitur.

The remittitur shall contain a copy of the judgment of this court and the return made by the clerk below, and shall be sealed with the seal and signed by the clerk of this court.

Decision; remittitur; enforcement; restitution.

The State Constitution (Art. VI, § 3), provides as follows:

Judge or justice not to sit in review; testimony in equity cases.

No judge or justice shall sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any court of which he was at the time a sitting member.

The testimony in equity cases shall be taken in like manner as in cases at law; and, except as herein otherwise provided, the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity that it has heretofore exercised.

The State Constitution (Art. VI, § 7), contains the following provision in regard to the Court of Appeals:

Five members of the court shall form a quorum, and the concurrence of four shall be necessary to a decision.

The Judiciary Law, section 15, contains the following provisions (formerly a part of § 46 of the Code):

Disqualification of judge by reason of interest or consanguinity.

§ 15. A judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity, or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But a judge of the Court of Appeals, or a justice of the Appellate Division of the Supreme Court, shall not be disqualified from taking part in the decision of an action or special proceeding in which an insurance company is a party or is interested, by reason of his being a policy-holder therein.

The Judiciary Law, section 22 (formerly part of § 46 of the Code), contains the following provision:

Judge other than of Court of Appeals or Appellate Division not to decide question argued during his absence.

§ 22. A judge other than a judge of the Court of Appeals, or of the Appellate Division of the Supreme Court, shall not decide or take part in the decision of a question, which was argued orally in court, when he was not present and sitting therein as a judge.

The Code of Civil Procedure provides as follows:

Form of judgment of affirmance.

§ 1317. * * * A judgment affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms,

award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed.

Judgment on appeal.

§ 1337. * * * In any action on an appeal to the Court of Appeals, the court may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to.

Decision on demurrer with leave to amend.

§ 497. Upon the decision of a demurrer, either at a general or special term, or in the court of appeals, the court may, in its discretion, allow the party in fault to plead anew, or amend upon such terms as are just. If a demurrer to a complaint is allowed because two or more causes of action have been improperly united, the court may, in its discretion, and upon such terms as are just, direct that the action be divided into as many actions as are necessary for the proper determination of the causes of action therein stated.

Remittitur; judgment absolute, and proceedings thereupon.

§ 194. The judgment or order of the Court of Appeals must be remitted to the court below, to be enforced according to law. Upon an appeal from an order granting a new trial, on a case or exceptions, if the Court of Appeals determines that no error was committed in granting the new trial, it must render judgment absolute upon the right of the appellant; and after its judgment has been remitted to the court below, an assessment of damages, or any other proceeding, requisite to render the judgment effectual, may be had in the latter court.

Remittitur upon certified questions.

§ 190 (subd. 2). * * * And the Court of Appeals shall certify to the Appellate Division its determination upon such questions.

Mode of enforcing affirmed or modified judgment.

§ 1319. Where a judgment, from which an appeal has been taken, from one court to another, is wholly or partly affirmed, or is modified, upon the appeal, it must be enforced, by the court in which it was rendered, to the extent permitted by the determination of the appellate court, as if the appeal therefrom had not been taken.

Correction of docket of judgment, on reversal, etc., by Court of Appeals.

§ 1322. Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or affirmed as to part only of the sum, upon an appeal to the Court of Appeals, the docket may be corrected, as prescribed in (section 1321) at any time after the remittitur has been filed in the court below.

Restitution; when awarded.

§ 1323. When a final judgment or order is reversed or modified, upon appeal, the appellate court, or the general term of the same court, as the case may be, may make or compel restitution of property, or of a right, lost by means of the erroneous judgment or order; but not so as to affect the title of a purchaser in good faith and for value. When property has been sold, the court may compel the value, or the purchase price, to be restored, or deposited to abide the event of the action, as justice requires. When the appeal is from a judgment in favor of the owner of real estate in an action to set aside a conveyance thereof or in an action to compel the specific performance of a contract for the sale thereof, such owner shall have the same right to sell or dispose of the same as though no appeal had been taken; unless the appellant shall file with the clerk of the court a written undertaking, in a sum fixed by the court, or a judge thereof, upon a notice to the respondent of at least ten days, and to be approved by such court or judge, to the effect that the appellant will, in case the judgment appealed from shall be affirmed, pay to such owner such damages as he may suffer by reason of such appeal, not exceeding the amount of the penalty in such undertaking. Such undertaking may be filed at any time during the appeal, but any sale of such real estate or contract to sell the same in good faith and for a valuable consideration, after said judgment and before the filing of such undertaking, shall be as valid as if such undertaking had not been filed. In case such undertaking shall not be filed, the respondent shall be entitled, at any time during such appeal, to an order discharging of record any notice of pendency of action filed in the action, and in an action to compel the specific performance of a contract for the sale of real estate, also canceling and discharging of record said contract, in case the same has been recorded. (Amended by Laws 1899, chap. 650.)

Restitution in summary proceedings to recover possession of real property.

§ 2263. If the final order is reversed upon the appeal, the appellate court may award restitution to the party injured, with costs; and it may make any order, or issue any other mandate, necessary to carry its determination into effect. The person dispossessed may also maintain an action, to recover the damages which he has sustained by the dispossession.

Decision.

Date of affirmance or reversal.—The announcement of its decision of an appeal constitutes the affirmance or reversal by the Court of Appeals and fixes the date thereof, irrespective of when the remittitur is issued or filed, or when an order thereon is entered below. Treadwell v. Clark (1908), 127 App. Div. 256.

Action embracing a number of items.— In an action at law

embracing a number of items or claims, an appellate court has no power to affirm a judgment allowing one item or claim and send the cause back for a new trial as to another (Wolsterholme v. Wolsterholme Mfg. Co. [Ct. App. 1876], 2 Wkly. Dig. 128); but if the erroneous item is distinguishable from the other parts of the judgment, the court may allow a modification by deducting it, and affirm the judgment, if the respondent consents to such deduction. Hayden v. Florence Sew. Mach. Co. (1873), 54 N. Y. 221; and see Freel v. County of Queens (1898), 154 N. Y. 661. See 163 N. Y. 345.

Severance of causes of action.—Where a case on appeal contains two entirely separate and distinct causes of action, it is within the power of the Court of Appeals to sever them and affirm the judgment as to one, though it reverses it as to the other. Bremer v. Manhattan Ry. Co. (1908), 191 N. Y. 333.

Reversal by divided court.— In considering a former decision of the Court of Appeals, where the court divided and the majority concurred simply for reversal, it is not safe to treat anything as having been adjudicated except the precise point in respect to which error in the judgment of the court below was made to appear. Clews v. N. Y. Nat. Banking Assn. (1887), 105 N. Y. 398, 403.

Affirmance without opinion.—Where a judgment is affirmed in the Court of Appeals without an opinion, and without formally adopting the opinion below, it is not to be understood that the affirmance is upon grounds substantially different from those taken below; on the contrary, the inference is the other way, as in case of such a difference the court would deem it proper to state the reason for affirmance. Higgins v. Crichton (1885), 98 N. Y. 626.

An affirmance by the Court of Appeals, without opinion, makes it responsible only for the point decided below, not for all the reasons given or opinions expressed; and the affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in or dissented from the statements contained in the opinion of the Supreme Court. Rogers v. Decker (1892), 131 N. Y. 490.

Power to correct judgment.—Where the Appellate Division has struck out the judgment of the Trial Court, in an action to fore-

close a mechanic's lien, a provision to which the plaintiff was entitled adjudging a lien in his favor and substituted a provision for a personal judgment to which he was not entitled, the Court of Appeals has power, under section 1337 of the Code, to correct the judgment by striking out the improper provision and restoring the original one. Gilmour v. Colcord (1906), 183 N. Y. 342.

Decision without opinion not overruling.—When a decision is made by the Court of Appeals upon full consideration, it cannot be regarded as overruled by a subsequent case in which no opinion was written and no ground of action stated. The court does not overrule important authorities *sub silentio.* Pratt Institute v. City of New York (161), 183 N. Y. 151.

Judgment of all judges present.—A judgment of affirmance pronounced in open court is deemed the judgment of all the judges present not dissenting. Mason v. Jones (1850), 3 N. Y. 375.

Final judgment.—To justify an Appellate Court in awarding final judgment in favor of an appellant it must appear that the facts upon which the right of recovery rests are undisputed and cannot be varied upon another trial, or that they are established by official records, or that they have been specifically found by the jury or Trial Court. Benedict v. Arnoux (1898), 154 N. Y. 715; Matter of Chapman (1900), 162 N. Y. 456; Dixon v. James (1905), 181 N. Y. 129; Duclos v. Kelly (1909), 197 N. Y. 76.

Decision on demurrer.—Where an order of the Appellate Division determining a demurrer grants leave to plead over conditionally, the affirmance of the order by the Court of Appeals carries with it an affirmance of such leave, without restating it; and the time originally granted for the performance of the condition runs from the filing of the remittitur. Cassidy v. Sauer (1907), 188 N. Y. 547.

Decision after death of party.—Where a party has died since the argument of an appeal, but before the decision was handed down, the court may amend the date of its decision *nunc pro tunc* so as to make it bear date as of a day prior to the death (Carter v. Beckwith [1880], 82 N. Y. 83; Matter of Beckwith [1882], 87 N. Y. 503); and the substituted date of decision is properly that of the argument or submission of the appeal. See Layton v. Kraft (1909), 195 N. Y. 525.

Scope of opinion.

Concurrence presumed.—Where two or more points are discussed in the opinions delivered on the decision of a cause, and the determination of either point in the manner indicated in such opinions would authorize the judgment pronounced by the court, the judges concurring in the judgment must be regarded as concurring in such opinions upon all the points so discussed, unless some dissent is expressed or the circumstances necessarily lead to a different conclusion. James v. Patten (1851), 6 N. Y. 9.

Reasons no part of judgment.—The reasons assigned by an appellate court for reversing a judgment form no part of the judgment of such court and cannot be used to modify its effect. Wilson v. Palmer (1877), 11 Hun, 325, 327.

Dicta.— If broader statements are made in an opinion, by way of argument or otherwise, than are essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court. Colonial City Traction Co. v. Kingston City R. R. Co. (1897), 154 N. Y. 493.

Remittitur; when should issue.

Where a return has been filed and any order is made by the Court of Appeals which disposes of the entire appeal, it is proper to send down a remittitur. This is so although the order may not be on the merits — as, an order of dismissal for not serving copies of the printed case. Dresser v. Brooks (1850), 2 N. Y. 559.

An order of dismissal is the judgment of the court, and a remittitur is the regular process to restore the cause to the court below to be enforced, whether the dismissal is in open court or under the rules. Langley v. Warner (Ct. App. 1849), 2 Code Rep. 97.

Where there is an appeal from a judgment and from an order at the same time, in one return, and the appeal is dismissed so far as it relates to the order only, a remittitur sending back the judgment as well as the order is irregular. McFarlan v. Watson (Ct. App. 1849), 4 How. Prac. 128.

On reversing a discretionary order because erroneously founded on a supposed want of power, the cause is to be re-

mitted to the court below for the exercise of its discretion. Hewlett v. Wood (1876), 67 N. Y. 394.

Action on remittitur in court below.

Order must be entered.—The judgment of the Court of Appeals is to be remitted to the court below to be enforced according to law, and it must, therefore, be brought formally to the notice of that court and be made one of its judgments. It has no other means of enforcing the judgment of the Court of Appeals, and until it makes an order to that effect, and the judgment of the Court of Appeals becomes incorporated in its own records, no proceeding can be taken to enforce the judgment of the Appellate Court. Merely filing the remittitur with the clerk and his adjustment of costs thereon is not sufficient (Seacord v. Morgan [Supr. Ct. 1859], 17 How. Prac. 394); and this practice has been uniformly followed. Murray v. Jones (N. Y. City Ct. 1888), 2 N. Y. Supp. 486.

The proper practice on entering judgment in the court below upon a remittitur from the Court of Appeals is to direct, by order, that the judgment of the Court of Appeals stand as the judgment of the court below, and to insert the costs of appeal when adjusted, in the latter judgment. Union India Rubber Co. v. Babcock (N. Y. Supr. Ct. 1854), 1 Abb. Pr. 262.

Neglect to file remittitur.—Where a remittitur had issued from the Court of Appeals under its seal and had been delivered to the prevailing party, as is the practice, with a view to having it transmitted to the court below, it was held that the party who had the remittitur could not be permitted to profit by his own neglect to file it with the court below, and that, therefore, he could not, after a new trial had been had under the judgment of the Court of Appeals, without objection, insist that the court below had no jurisdiction because the remittitur had not been filed with it. Judson v. Gray (Ct. App. 1859), 17 How. Prac. 289.

What is not a filing of remittitur.— The mere coming of the remittitur to the hands of the clerk of the court below is not an actual filing, where the clerk immediately, on being served with a stay, handed the remittitur back to the attorney, without having marked it filed, and expressly refused to file it. Cush-

man v. Hatfield (1873), 52 N. Y. 653; 15 Abb. Prac. (N. S.) 109, and note.

The filing of a remittitur without the authority of the Court of Appeals or in violation of its order is, in legal contemplation, no filing. Marshall v. Macy (Supr. Ct. 1877), 5 Wkly. Dig. 90.

Omission to enter order may be amended.—The order making the judgment of the Court of Appeals the judgment of the court to which the remittitur is sent, is an order of course, and the omission to enter it is a formal irregularity which the court below may amend *nunc pro tunc* and which, on appeal from subsequent orders, will be disregarded in the Court of Appeals; but the better practice is to make a formal motion in the court below, on filing the remittitur. Chautauqua County Bank v. White (1861), 23 N. Y. 347. That the order of the court below may be entered *nunc pro tunc* was reasserted in Seacord v. Morgan (Ct. App. 1867), 4 Abb. Prac. (N. S.) 249, 257; 3 Keyes, 636.

Interlocutory order.— No judgment can be entered upon a remittitur of an order of the Court of Appeals reversing an interlocutory order. Brown v. Leigh (1872), 50 N. Y. 427.

Court below cannot question regularity.—The court below cannot go behind a judgment entered in conformity with a remittitur from the Court of Appeals and inquire into its regularity. Griswold v. Havens (Supr. Ct. 1863), 16 Abb. Prac. 413.

The court below cannot, upon motion, vacate a judgment entered upon a remittitur from the Court of Appeals, on account of irregularity in obtaining the order of the Appellate Court on which it issued; and although the Appellate Court loses jurisdiction after an appeal has been regularly dismissed, the remittitur sent down and judgment thereon perfected in the court below, still, when its order had been irregularly obtained it seems that it might vacate it and then the court below would set aside the judgment entered thereon. Newton v. Harris (Supr. Ct. 1850), 8 Barb. 306.

Order must conform to remittitur.— If the order of the court below on a remittitur affirming a judgment is broader than the judgment affirmed, or differs from it, it is so far of no effect. Freeman v. Barber (1874), 1 Hun, 433.

The court below cannot supply any defect in the judgment contained in a remittitur from the Court of Appeals nor add any direction to it, beyond what is required to carry it into effect. McGregor v. Buell (1864), 1 Keyes, 153; Matter of Prot. Epis. Public School (1881), 86 N. Y. 396.

A judgment entered in pursuance of a decision of the Court of Appeals cannot be altered by the court below, but it may authorize the filing of a supplemental complaint after such judgment has been entered in the action. Clark v. Mackin (1884), 34 Hun, 345.

Order must conform strictly to remittitur, and error in order can only be corrected by Court of Appeals. Zapf v. Carter (1904), 90 App. Div. 407.

Judgment on remittitur, not an actual determination.—The duty of the court below in reference to a remittitur is simply to enforce the judgment of the Court of Appeals, and the judgment entered for that purpose is not an actual determination from which an appeal lies to the Court of Appeals, although after having been entered at Special Term it has been affirmed at General Term. Wilkins v. Earle (1871), 46 N. Y. 358.

Judgment absolute.

Covers all the issues.—Where, on appeals from an order granting a new trial, the Court of Appeals renders judgment absolute against the appellant, it is obligatory upon the court below to enter judgment in favor of the respondent upon all the issues in the action. Wilson v. Palmer (1877), 11 Hun, 325, 327.

Specific relief in court below.— Where "judgment absolute" has been awarded by the Court of Appeals, without determining the character of the judgment, in an action where the relief may, in the discretion of the court below, consist of an injunction or of an award of damages in lieu thereof, the application for specific relief should be made to the court below, and an amendment of the remittitur in that respect is unnecessary. Bates v. Holbrook (1902), 171 N. Y. 688.

Whole claim covered by stipulation.—An objection that a judgment should not have been reversed altogether, but should have been sustained as to part of a claim and judgment for a smaller amount given, cannot be made in the Court of Appeals after

stipulation for judgment absolute in case no error was committed in granting a new trial where the whole claim was treated by the appellant and passed upon below as a single claim, part of which was invalid, since on such an appeal the order of reversal must be affirmed if the record shows any error by the trial court calling therefor. Bank of China v. Morse (1901), 168 N. Y. 458.

Effect of judgment.— The effect of a judgment absolute by the Court of Appeals, under section 194 of the Code, against the defendant, in the action, is to award the plaintiff the judgment which he is entitled to upon his complaint without regard to any defense interposed by the answer; and in assessing the damages thereunder the allegations of the complaint are to be treated as true and the same as if no answer had been interposed. City Trust, etc., Co. v. Am. Brewing Co. (1905), 182 N. Y. 285.

Counterclaim.— The judgment to be rendered on the affirmance of an order granting a new trial, must be absolute against the appellant upon the whole matter and right in controversy in the action. Where, therefore, an order reversing a judgment in favor of the plaintiff and granting a new trial is affirmed on appeal to the Court of Appeals and judgment absolute ordered, in an action where the answer sets up a counterclaim, the defendant is entitled to such judgment upon the remittitur as the facts alleged by him in his answer entitle him to. Hiscock v. Harris (1880), 80 N. Y. 402.

But there cannot be judgment absolute for a counterclaim against the State, under a stipulation, on such an appeal. People v. Dennison (1881), 84 N. Y. 272.

Costs.

To be adjusted and inserted.— The costs of the appeal to the Court of Appeals should be adjusted by the clerk of the court below and inserted in the entry of judgment on the remittitur. Union India Rubber Co. v. Babcock (Supr. Ct. 1854), 1 Abb. Prac. 262.

Where an order of the General Term is affirmed by the Court of Appeals, with costs, and the cause is remitted to the Supreme Court, that court has power to adjust the costs in cases where the clerk cannot do it. Cochran v. Ingersoll (1877), 11 Hun, 342.

Interlocutory order.— The proceedings on a remittitur of the Court of Appeals, reversing an interlocutory order are interlocu-

tory, and the costs are to be adjusted and collected as other interlocutory costs. Brown v. Leigh (1872), 50 N. Y. 427.

Irregular insertion of costs.—Although an entry of judgment upon a remittitur from the Court of Appeals, with the costs inserted therein as adjusted in the absence of the attorney for the unsuccessful party, is irregular, the whole judgment is not void on that account; and the irregularity, being confined to the entry of the award of costs, can be corrected by amending the judgment-roll, docket and execution, by striking it out. Lawrence v. Bank of Republic (Supr. Ct. 1866), 6 Rob. 497.

Costs not allowed when damages excessive.— Where, on affirming a judgment, it has seemed to the Court of Appeals that the damages recovered are excessive, it has refused to allow costs. See Cheesebro v. Corning, and Spink v. Corning (1902), 172 N. Y. 626.

Double appeal.— Costs will be allowed against appellant on the dismissal of one of two appeals from the same judgment on two separate records which present the same question, although it was taken from abundant caution to make certain of the hearing of the question upon one record or the other and to settle a doubtful question of practice and the appellant is successful on the other appeal. Abbey v. Wheeler (1902), 170 N. Y. 122.

New trial ordered without costs.— Where the Court of Appeals has reviewed a judgment as to one cause of action and granted a new trial and has otherwise affirmed the judgment without costs in the Court of Appeals to either party, the costs of the first trial need not be retaxed after the new trial is had; only the costs subsequent to the reversal are taxable. Talcott v. Wabash R. R. Co. (1904), 99 App. Div. 239.

Court below cannot change provision of remittitur.— The court below cannot add any provision for costs to the remittitur (McGregor v. Buell [1864], 1 Keyes, 153; Matter of Prot. Epis. Public School [1881], 86 N. Y. 396; Stevens v. Central Nat. Bank [1901], 168 N. Y. 560); nor can it disallow costs granted by the remittitur, but if a change should be made in that respect, the remittitur should be returned to the Court of Appeals for remedial action there. Sheridan v. Andrews (1880), 80 N. Y. 648.

Provisions of remittitur, as to costs.— In the Court of Appeals, all appeals are on the same footing and, on the dismissal of an appeal with costs, full general costs follow, whether the appeal be from an order or a judgment. White v. Anthony (1861), 23 N. Y. 164; Brown v. Leigh (1872), 50 N. Y. 427.

Under section 3238 of the Code, regulating costs upon appeal from a final judgment, the Court of Appeals has power, in an equitable or legal action, upon the reversal of the judgment and the granting of a new trial, in its discretion, to provide that the costs shall abide the event, or to award them absolutely. Where it is provided that costs shall abide the event, this means all the costs of the action up to and including the decision of the Court of Appeals. Franey v. Smith (1891), 126 N. Y. 658.

When costs are given by the judgment of the Court of Appeals it means costs in that court to the successful party as against the unsuccessful party. Sisters of Charity v. Kelly (1877), 68 N. Y. 628.

Costs on appeal from a decree of Surrogate's Court, being in the nature of a decree in equity, are discretionary. Lawrence v. Lindsey (1877), 70 N. Y. 566.

Where the Court of Appeals has once passed upon the question of costs in that court, the State courts and the parties to the action are thereafter bound by that decision, although the case has subsequently gone to the United States Supreme Court and its mandate has passed through the Court of Appeals down to the court of original jurisdiction, but does not disturb the original decision as to costs. Stevens v. Central Nat. Bank (1901), 168 N. Y. 560.

In a judgment of reversal by the Court of Appeals, "with costs to abide event," in an action against an executor or administrator the word "event" means not only final success in the action, but also a valid award of costs, generally, under section 1836 of the Code, regulating the award of costs against executors and administrators. Benjamin v. Ver Nooy (1901), 168 N. Y. 578.

Where the Court of Appeals reverses a judgment and grants a new trial, "with costs to abide the event," without other limitation, the party finally succeeding in the action is entitled to tax the costs of the appeal. First Nat. Bank of Meadville v. Fourth Nat. Bank of N. Y. (1881), 84 N. Y. 469.

The words " with costs " in an order of affirmance or reversal in the Court of Appeals, in a case where the allowance of costs is discretionary, mean costs in that court only (Matter of Water Commissioners [1887], 104 N. Y. 677). When leave to withdraw an appeal is granted " upon payment of all costs before notice of argument," the costs referred to mean those in the Court of Appeals. Broadway Savings Inst. v. Town of Pelham (1896), 148 N. Y. 737.

The words " with costs," in a remittitur of reversal, in a case where there were several appellants, do not mean costs to each of the appellants. Isola v. Weber (1896), 12 App. Div. 267.

When the Court of Appeals awards to a party costs in the trial court, the award carries with it not only the taxable costs and taxable disbursements, but such further sum, if any, by way of an extra allowance, as that court, in the exercise of a sound discretion, may award. Hascall v. King (1901), 165 N. Y. 288.

Costs in special proceedings are in the discretion of the court and no costs follow its decision unless awarded by it. It seems that when granted they should be at the same rate as for similar services in an action. Matter of Prot. Epis. School (1881), 86 N. Y. 396.

Costs of appeal in proceedings by common-law certiorari were not allowable, whether the proceedings come into the Court of Appeals upon appeal from a judgment or from an order superseding the writ (People ex rel. Smith v. Village of Nelliston [1879], 79 N. Y. 638). Now, however, decisions on appeals in certiorari proceedings when " with costs," carry full regular costs of the Court of Appeals. As to costs of court below, see People ex rel. Hill v. Town Auditor (1897), 42 App. Div. 250; People ex rel. Am. Ex. Nat. Bk. v. Purdy (1909), 196 N. Y. 270.

(As to number of term fees which can be included in costs of appeal to the Court of Appeals, see under Rule XIX, " Calendars.")

Allowance of costs of action, after filing remittitur.— Where a party is defeated upon the trial of an action, and has therefore had no occasion or opportunity to ask for costs or an allowance, but succeeds, upon an appeal to the Court of Appeals, in obtaining a favorable judgment, the special term of the trial court may,

upon application, after the filing of the remittitur and the entering of an order thereon, grant to such party the costs of the action and an additional allowance (Brown v. Farmers' L. & T. Co. [Supr. Ct. 1890], 24 Abb. N. C. 160, with note). Where the complaint in an equity action was dismissed on the trial, but on appeal the judgment was reversed, the order of the General Term affirmed by the Court of Appeals and judgment absolute ordered for plaintiff, it was held that the Special Term had power, upon the filing of the remittitur, to award costs of the trial and appellate courts and an extra allowance. Barnard v. Hall (1894), 143 N. Y. 339.

Damages for delay.

The Code of Civil Procedure, section 3251, subdivision 5, contains the following provision:

> Where a judgment is affirmed by the Court of Appeals, the court may, in its discretion, also award damages, by way of costs, for the delay, not exceeding ten per centum upon the amount of the judgment; or, where it was rendered upon an appeal, upon the amount of the original judgment.

Where not allowed.— Where an appeal presents debatable questions not settled at the time it was brought, damages, by way of costs, for the delay caused by the appeal, authorized by the Code of Civil Procedure (§ 3251, subd. 5), will not be allowed. Tisdale v. Del. & Hud. Canal Co. (1889), 116 N. Y. 416.

Where allowed.— The Court of Appeals granted ten per cent. damages for delay on affirmance of judgment in Warner v. Lessler (1865), 33 N. Y. 296, where the appellant submitted no points and indicated no errors; in Jackson v. City of Rochester (1891), 124 N. Y. 624, where the case did not differ materially from one which had recently been decided against the same appellant; and in Hinds v. Kellogg (1892), 30 N. E. 1148, which was an action for work, labor and services, and materials furnished, in 1887, in the manufacture of articles which defendant refused to accept, on the ground that they were not delivered within the time stipulated, which was to be "as soon as possible." Other and more recent instances of the allowance of damages for delay are Simmons v. Craig (1893), 137 N. Y. 550, 553 (five per cent.); Reid v. Mayor of New York (1893), 139 N. Y. 535, 538 (ten

per cent.); White v. City of Brooklyn (1893), 139 N. Y. 651 (ten per cent.); Zoliewski v. N. Y. C. & H. R. R. R. Co. (1893), 140 N. Y. 621 (ten per cent.); Lifurgy v. Stewart (1893), 140 N. Y. 661 (five per cent.); Digener v. Underwood (1894), 37 N. E. 567 (five per cent.); Jones v. Moores (1894), 37 N. E. 569 (ten per cent.); Riker v. Mahoney (1894), 37 N. E. 570 (ten per cent.); Bates v. United Life Ins. Ass'n (1894), 37 N. E. 824; Devlin v. Kosel (1894), 37 N. E. 824 (fifty dollars); Donavan v. Sheridan (1894), 143 N. Y. 675 (ten per cent.); Van Keuren v. Miller (1894), 144 N. Y. 636 (five per cent.); Van Keuren v. Miller (1896), 149 N. Y. 583 (ten per cent.); Dunlop v. Wilken (1898), 155 N. Y. 673; Burke v. Tindale, Id., 673; Roos v. Laird, Id., 683; White v. Jeffers (1899), 158 N. Y. 680; Storm v. N. Y. & N. E. R. R. Co. (1899), 159 N. Y. 538; Cram v. Crawford (1900), 162 N. Y. 627; Rockwell v. Petrie (1901), 165 N. Y. 654; Ahr v. Marx (1901), 167 N. Y. 582; Spero v. West Side Bank (1901), 168 N. Y. 588; Lott v. Clason (1901), 168 N. Y. 652; Stowasser v. Sherman Outfitting Co. (1901), 168 N. Y. 661; Appleby v. Sewards (1901), 168 N. Y. 664; Cohen v. Metropolitan St. Ry. Co. (1902), 170 N. Y. 588; Hasbrouck v. Marks (1902), 170 N. Y. 594; Hill v. Chamberlain (1902), 170 N. Y. 595; Alignum Co. v. Stoll (1903), 174 N. Y. 542; Briefer v. Stoll (1904), 177 N. Y. 577; Wheeler C. & E. Co. v. Packard Co. (1904), 178 N. Y. 571; Donnelly v. Burnham (1904), 177 N. Y. 546.

Restitution.

To what court application should be made.— Where, after the collection of a judgment for costs entered on a remittitur from the Court of Appeals, the remittitur was recalled and the judgment modified by striking out the allowance for costs, it was held that it being doubtful whether relief could be granted under section 1323 of the Code, the remedy was not by a motion in the Appellate Court for restitution, but by action or proceedings in the court below to compel repayment. Wright v. Nostrand (1885), 100 N. Y. 616.

The court referred to in section 1292 of the Code (which provides that when a judgment is set aside on motion, the court may direct and enforce restitution) is the court which set aside

the judgment; hence, where after the collection of a judgment in an action it was vacated by the General Term, and the order of General Term was affirmed by the Court of Appeals, and an order was entered on the remittitur at Special Term, making the order of the Court of Appeals that of the court below, a motion for restitution was properly made at General Term. Market Nat. Bank v. Pacific Nat. Bank (1886), 102 N. Y. 464.

In Hayes v. Nourse (N. Y. Com. Pl., Spl. T. 1889), 25 Abb. N. C. 96, it was held that after reversal by the Court of Appeals of a judgment which the appellant has, pending the appeal, paid, an application for restitution should be made to the General Term of the Trial Court; that there is no power to entertain the application at a Special Term. But in Genet v. Del. & Hud. Canal Co. (1892), 61 N. Y. Supr. Ct. 332, it was held that after a reversal by the Court of Appeals, the Trial Court at Special Term had authority to order restitution of costs. The case was upon two causes of action; the plaintiff succeeded, at the trial, upon one, but was defeated as to the other, and the costs were set off and judgment for the difference only allowed, which was affirmed by the General Term. Both parties appealed to the Court of Appeals, which court affirmed so much of the judgment as was appealed from by plaintiff and reversed those parts appealed from by defendant, and dismissed the entire complaint with costs. It was held that defendant could obtain at Special Term, by way of restitution, a vacation of the order of set-off and leave to amend the judgment-roll by inserting the costs of the original dismissal of one cause of action.

It was held by the Court of Common Pleas that when its judgment had been reversed by the Court of Appeals upon a ground which in effect disposed of the controversy and prevented another recovery upon the issues as framed, the former court would, the judgment having been paid, order restitution, but would not direct judgment therefor; and that application for judgment of restitution must be made to the Court of Appeals. Hayes v. Nourse (N. Y. Com. Pl., Gen. T. 1889), 25 Abb. N. C. 97.

The Court of Appeals upon application for such restitution directed a recovery back by the appellant of the sum paid, with interest from date of payment, and remitted the proceedings for judgment in the court below. Hayes v. Nourse (Ct. App.

1890), 25 Abb. N. C. 101. See Holly v. Gibbons (1904), 177 N. Y. 401.

Reversal absolute.—Where the judgment of the appellate court is given for the appellant absolutely and finally, no new trial being ordered, there is no ground for exercising any discretion, and restitution should be ordered. Estus v. Baldwin (Supr. Ct. 1853), 9 How. Prac. 80.

Where plaintiff recovered judgment for money paid on a contract for the purchase of land, and the defendant paid the judgment, which was afterwards reversed by the Court of Appeals, it was held that, as the Appellate Court had determined in the defendant's favor the only issue involved, restitution of the sum paid by him should be ordered. Hayes v. Nourse (N. Y. Com. Pl., Gen. T. 1889), 25 Abb. N. C. 95, *supra.*

New trial directed.—Where the Appellate Court directs a new trial, restitution will not be directed unless the remittitur contains such direction or the judgment is reversed for such reasons as would preclude the plaintiff from succeeding on such new trial. Young v. Brush (Supr. Ct. 1864), 18 Abb. Prac. 171.

It seems that the Supreme Court has power, on a motion for restitution, where the judgment of reversal grants a new trial, in order to guard the respondent from loss on account of the insolvency of the appellant, to make such order as it shall deem proper for the withholding and for the disposition and safekeeping of moneys collected, pending the litigation. Marvin v. Brewster Iron Mining Co. (1874), 56 N. Y. 671.

Restitution — New trial.—Where, by the reversal of an erroneous judgment in a creditor's action to compel an executor to sell real estate under a power of sale for the payment of debts, the appellant is entitled to a restitution of the property which is in the possession of the respondent, the fact that the judgment of reversal ordered a new trial does not affect the right to an immediate restitution of the property, accompanied by an accounting as to mesne profits. Holly v. Gibbons (1904), 177 N. Y. 401.

Possession of real estate.—When a judgment in a proceeding to recover possession of real property is reversed, it is almost a matter of course to award restitution of the premises to the party improperly dispossessed. People ex rel. Reilly v. Johnson (1868), 38 N. Y. 63, 66.

Where judgment for the plaintiff in an action of ejectment is reversed and a new trial ordered, restitution to the defendant of the premises in question will be ordered as of course; but without prejudice to the rights, if any, of a purchaser *pendente lite*. Costar v. Peters (N. Y. Supr. Ct. 1868), 4 Abb. Prac. (N. S.) 53.

Where a writ of assistance, improperly granted, has been executed, and is afterwards set aside, the person dispossessed under it is entitled to be restored to possession, and the Court of Appeals will, on reversing the order, award restitution of possession. Chamberlain v. Choles (1866), 35 N. Y. 477.

When reconveyance not necessary.—Where restitution is proper, of property which has been sold to a trustee for creditors, whose title has been extinguished by the reversal, it seems that no reconveyance is necessary; all that is required is to restore the owner to possession. Wallace v. Berdell (1885), 98 N. Y. 480.

Rents and profits.—Where, on reversal of a judgment, the Court of Appeals directed immediate restitution of certain real estate of which an appellant had been dispossessed by means of the erroneous judgment, and that the "mesne profits" up to the time of the restitution be ascertained and paid to him, it was held that the intent was to provide for the same compensation for withholding the real estate as the appellant would have been entitled to on recovering the same in an action of ejectment; and that an order, entered upon the decision, providing that "the value of the rents and profits" be ascertained, was substantially in accord with the decision. Wallace v. Berdell (1885), 101 N. Y. 13.

The owner of property withheld is not confined to the rents actually received by the party required to make restitution, but he should have either these or the rental value, as may be just under the circumstances. *Id.*

Provision in order of restitution, not in decision.—Where, on reversal, the Court of Appeals directed the restitution of certain real estate, and the order of restitution contained a provision not contained in the decision, to the effect that the restitution and payment of the rents and profits should be without prejudice to the right of the owner to commence and maintain any suit or proceeding for waste or injury to the property, it was held that,

while the provision might be superfluous, the order as entered was proper, as it was not the intent of the court to deprive the owner of any such right of action, if he had any. *Id.*

Property must have been taken under judgment reversed.—Under the provision of section 1323 of the Code, authorizing an Appellate Court, on reversal of a final judgment, to "make or compel restitution of property, or of a right, lost by means of the erroneous judgment," such court cannot restore property taken and sold under another judgment, although the effect of the reversal is to decide that the property was taken from the party legally entitled to it; the court may interfere in this summary manner only to restore property or rights lost by the judgment reversed. Murray v. Berdell (1885), 98 N. Y. 480.

Restitution directed to a receiver.—It is not a ground of objection to an order of restitution that it directs restitution to be made to a receiver of the party. Market Nat. Bank v. Pacific Nat. Bank (1886), 102 N. Y. 464.

Quo warranto.—Where, under an adverse judgment in an action in the nature of a *quo warranto,* the defendant, who was in the possession of the office, having a certificate of election from the duly constituted board of canvassers, was removed from office, it was held that, upon reversal of the judgment in the Court of Appeals, that court had power and it was proper to compel restitution of the rights lost by means of the erroneous judgment. People ex rel. Dailey v. Livingston (1880), 80 N. Y. 66.

Attachment.—Where a judgment in a suit by attachment had been paid, it was held, on reversal of the judgment with a direction for a new trial, that restitution should be effected by ordering a deposit of the moneys into court, to abide the result of the new trial. Britton v. Phillips (Supr. Ct. 1862), 24 How. Prac. 111.

Where the reversal of a judgment and the restoration of property thereunder had the effect of reviving an attachment and execution, it was held that an order by the court below that the attachment and execution, with the returns thereto, be taken from the files of the county clerk's office and delivered to the sheriff, and that the returns and the record of satisfaction of a judgment be canceled, was proper, under the circumstances. Wallace v. Berdell (1887), 105 N. Y. 7.

Restitution, when effected by execution.—A direction for the restitution of moneys paid upon a judgment which has been set aside upon motion or reversed upon appeal, as authorized by the Code of Civil Procedure (§§ 1292, 1323), is in effect a judgment "for a sum of money" (§ 1240), and is therefore enforceable by execution. O'Gara v. Kearney (1879), 77 N. Y. 423.

Proceedings for contempt, to enforce restitution.—Where a judgment for a sum of money is reversed, restitution cannot be enforced by proceedings for contempt (O'Gara v. Kearney [*supra*]); but where the restitution of the possession of land is awarded, disobedience of the order may be punished as for a contempt. Dawley v. Brown (Supr. Ct. 1872), 43 How. Prac. 17.

Notice to party affected.—It is irregular to permit a judgment of restitution to be entered without notice to the party to be affected thereby, where it has not been directed by the Appellate Court in the remittitur. Young v. Brush (Supr. Ct. 1864), 18 Abb. Prac. 171.

Laches.—Restitution may, in the discretion of the court, be denied on account of delay in moving therefor. Market Nat. Bank v. Pac. Nat. Bank (1886), 102 N. Y. 464.

Provisions of Code not exclusive.—The provisions of the Code of Civil Procedure for restitution, on reversal of a judgment or order, of money or property, or its proceeds, of which the appellant has been deprived by reason of the erroneous judgment or order, were enacted in recognition of the common-law right of restitution, and to furnish additional means of enforcing that right. The remedies prescribed are therefore not exclusive, and a party entitled to restitution may obtain relief by action. Haebler v. Myers (1892), 132 N. Y. 363; see, also, S. C. reported below, with note, 24 Abb. N. C. 236.

The provision of section 1323 of the Code, conferring upon an Appellate Court, or the General Term of a court in which a judgment was recovered, the power to award restitution where the judgment was reversed, was not intended to and does not take away the authority of the court which rendered the judgment to direct restitution summarily. Platt v. Withington (Supr. Ct. 1890), 19 Civ. Proc. R. 378, citing Wright v. Nostrand (1885), 100 N. Y. 616 (*supra*, p. 189), Holly v. Gibbons (1904), 177 N. Y. 401.

When jurisdiction in Court of Appeals ceases.

Jurisdiction in the Court of Appeals is not lost until the remittitur has been filed in the court below and that court has taken some action thereon. Accordingly, the Court of Appeals has jurisdiction to make an *ex parte* order correcting a remittitur which had been filed with the court below, but upon which no action had been taken in that court. People ex rel. Smith v. Village of Nelliston (1879), 79 N. Y. 638.

Before the above decision in People ex rel. Smith v. Village of Nelliston, some uncertainty had existed in the practice, as to the precise time when the Court of Appeals lost jurisdiction of a cause which had been brought to it on appeal — *e. g.*, it had been held in Burkle v. Luce (1848), 1 N. Y. 239, that the Court of Appeals did not lose jurisdiction until its remittitur had been actually filed with the clerk of the court below, and that the mere delivery of the remittitur to the attorney for the successful party did not have that effect; in Martin v. Wilson (1848), 1 N. Y. 240, that where, after affirmance, the remittitur had been filed with the clerk of the court below, the Court of Appeals lost jurisdiction of the cause so that it could not open a default therein; in Dresser v. Brooks (1850), 2 N. Y. 559, that after a remittitur had been regularly sent to and filed with the court below, the Court of Appeals lost jurisdiction; in Palmer v. Lawrence (1851), 5 N. Y. 455, that where the order entered by the clerk on a decision of the Court of Appeals did not correctly state the judgment of the court it would be amended on motion, notwithstanding the remittitur might have been sent to the court below and filed there; in Seacord v. Morgan (Supr. Ct. 1859), 17 How. Prac. 394, that there must be action in the court below, as well as filing there, to effect a change of jurisdiction; in Wilmerdings v. Fowler (Ct. App. 1873), 15 Abb. Prac. (N. S.) 86, that after the remittitur from the Court of Appeals had been filed in the court below, and the usual order entered thereon, it must be returned, by direction of the lower court, before the Court of Appeals could grant a reargument of the appeal; and in Cushman v. Hatfield (1873), 52 N. Y. 653, 15 Abb. Prac. (N. S.) 109, that until actually and regularly filed below, the remittitur was under the control of the Court of Appeals.

Return of remittitur for purposes of motion in Court of Appeals.

No amendment, until remittitur returned.— When the remittitur has passed beyond the jurisdiction of the Court of Appeals, by being regularly filed in the court below, and judgment entered thereon, the Court of Appeals cannot amend the remittitur, or vacate a dismissal on which it was issued, or entertain a motion for reargument, until the remittitur has been returned by the court below. Salmon v. Gedney (1878), 75 N. Y. 479, 483; Jones v. Anderson (1877), 71 N. Y. 599; Wilmerdings v. Fowler (Ct. App. 1873), 15 Abb. Prac. (N. S.) 86.

When return of remittitur will be requested.—After the Court of Appeals has lost jurisdiction of a cause by its remittitur having been filed in the court below and judgment entered thereon, it will, in a proper case, request its return by the court below, and allow a motion to stand over until jurisdiction is restored by the return of the remittitur. Bliss v. Hoggson (1881), 84 N. Y. 667.

If motion is granted, then the court below is requested to return the remittitur to the Court of Appeals to be amended accordingly. See Haseall v. King (1901), 165 N. Y. 288; Montgomery v. Buffalo Ry. Co. (1901), 165 N. Y. 648.

Although it seems the Court of Appeals would, if likely to lead to a disposition of the appeal favorable to the appellant, permit its remittitur, sent down on an affirmance of an order vacating an attachment, to be recalled to permit of an application to the court below for an amendment to the order appealed from so as to show that it was made on the ground that the justice of the court below, who granted the attachment, had no power or jurisdiction in the premises — yet, where that point has been considered on the hearing of the appeal and the proposed amendment would not aid the appellant, the motion will be denied. National Shoe & Leather Bank v. Mech. Nat. Bank (1882), 89 N. Y. 467.

Return of remittitur, by court below.— In the absence of an expression by the Court of Appeals of a desire or willingness that its remittitur should be returned, the judgment or order entered in the court below upon the remittitur will not be vacated and the remittitur returned to the Court of Appeals for the purpose of applying for a reargument, unless there appears to be some chance

that, under the decisions, a reargument will be ordered in that court. Hillyer v. Vanderwater (Supr. Ct. 1890), 11 N. Y. Supp. 167.

But it seems, that if the court should in any manner indicate its desire or willingness that a remittitur sent down and filed with the clerk of the court below be returned, the court below would at once order any judgment or order that might have been entered upon the remittitur to be vacated and the remittitur itself returned to the Court of Appeals. *Id.*

After the remittitur from the Court of Appeals has been filed in the court below and an order entered to carry it into effect, a motion to restore it to the Court of Appeals with a view to its amendment or correction there, cannot be entertained by the court below without the express assent or direction of the appellate court, authenticated by its order (Selden v. Vermilya [1850], 3 Sandf. 683); or a suggestion from the Court of Appeals that the remittitur does not conform to its judgment, or has been irregularly issued. Bogardus v. Rosendale Mfg. Co. (1852), 1 Duer, 592.

Jurisdiction before return of remittitur.— It is competent for a judge of the Court of Appeals, after its remittitur has been filed and order entered thereon in the court below, to make an order to show cause why the return of the remittitur should not be requested and a reargument granted, with a stay of proceedings in the meantime. Franklin Bank Note Co. v. Mackey (1898), 158 N. Y. 683.

This was a motion at Chambers to vacate an order to show cause and a stay of proceedings granted by a judge of the Court of Appeals for the purpose of enabling the appellant to move for a reargument after a decision of affirmance. One of the grounds of the motion was that, the remittitur having been filed and order entered thereon below, the Court of Appeals had no jurisdiction and its judge was without power to make the order. The opinion proceeds as follows:

"The order to show cause and stay were granted under the following state of facts: The case was decided by this court in favor of plaintiff April 19, 1898; the remittitur was filed with the clerk of the Supreme Court, city of New York, April 25th, and order entered, making the judgment of this court the judg-

ment of the Supreme Court, May 16th. On the 24th of June, 1898,— being the last day of the June session of the court,— the counsel for the defendant and appellant applied for an order requiring the plaintiff to show cause before the court on the first Monday of October, 1898, why the return of the remittitur herein should not be requested, and why a reargument of this cause should not be ordered, or, if such reargument should not be deemed proper, why the remittitur should not be amended in certain respects. This order was granted, with a stay of proceedings pending the hearing and determination of the application. * * * This is a motion that the court request the return of the remittitur by the court below for the purposes of the application. There is a very general misapprehension as to the practice of the court on motions for reargument or to amend the remittitur. It is often erroneously assumed that after the filing of the remittitur in the court below, and order entered thereon, this court is deprived of all jurisdiction in the cause. In Sweet v. Mowry, 138 N. Y. 650, a motion for reargument was granted, and a return of the remittitur requested. These acts of the court were held to be in resumption of jurisdiction. In Lawrence v. Church, 128 N. Y. 324, a motion to amend the remittitur was granted, and the order entered requested the return of the remittitur by the court below, and when so returned it was ordered to be amended. In Moffett v. Elmendorf, 153 N. Y. 674, a motion to amend remittitur was granted, and order entered that the remittitur be recalled for that purpose. A like motion was granted in Buchanan v. Little, 155 N. Y. 635. This later practice of the court is not necessarily inconsistent with the earlier cases, which hold that this court has no jurisdiction to grant a reargument or an amendment of the remittitur after the remittitur is filed and acted upon in the court below. Wilmerdings v. Fowler, 15 Abb. Prac. (N. S.) 86; Jones v. Anderson, 71 N. Y. 599; Cushman v. Hadfield, 15 Abb. Prac. (N. S.) 109; People ex rel. Smith v. Village of Nelliston, 79 N. Y. 638. It is competent for this court to determine whether it will resume jurisdiction for any purpose, and, having decided to do so, it then requests the court below to return the remittitur so that reargument can be had or the remittitur amended, as the case may be. It is technically true that this court must be repossessed of the remit-

titur before an order made in the cause is effectual, but there is no objection to the return of the remittitur following the determination of this court to resume jurisdiction. The Supreme Court is always reluctant to vacate its order and return the remittitur in the absence of an expression by this court that it desires such a course to be pursued. Hillyer v. Vandewater, 11 N. Y. Supp. 167. I am of opinion that there was jurisdiction to grant the order to show cause herein."

Judgment not affected by mere return of remittitur.—Although a remittitur has been remanded to the Court of Appeals, it cannot be said that the appeal in that court is still undetermined; for, until the judgment (or order of dismissal) of the Court of Appeals is vacated by that court, the judgment of the court below entered thereon remains in full force and is binding. Murray v. Jones (N. Y. City Ct. 1888), 2 N. Y. Supp. 486, citing Newton v. Harris (1850), 8 Barb. 306, which see.

Where, after the entry of judgment below upon a remittitur sent down from the Court of Appeals, a motion for reargument was granted, with a request to the court below to return the remittitur, which was done, and upon the reargument the former decision was reaffirmed, and the record sent back with a further remittitur, ordering and adjudging as in the first remittitur, and granting costs in the Court of Appeals, it was held that this left the order and judgment entered below on the first remittitur unaffected; that the resumption by the Court of Appeals of its jurisdiction of the appeal operated simply to suspend proceedings in the court below; that the provisions of the first remittitur were not altered by the subsequent decision; that the award of costs in the latter related simply to costs on the second argument; and that, therefore, a motion to set aside the judgment entered on the first remittitur was properly denied. Sweet v. Mowry (1893), 138 N. Y. 650.

Staying filing of remittitur.

When filing of remittitur will be stayed by court below, for motion for reargument.—After an appeal has been determined by the Court of Appeals, the court below will not stay the filing of the remittitur, upon an affidavit of intention to apply for a reargument in the appellate court, and showing grounds

therefor. The court below ought not to question the decision of the appellate court nor delay enforcing it, without some sanction from that court or one of its judges. But where a judge of the Court of Appeals grants an order to show cause why a reargument should not be had and directing that in the meantime the remittitur be stayed if it had not been sent down, the court below may properly order that the filing of the remittitur be stayed pending the application to the Court of Appeals, even though the remittitur had been sent down when the order to show cause was made. Jarvis v. Shaw (N. Y. Supr. Ct. 1863), 16 Abb. Prac. 415.

(As to staying action on remittitur by order of a judge of the Court of Appeals, see Rule XVIII.)

Amending remittitur.

Amendment, so as to show grounds of decision, denied.—A motion to amend a remittitur by stating therein the grounds of the decision, on a showing of an intent to appeal to the Supreme Court of the United States, was denied, on the ground that the appellant could procure the transmission of a duly authenticated copy of the opinion of the court with the record, in People ex rel. Schurz v. Cook (1888), 111 N. Y. 688.

Amendment, so as to permit further proof below, granted.—Where an affirmance by the Court of Appeals is based upon a defect of proof on a point not taken in the court below, the Court of Appeals may amend its remittitur so as to show that fact and that the affirmance is without prejudice to an application by the appellant to the court below to reopen the case and allow a rehearing on further proofs. Matter of Ingraham (1876), 64 N. Y. 310.

New condition cannot be inserted.—The Court of Appeals has no power to amend its remittitur by putting in some other condition than one imposed, on amendment of prior proceedings, by the court below. Symson v. Selheimer (1887), 1 Silv. Ct. App. 455.

Cannot be amended on evidence outside record.—The Court of Appeals cannot re-examine a case and correct a remittitur upon affidavits or other evidence outside the record, making a case different from that brought up by the record. Matter of Peugnet (1876), 67 N. Y. 441, 446.

Motion to amend, when in effect a motion for reargument.— In Genet v. Delaware and Hudson Canal Co. (1893), 137 N. Y. 626, a motion to amend the remittitur was denied, where it appeared that the motion was in substance and effect a second motion for a reargument after one had been made and denied, brought more than a year after the remittitur had been sent down by express direction of the court, without any claim or suggestion that any point or authority had been overlooked, and practically and substantially amounting to an appeal from the Second Division of the Court of Appeals.

Amendment of record below, as indicated by remittitur.

Where the Court of Appeals granted an amendment of a complaint, under the power conferred by section 723 of the Code of Civil Procedure, so as to show the character in which the plaintiff sued, it was considered proper that when its remittitur went down, the complaint and the judgment as entered should be amended in the respect indicated. Reeder v. Sayre (1877), 70 N. Y. 180, 191.

Remittitur as evidence.

The remittitur is conclusive evidence as to the regularity of the appeal, in an action on the undertaking. Hill v. Burke (1875), 62 N. Y. 111.

Decisions, remittiturs, and opinions; procedure in reference to.

Decisions.— Decisions are handed down at the opening of court on each Tuesday during sessions and on the last Friday of each session, and are delivered to the clerk for entry, and issuance of remittiturs thereon. The decisions are immediately furnished to the newspaper associations for publication throughout the State; and the clerk telegraphs the decision in each case to the respective attorneys.

Remittiturs.— Remittiturs are made out as soon as possible after the decisions are handed down, and are transmitted to the attorney for the prevailing party in each case decided, unless a request has been received by the clerk from the attorney on the other side to hold the remittitur; in that event, the remittitur will be held for a reasonable time, if not demanded by the party

entitled thereto; if so demanded, it will be transmitted, unless a stay shall have been obtained. The fee for a remittitur is two dollars.

Opinions.—Opinions in cases decided are delivered to the State reporter, as provided by section 210 of the Code of Civil Procedure, and all requests for copies and inquiries in reference to opinions should be addressed to him. The only opinions filed with the clerk are those which are not reported by the State reporter. Such opinions are deposited with the clerk immediately after the publication of the reports of other cases decided at the same time, as prescribed by section 216 of the Code of Civil Procedure. Until such publication, all opinions are in charge of the reporter.

Criminal causes.

The Code of Criminal Procedure provides as follows:

Judgment on appeal; amendment; execution of death sentence.

§ 543. Upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered upon a lawful verdict, or finding of fact, correct the judgment to conform to the judgment, or finding; in all other cases they must either reverse or affirm the judgment appealed from, and in cases of reversal, may, if necessary or proper, order a new trial. If the judgment of death is affirmed, the Court of Appeals, by an order under its seal, signed by a majority of the judges, shall fix the week during which the original sentence of death shall be executed, and such order shall be sufficient authority to the agent and warden of any State prison for the execution of the prisoner at the time therein specified, and the agent and warden must execute the judgment accordingly.

Judgment of appellate court, how entered and remitted.

§ 547. When the judgment of the appellate court is given, it must be entered in the judgment book and a certified copy of the entry forthwith remitted to the clerk with whom the original judgment-roll is filed, or, if a new trial be ordered in another county, to the clerk of that county, unless the judgment be rendered in the absence of the adverse party, in which case, the court may direct it to be retained, not exceeding ten days.

Decision and return to be remitted.

§ 548. The decision of the court and the return shall be remitted to the court below in the same form and manner as in civil actions.

When jurisdiction of appellate court ceases.

§ 549. After the certificate of the judgment has been remitted as provided in section five hundred and forty-seven, the appellate court has no further jurisdiction of the appeal, or of the proceedings thereon; and except as provided in section five hundred and forty-three, all orders, which may be

necessary to carry the judgment into effect, must be made by the court to which the certificate is remitted, or by any court to which the cause may thereafter be removed.

Provision for reassignment of time for execution of sentence in capital cases, when the time originally fixed (§ 492) has passed, is also made by sections 503 and 504 of the Code of Criminal Procedure.

Amendment of entry of judgment.— The omission of the clerk of the trial court in his entry of judgment to state the offense for which the conviction was had does not render the sentence void but the defect is amendable under section 543 of the Code of Criminal Procedure and upon appeal to the Court of Appeals other parts of the record may be referred to and if they furnish evidence of the fact so omitted, the court may conform the entry to the fact. People v. Bradner (1887), 107 N. Y. 1.

RULE XVII.

Affirmance by Default.

When a judgment or order shall be affirmed by the default of the appellant, the remittitur shall not be sent to the court below, unless this court shall otherwise direct, until ten days after notice of the affirmance shall have been served [by the attorney for the respondent] on the attorney for the appellant [and proof thereof filed with the clerk.] Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served.

Object of the rule.

The object of this rule is to protect the appellant against surprise, and to give him ample time to make his application for relief, or to obtain an order staying proceedings to enable him to do so. But if he neglects to avail himself of the benefit of the time thus given, and the remittitur has gone down and been filed in the court below, and the court has lost control of the case, it is too late to move to open the default. Latson v. Wallace (Ct. App. 1854), 9 How. Prac. 334.

(See, under Rule XVI, as to when the jurisdiction of the Court of Appeals ceases and it loses control of a case.)

Practice of the clerk's office.

Unless the court stays the remittitur or directs it to issue otherwise than is provided by the rule, the clerk will, on the expiration of ten days after service on the appellant's attorney of notice of an affirmance under Rule XV, proved as required by this rule, make up the remittitur and transmit it to the respondent's attorney.

RULE XVIII.

Enlarging Time — Revoking Orders.

The time prescribed by these rules for doing any act may be enlarged by the court or by any of the judges thereof; and any of the judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings, according to the terms of the order. Any order may be revoked or modified by the judge who made it; or, in case of his absence or inability to act, by any of the other judges.

Enlarging time.

The Code of Civil Procedure provides as follows:

How time enlarged, before its expiration.

§ 781. Where the time, within which a proceeding in an action after its commencement, must be taken, has begun to run, and has not expired, it may be enlarged, upon an affidavit showing grounds therefor, by the court, or by a judge authorized to make an order in the action.

Copy of affidavit must be served.

§ 782. In a case specified in the last two sections, the affidavit, upon which the order was granted, or a copy thereof, must be served with a copy of the order; otherwise the order may be disregarded.

Relief after time has expired.

§ 783. After the expiration of the time within which a pleading must be made, or any other proceeding in an action, after its commencement must be taken, the court, upon good cause shown, may, in its discretion, and upon such terms as justice requires, relieve the party from the consequences of an omission to do the act, and allow it to be done; except as otherwise specially prescribed by law.

When time cannot be extended.

§ 784. A court, or a judge, is not authorized to extend the time fixed by law, within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a dis-

ability; or the time fixed by the court, within which a supplemental complaint must be made, in order to continue an action; or an action is to abate, unless it is continued by the proper parties. A court, or a judge, cannot allow either of those acts to be done, after the expiration of the time fixed by law, or by the order, as the case may be, for doing it; except in a case specified in the next section.

Qualification of last section.

§ 785. Where a party, entitled to appeal from a judgment or order, or to move to set aside a final judgment for error in fact, dies, either before or after this chapter takes effect, and before the expiration of the time within which the appeal may be taken, or the motion made, the court may allow the appeal to be taken, or the motion to be made, by the heir, devisee, or personal representative of the decedent, at any time within four months after his death.

Staying proceedings.

Section 775 of the Code of Civil Procedure is as follows:

When stay of proceedings not to exceed twenty days.

§ 775. An order to stay proceedings in an action, for a longer time than twenty days, shall not be made by a judge, out of court, except to stay proceedings under an order or judgment appealed from, or where it is made upon notice of the application, to the adverse party, or in cases where special provision is otherwise made by law.

Application of rule.— This rule, authorizing orders by a single judge to stay proceedings, and making such orders effectual when served with motion papers, has reference to general stays of proceedings in causes pending in the Court of Appeals. Cushman v. Hatfield (1873), 52 N. Y. 653; 15 Abb. Prac. (N. S.) 109.

Staying filing of remittitur.— The Court of Appeals has control of its own remittitur, in whosesoever hands it may be, until it is actually and regularly filed in the court below; and an order of any one of the judges temporarily staying the filing thereof is valid and operative, although not accompanied by motion papers or notice of motion. Cushman v. Hatfield, *supra.*

The above decision overrules a contrary statement as to the power of a single judge of the Court of Appeals to stay a remittitur, in Lawrence v. Bank of Republic (N. Y. Supr. Ct. 1866), 6 Rob. 497; and it is now settled that the Court of Appeals does not lose control of its remittitur until some action, in addition to mere filing, has been taken on it in the court below. See People ex rel. Smith v. Village of Nelliston (1879), 79 N. Y. 638, under Rule XVI, *supra.*

Stay for more than twenty days.— The restriction imposed by section 775 of the Code of Civil Procedure upon the power of a judge out of court to stay proceedings for more than twenty days except upon notice, does not apply to a stay for the purpose of a motion for reargument of an appeal. Franklin Bank Note Co. v. Mackey (1898), 158 N. Y. 683.

The filing of a remittitur in violation of an order of the Court of Appeals, is, in legal effect, no filing. Marshall v. Macy (Supr. Ct. 1877), 5 Wkly. Dig. 90.

Revoking orders.

Inherent power of courts.— Every court of record, unless restrained by positive enactment, has the power, on motion, to vacate its judgment or process to prevent a perversion thereof or to frustrate oppression (Morgan v. Holladay [1874], 38 N. Y. Supr. Ct. 117); and this inherent power has not been impaired by the Code of Civil Procedure. Levy v. Loeb (N. Y. Supr. Ct. 1878), 5 Abb. N. C. 157.

RULE XIX.

Calendars.

When a new calendar is ordered by the court, the clerk shall place thereon all causes in which notices of argument, with proof or admission of service, have been filed in his office; and, also, if ordered by the court, all other causes in which the returns have been filed in his office; and the causes so put on the calendar by the direction of the court will be heard in their order as if regularly noticed.

Calendars; notice of argument.

Position on calendar regulated by date or filing return.—A notice of argument is of no effect, and a cause cannot be placed on the calendar of the Court of Appeals, until the return has been filed. Reformed Church v. Brown (Supr. Ct. 1862), 24 How. Prac. 89.

A motion to place a cause on the calendar as of the time when the return should have been regularly filed, was denied, for the reason that such motions would derange the whole calendar. Crain v. Rowley (Ct. App. 1849), 4 How. Prac. 79.

The original date of filing return is not affected by amendment. Livingston v. Miller (Ct. App. 1852), 7 How. Prac. 219.

Appellant not compelled to notice.— It is not a ground for dismissal of appeal that the appellant has failed to notice the case for argument and place it on the calendar; if the respondent wishes to expedite it, he may notice. Nichols v. MacLean (1885), 98 N. Y. 458.

Respondent not precluded, by noticing, from moving to dismiss.—A respondent is not precluded from making a motion to dismiss the appeal by the fact of his having noticed the case for argument and placed it on the calendar. Stoughton v. Lewis (Ct. App. 1885), 2 How. Prac. (N. S.) 331.

Terms or sessions of the court; when new calendar made.

Sessions and recesses.— The Judiciary Law, section 54, provides as follows:

Terms of Court of Appeals.

§ 54. The terms of the court of appeals must be appointed to be held, at such times and places as the court thinks proper, and continued as long as the public interest requires.

A term of the court may be appointed to be held in a building, other than that designated by law for holding courts.

A term may be adjourned from the place where it is appointed to be held, to another place in the same city.

One or more of the judges may adjourn a term, without day, or to a day certain.

(Paragraph 1, from Code of Civil Procedure, § 196, paragraphs 2, 3 and 4 from Code of Civil Procedure, § 197.)

The practice of the court is to hold sessions of four weeks or more each with intervening recesses, usually of one or two weeks, throughout the year, except during the summer when a recess is usually taken from the latter part of June to the first Monday of October. On adjourning for a recess, the court appoints and announces the date when the next session will begin. The sessions are regularly held at the Capitol, in Albany, the court sitting from 2 o'clock to 6 o'clock P. M. The court does not sit on Saturdays.

Term fees.— The question whether the sessions of the court are parts of one term continuing through the year, or are separate

terms, has not been passed upon by the Court of Appeals, but it has been raised in the courts of original jurisdiction, in connection with the taxation of term fees in bills of costs, under section 3251, subdivision 5, of the Code of Civil Procedure, which contains the following, among the provisions for costs upon an appeal to the Court of Appeals:

> For each term, not exceeding ten, at which the cause is on the calendar, excluding the term at which it is argued, or otherwise finally disposed of, ten dollars.

The Supreme Court has held, in Whiteman v. Leslie (1879), 1 Law Bull. 50, and in Powell v. N. Y. C. & H. R. R. Co. (1888), 14 Civ. Proc. R. 125, that there being no formal assignment of terms in the Court of Appeals, it is to be considered as holding only one term a year, commencing in January and continuing, with recesses, through the year, and that the time of making the calendar does not control; and, consequently, that only one term fee for each calendar year can be allowed in any cause. Other decisions on this subject, but made before the adoption of the Code of Civil Procedure and based on earlier statutory provisions as to terms of the Court of Appeals, are Palmer v. De Witt (N. Y. Supr. Ct. 1872), 42 How. Prac. 466; Macy v. Nelson (Supr. Ct. 1875), 49 How. Prac. 204 and Carpenter v. Willett (N. Y. Supr. Ct. 1865), 28 How. Prac. 376; S. C., 3 Rob. 700.

New calendars; when made.—A new calendar is not made at any fixed time, but on or about the last day of any session at which it is apparent that not enough causes remain undisposed of to occupy the court for another session, a new calendar is ordered to be made for the ensuing session. The order therefor, which is published throughout the State, contains a statement of the date on or before which returns and notices of argument for the new calendar must be filed, and the date of the beginning of the session at which the new calendar will be taken up.

Notices of argument.— On the promulgation of such order for a new calendar, notices of argument for the day specified in the order must be served, and filed in the clerk's office, with proof or admission of service, on or before the date fixed therefor in the order, to entitle any cause to be placed on the calendar, unless the

order for a new calendar contains a direction to place thereon all causes in which returns have been filed. But such a direction will apply only to the general calendar, and a notice of argument, containing a claim and statement of the ground of preference, as required by Rule XIV, must, in all cases, be served and filed, with proof or admission of service, to entitle a cause to be placed on the preferred calendar.

Making up calendar.— Causes not entitled to a preference are placed on the general calendar in the order of dates of filing the respective returns, except as a cause may be advanced on second and subsequent appeals, or set back by reason of having been passed or exchanged. Preferred causes (except appeals from orders entitled to be heard on motion day) precede the general calendar, in the prescribed classes of preference (see under Rule XIV), being arranged in the several classes according to dates of filing returns. Appeals from orders entitled to be heard on motion day (see Rule XI), and criminal causes added after the calendar is made up (see Rule IX), are given numbers after the general calendar.

The court will not add cases to an existing calendar even though they are entitled to preference, unless some question of public importance is involved or the circumstances are extraordinary. Goldberg v. Markowitz (1904), 179 N. Y. 596.

No civil causes, except appeals under Rule XI entitled to be heard, can be added to the calendar after it is made up, except by special order of the court, upon a motion duly made; and such order will be granted only under extraordinary circumstances.

Motions to correct calendar.— Motions to correct the calendar, or to change the position of a cause thereon, should be noticed for and be made on the first motion day of the session at which a new calendar is taken up.

RULE XX.

Motion for Reargument.

[Motions for reargument must be submitted on printed briefs, without oral argument, on notice to the adverse party, stating briefly the ground upon which a reargument

is asked, and the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case, and the authorities relied upon.]

Requisites of motion for reargument.

Papers must show what.—A motion for reargument will not be entertained unless founded on papers clearly showing either that some question, decisive of the case and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute or a controlling decision overlooked by the court, or to which its attention was not drawn through the neglect or inadvertence of counsel. Mount v. Mitchell (1865), 32 N. Y. 702.

In Marine Nat. Bank v. Nat. City Bank (1874), 59 N. Y. 67, 73, the court stated that it proposed to adhere to the general rule laid down in Mount v. Mitchell (*supra*), and that motions for reargument would not be entertained unless brought within it. The same rule was applied in Auburn City Nat. Bank v. Hunsiker (1878), 72 N. Y. 252, 259, and was reaffirmed in Fosdick v. Town of Hempstead (1891), 126 N. Y. 651. But in O'Brien v. Mayor of New York (1894), 142 N. Y. 671, the court entertained a motion for reargument in consideration of the extraordinary importance of the case, although the motion was not based on any of the grounds usually recognized by the court as required to support a motion for reargument.

The papers on a motion for reargument should be sufficient to enable the court to determine whether the decision requires correction in any respect; hence, on a motion based on alleged errors in the dissenting opinion of the court below, on which the case was decided in the Court of Appeals, the case on appeal containing the opinion should be furnished. Anderson v. Continental Ins. Co. (1887), 106 N. Y. 661.

Motion for reargument — Practice.— While there is no prescribed limitation of time within which a motion for reargument may be made, it is understood that such a motion should be made as soon as possible after the announcement of the decision, to avoid the imputation of laches.

Reargument of capital case.— While in a capital case the appellant will not be held to the rule that points alleged to have been overlooked by the court and made the basis of a motion for reargument must have been raised by counsel on the argument, yet, where no important objection has been overlooked, the motion must be denied; the fact, however, that exceptions raised upon the trial are not specifically alluded to or separately discussed in the prevailing opinion does not indicate that they were not considered before the decision of the appeal. People v. Patrick (1905), 183 N. Y. 52.

Instances of granting a reargument are People ex rel. Wasson v. Schuyler (1877), 69 N. Y. 242, 245; Sweet v. City of Syracuse (1891), 128 N. Y. 680, 129 N. Y. 316, 138 N. Y. 650; Franklin Bank Note Co. v. Mackey (1898), 158 N. Y. 683.

Record must present question.—A reargument must be on the record used on the original argument, and if it does not contain an exception presenting the question desired to be raised, a reargument cannot be had. Hunt v. Church (1878), 73 N. Y. 615.

Insufficient grounds for motion.

Settlement of questions in other actions.—A reargument will not be granted to obtain a settlement of questions which may arise in other pending actions; nor to obtain an elaborate expression of reasons, when the only question involved in the appeal has been necessarily passed upon by the decision of the court, without a written opinion. Becker v. Howard (1876), 66 N. Y. 5.

Death of party; motion before substitution had.— The fact that at the time of the argument and decision of an appeal the plaintiff was dead, though that fact was not then known to counsel nor disclosed to the court, is not a ground for a reargument, before substitution has been regularly had. Blake v. Griswold (Ct. App. 1886), 9 N. E. 493.

Omission to present point.— The omission of counsel to present on the argument or notice in his points a question arising in the case is not, as a general rule, a ground for reargument; the ordinary rule that an exception not raised on argument is to be deemed abandoned will govern. Rogers v. Laytin (1880), 81 N. Y. 642; Eno v. Mayor of N. Y. (Ct. App. 1877), 4 Wkly. Dig. 246.

Hardship resulting from judgment absolute.— It is not a ground for granting a reargument, after rendition of judgment absolute against the appellant on an appeal from an order granting a new trial, that injustice will result to him from such judgment, where no error was committed in granting the order appealed from. The result could have been avoided by taking the new trial; and if parties stipulate their causes into the Court of Appeals, instead of availing themselves of the new trial ordered below, they necessarily assume the hazard of injurious consequences. Godfrey v. Moser (1876), 66 N. Y. 250; Williams v. Lindblom (1894), 143 N. Y. 675.

Amendment of defects since argument.—A reargument will not be granted on proof of the amendment of defects by reason of which the original decision had held that a corporation had not been created — such proof not having been in the case below, to a review of which the Court of Appeals is confined. N. Y. Cable Co. v. Mayor of N. Y. (1887), 104 N. Y. 1.

Amendment showing reversal on facts.— Where a General Term order of reversal did not state that it was made upon the facts, and upon appeal therefrom the counsel for the respondent proceeded to argument without applying for a postponement to enable him to procure an amendment of the order, and after the appeal was decided against him applied to the General Term and obtained an amendment by inserting such a statement, a reargument upon the amended order was refused, it being held that the respondent was concluded by his election to have the case decided on the questions of law. Cudahy v. Rhinehart (1892), 133 N. Y. 675.

Erroneous assumption that point not in opinion was overlooked. — It is not the duty of the court in its opinions to satisfy counsel in every case that the proper judgment has been given and for the right reason; nor to answer every suggestion of, and review every case cited by disappointed counsel. Counsel must assume that the court is familiar with and not inattentive to its own decisions, and has, with reasonable intelligence and industry, considered their arguments. Kamp v. Kamp (1874), 59 N. Y. 212, 221.

It is not to be assumed because a fact appearing in the record or authority cited on argument in the Court of Appeals, which is

deemed important by counsel, is not noticed or commented on in the opinion that it has not been considered and due weight given to it in arriving at the decision, and the omission to notice it is not a ground for a motion for reargument. Dammert v. Osborn (1894), 141 N. Y. 564; Carleton v. Lombard (1896), 149 N. Y. 601; Colonial City Traction Co. v. Kingston City R. R. Co. (1897), 154 N. Y. 493; and the fact that certain points made upon the argument are not discussed in the opinion does not warrant the conclusion that they were overlooked. Burke v. Continental Ins. Co. (1906), 184 N. Y. 570; People v. Ladew (1907), 190 N. Y. 543.

The omission of the court, when sanctioning a former decision, to notice and discuss in its opinion supposed distinctions, is not sufficient to warrant a supposition that they have escaped observation. Terry v. Wait (1874), 56 N. Y. 91.

Insufficient ground for motion for reargument.— It is not the usual practice of the Court of Appeals to permit reargruments for the purpose of correcting some error in the reasoning of the court as expressed in the opinion, when it is admitted that the decision itself is correct. Matter of Lyman (1899), 161 N. Y. 119.

Proceedings in conference chamber.— Proceedings in the conference chamber of the judges are not to be inquired into to sustain a motion for reargument. Mason v. Jones (1850), 3 N. Y. 375.

Alleged error in printed record.— In Burt v. Oneida Community (1893), 138 N. Y. 649, a motion for reargument upon the ground of an alleged error in the record on appeal, consisting of a misstatement in the findings of the referee, was denied, where it was admitted that a correct copy of the record had been filed with the reporter of the court, and it appeared that the copies handed up on argument and upon which the court rendered its decision agreed with this correct copy, and that if there were any faulty or defective copies printed they were not before the court and could not have affected its determination.

Relief by new trial, rather than by reargument.

A motion for reargument was denied upon the ground that, as a new trial had been ordered and the remittitur had gone down, either party could, if dissatisfied with the result, bring the case

again to the Court of Appeals for final disposition, in Mech. & Trad. Bank v. Dakin (1873), 54 N. Y. 681.

The Court of Appeals, in People v. Ballard (1892), 136 N. Y. 639, refused a reargument of an appeal determined in the Second Division of that court, upon a question claimed to have been overlooked, where it appeared that such question might be determined upon the new trial which had been ordered by the judgment rendered.

In Griggs v. Day (1893), 137 N. Y. 542, a motion for a reargument upon the ground that the opinion of the court declared certain securities to be valueless, although the referee had refused so to find, was denied, it appearing that the expression in the opinion could not conclude the party on the new trial which had been granted.

Motion after remittitur has gone down.

After the remittitur has gone down and been filed and acted upon in the court below, the Court of Appeals is without jurisdiction to entertain a motion for reargument (Cochran v. Ingersoll [1876], 66 N. Y. 652; People ex rel. Smith v. Village of Nelliston [1879], 79 N. Y. 638); and the remittitur must be returned before a reargument can be granted (Wilmerdings v. Fowler [Ct. App. 1873], 15 Abb. Prac. [N. S.] 86.)

But it is competent for the Court of Appeals to determine whether it will resume jurisdiction for any purpose, and, having decided to do so, it then requests the court below to return the remittitur, so that reargument can be had or the remittitur amended, as the case may be. Franklin Bank Note Co. v. Mackey (1898), 158 N. Y. 683.

(See further, as to restoration of jurisdiction by return of remittitur, under Rules XI and XVI, and as to stay of proceedings under Rule XVIII.)

Judgment on remittitur not affected by reargument.—A recall of the original remittitur and a reargument of the case in the Court of Appeals, resulting in a reaffirmance by that court of its first decision, do not of themselves affect proceedings already had in the court below upon the remittitur or the judgment entered thereon. Sweet v. Mowry (1893), 138 N. Y. 650.

Reargument — Time within which motion should be made.—Although there is no time limit prescribed by statute or the rules,

within which a motion for reargument must be made, still, as matter of convenience, to avoid the imputation of laches, and to prevent complications arising from enforcement of the decision on the original argument, the motion should be made as soon as possible after the rendition of the decision.

Motion for reargument in guise of a motion to amend remittitur.— In Genet v. Delaware and Hudson Canal Co. (1893), 137 N. Y. 626, a motion to amend the remittitur was denied, where it appeared that the motion was in substance and effect a second motion for a reargument after one had been made and denied.

Procedure on moving for reargument.

The remittitur.— If it is intended to move for a reargument, a stipulation should be obtained from the other side, or an order from one of the judges (see Rule XVIII), staying the remittitur, in case it has not gone down, or staying proceedings thereon in case it has gone down but not been acted upon. If the remittitur has been filed and action taken thereon in the court below, application should be inserted in the moving papers for a reargument, and the court should be asked therein to request the return of the remittitur and thereupon to grant a reargument.

Motion papers.— Motions for reargument may be noticed for any Monday when the Court is in session. As such motions are required to be submitted without oral argument, the original motion papers and notice, with proof or admission of service, and eighteen copies of the printed briefs of each side on the motion, should be filed with the clerk, on or before the Friday preceding the day named in the notice. (See under Rule XI, page 157.)

Order.— On decision of the motion, the clerk drafts and enters the proper order, and transmits a certified copy thereof to the attorney for the prevailing party. The fee for entering the order and furnishing a certified copy thereof is one dollar.

RULES FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS-AT-LAW.*

ORDER ADOPTING RULES.

IN THE COURT OF APPEALS.

Dec. 20, 1906.

Ordered, That the following amended Rules regulating the Admission of Attorneys and Counselors-at-Law be and the same hereby are adopted, in pursuance of the provisions of the Code of Civil Procedure, such Rules to take effect July 1, 1907.

RULE I.

Admission and License.

No person shall be admitted to practice as an attorney or counselor in any court of record in this State, without a regular admission to the bar and license to practice granted by [the] Appellate Division of the Supreme Court.

Changes in the Rule.

This rule is taken from the first clause of former Rule I. The other portions of that rule, which provided for the examination of applicants for admission, by the justices of the General Terms of the Supreme Court, or by a committee of lawyers appointed by them, have been superseded by the amendment of 1894 to former section 56 of the Code of Civil Procedure (as amended, chap. 946, L. 1895), creating a State Board of Law Examiners, now embodied in the Judiciary Law, which is given below.

* These rules, as now numbered and arranged, were adopted October 22, 1894, and took effect January 1, 1895. Certain amendments were made on December 2, 1895, to take effect January 1, 1896, and are hereinafter referred to as amendments of 1896. When "former rules" are mentioned, the reference is to the rules which were adopted October 28, 1892, and were in force until January 1, 1895; and, when any rule or provision is said to be "new," it is meant that it was introduced by the revision of 1894, which went into effect January 1, 1895. The amendments made on December 20, 1906, in effect July 1, 1907, are indicated by being printed in brackets, and those made April 24, 1908, in effect June 1, 1908, by being printed in italics.

Examination, admission and suspension.

The Judiciary Law provides as follows:

Power of Court of Appeals as to admission of attorneys and counselors.

§ 53. 1. The Court of Appeals may from time to time make, alter and amend, rules not inconsistent with the Constitution and statutes of the State, regulating the admission of attorneys and counselors-at-law, to practice in all the courts of record of the State.

2. The court may make such provisions as it shall deem proper for admission to practice as attorneys and counselors, of persons who have been admitted to practice in other states or countries.

3. The court shall prescribe rules providing for a uniform system of examination of candidates for admission to practice as attorneys and counselors, which shall govern the State Board of Law Examiners in the performance of its duties.

4. The rules established by the Court of Appeals, touching the admission of attorneys and counselors to practice in the Courts of record of the State, shall not be changed or amended except by a majority of the judges of that court. A copy of each amendment to such rules must, within five days after it is adopted, be filed in the office of the Secretary of State.

5. Nothing contained in this chapter prevents the Court of Appeals from dispensing, in the rules established by it, with the whole or any part of the stated period of clerkship required from an applicant, or with the examination where the applicant is a graduate of the Albany law school, being the law department of the Union University, or of the law department of the University of The City of New York, or of the law school of Columbia College, or of the law school of the University of Buffalo, or the New York Law School, or the college of law, Cornell University, or of the school of law, Syracuse University, or the Brooklyn Law School of St. Lawrence University, or Fordham University Law School, and produces his diploma upon his application for admission. (Formerly embodied in the Code of Civil Procedure, sections 193, 56, 57, 58.)

Appointment and compensation of State Board of Law Examiners.

§ 56. The members of the State Board of Law Examiners shall be appointed from time to time, by the Court of Appeals, as provided in section 461 of this chapter. The Court of Appeals shall fix the compensation of the members of the said board. (From the Code of Civil Procedure, section 56, part.)

Examination and admission of attorneys.

§ 460. A citizen of the State, of full age, applying to be admitted to practice as an attorney or counselor in the Courts of Record of the State, must be examined and licensed to practice as prescribed in this chapter. (From Code of Civil Procedure, section 56, part.)

State Board of Law Examiners continued.

§ 461. The State Board of Law Examiners is continued. Said board shall consist of three members of the bar, of at least ten years' standing,

who shall be appointed, from time to time, by the Court of Appeals, and shall hold office, as a member of such board, for a term of three years, and until the appointment of his successor. (From the Code of Civil Procedure, section 56, part.)

Times and places of examinations.

§ 462. There shall be examinations of all persons applying for admission to practice as attorneys and counselors-at-law at least twice in each year in each judicial department, and at such other times and places as the Court of Appeals may direct. (From Code of Civil Procedure, section 56, part.)

Certification by State Board of successful candidates.

§ 463. The State Board of Law Examiners shall certify to the Appellate Division of the Supreme Court of the department in which each candidate has resided for the past six months every person who shall pass the examination, provided such person shall have in other respects complied with the rules regulating admission to practice as attorneys and counselors, which fact shall be determined by said board before examination. (From Code of Civil Procedure, section 56, part.)

Fee for examinations.

§ 465. Every person applying for examination for admission to practice as an attorney and counselor-at-law shall pay such fee, not to exceed fifteen dollars, as may be fixed by the Court of Appeals as necessary to cover the cost of such examination. On payment of one examination fee the applicant shall be entitled to the privilege of not exceeding three examinations. (From Code of Civil Procedure, section 56, part.)

Attorney's oath of office.

§ 466. Each person admitted as prescribed in this chapter must, upon his admission, take the constitutional oath of office in open court, and subscribe the same in a roll or book, to be kept in the office of the clerk of the Appellate Division of the Supreme Court for that purpose. (From Code of Civil Procedure, section 59, part.)

Race or sex no bar to admission to practice.

§ 467. Race or sex shall constitute no cause for refusing any person examination or admission to practice. (From Code of Civil Procedure, section 56, part.)

Admission to and removal from practice by Appellate Division.

§ 88. 1. Upon the certificate of the State Board of Law Examiners, that a person has passed the required examination, if the Appellate Division of the Supreme Court in the department in which such person lives shall

find such person is of good moral character, it shall enter an order licensing and admitting him to practice as an attorney and counselor in all courts of the State. (From Code of Civil Procedure, section 56.)

2. An attorney and counselor, who is guilty of any deceit, malpractice, crime or misdemeanor, or who is guilty of any fraud or deceit in proceedings by which he was admitted to practice as an attorney and counselor of the Courts of Record of this State, may be suspended from practice, or removed from office, by the Appellate Division of the Supreme Court. Any fraudulent act or representation by an applicant in connection with his application or admission shall be sufficient cause for the revocation of his license by the Appellate Division of the Supreme Court granting the same. (From Code of Civil Procedure, sections 56, 57.)

3. Whenever any attorney or counselor-at-law shall be convicted of a felony, there may be presented to the Appellate Division of the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted, shall, by order of the court, be stricken from the roll of attorneys. (From Code of Civil Procedure, section 67.)

4. Upon a reversal of the conviction for felony of an attorney and counselor-at-law, or pardon by the President of the United States or Governor of this State, the Appellate Division shall have power to vacate or modify such order or debarment. (From Code of Civil Pro., section 67.)

5. The presiding justice of the Appellate Division making the order of designation of a district attorney within the department to prosecute a case for the removal or suspension of an attorney or counselor, or the order of reference in such cases, may make an order directing the expenses of such proceedings to be paid by the county treasurer of the county where the attorney or counselor removed or suspended, or against whom charges were made as prescribed in section 476 of this chapter, had his last known place of residence or principal place of business, which expenses shall be a charge upon such county. (From Code of Civil Procedure, section 68.)

Suspension of attorney from practice must be on notice.

§ 476. Before an attorney or counselor is suspended or removed as prescribed in section eighty-eight of this chapter, a copy of the charges against him must be delivered to him personally or, in case it is established to the satisfaction of the court, that he cannot be served within the State, the same may be served upon him without the State by mail or otherwise as the court may direct, and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any district attorney within a department, when so designated by the Appellate Division of the Supreme Court, to prosecute all cases for the removal or suspension of attorneys or counselors. (From Code of Civil Procedure, section 68.)

Attorney convicted of felony shall cease to be attorney.

§ 477. Any person being an attorney and counselor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney

and counselor-at-law, or to be competent to practice as such. (From Code of Civil Procedure, section 67.)

Suspension or removal of attorney effective in all courts.

§ 478. The suspension or removal of an attorney or counselor, by the Supreme Court, operates as a suspension or removal in every court of the State. (From Code of Civil Procedure, section 69.)

Action against attorney for lending his name in suits and against persons using name.

§ 479. If a person knowingly permits a person not being his general law partner, or a clerk in his office, to sue out a mandate, or to prosecute or defend an action in his name, he, and the person who so uses his name, each forfeits to the party against whom the mandate has been sued out, or the action prosecuted or defended, the sum of fifty dollars, to be recovered in an action. (Code of Civil Procedure, section 72.)

Duties of clerk of Appellate Division as to person admitted to practice law.

§ 264, subd. 6, of the Judiciary Law provides as follows:

6. The clerk of each department of the Appellate Division, upon the payment of the fees allowed by law, must deliver to the person admitted to practice as an attorney and counselor a certificate under his hand and official seal, stating that such person has been so admitted, and that he has taken and subscribed the constitutional oath of office as prescribed in section 466 of this chapter. (From Code of Civil Procedure, section 59.)

Contempts punishable civilly.

§ 753. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases:

1. An attorney, counselor * * * in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust or for a wilful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.

3. A party to the action or special proceeding, an attorney, counselor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

4. A person, for assuming to be an attorney or counselor, or other officer of the court, and acting as such without authority; * * * (Formerly Code of Civil Procedure, section 14.)

The office of attorney.

An attorney is an officer of the court.—Attorneys, receiving their authority from the court, are deemed its officers, and their license is an assurance, not only of their competency, but of their character and title to confidence. The direct control of the courts over them as officers, by way of summary discipline and punishment to compel them to performance of their duty, or to suspend or degrade them, is retained and exercised as a guaranty of their fidelity. Hamilton v. Wright (1868), 37 N. Y. 502.

An attorney is an officer of the court and is not a public officer of the State in such a sense as to be entitled to have his right to the office determined by a legal action; his right to practice is, therefore, the subject of inquiry and examination by the General Term of the Department in which he practices, and if he has obtained his license without authority of law, it may be revoked by a summary proceeding, brought by any person who can supply the information necessary to justify proper action by the court. Matter of Burchard (1882), 27 Hun, 429.

Tenure of office; residence.—Attorneys are not public officers within the meaning of the statute which provides that every office shall become vacant by the incumbent ceasing to be an inhabitant of the State. Their tenure of office is during life, subject to removal or suspension by the courts. But while this is so, the courts have always required that an attorney should reside within the State; and an attorney-at-law, who is a nonresident of this State, has no authority or right to, and cannot practice in the courts of the State. Richardson v. Brooklyn City & Newtown R. R. Co. (Supr. Ct. 1862), 22 How. Prac. 368.

An exception to this rule has been created by section 470 of the Judiciary Law, which provides that —

> A person, regularly admitted to practice as an attorney and counselor, in the courts of record of the State, whose office for the transaction of law business is within the State, may practice as such attorney or counselor, although he resides in an adjoining State. (From Code of Civil Proc., § 60.)

Suspension or disbarment.— In a proceeding to discipline an attorney the power of review in the Court of Appeals ends when it appears that the proceeding has been instituted and conducted in accordance with the statutes and rules authorizing it; that no

substantial legal right of the accused has been violated; that no prejudicial error has been committed in the reception or exclusion of testimony, and that there is some evidence to sustain the findings upon which the order is based. The power and discretion of the Appellate Division in the infliction of punishment when guilt is established are not subject to review in the Court of Appeals. Matter of Goodman (1910), 199 N. Y. 143.

Right to admission confined to citizens of the State.

Limitation, not prohibited by Federal Constitution.— The right to practice in the State courts is not a privilege or immunity of a citizen of the United States within the meaning of the first section of the fourteenth amendment to the Federal Constitution, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Bradwell v. The State (1872), 16 Wall. 130.

The power of a State to prescribe the qualifications for admission to the bar of its own courts, is unaffected by the Federal Constitution, and the Supreme Court of the United States cannot inquire into the reasonableness or propriety of the rules it may establish. *Id.*

A law school graduate may apply for admission in a department other than where he resides. Matter of Burchard, 27 Hun, 429.

Aliens.—An alien may not, under the provisions now in force, be admitted to practice as an attorney and counselor-at-law in this State, although it seems that under the present Constitution of the State the Legislature has power to authorize the admission of persons not citizens of the United States. Matter of O'Neill (1882), 90 N. Y. 584. See Matter of Maggio, 27 App Div. 129.

This disability of aliens is to be noticed in connection with Rule II, which provides for the licensing of persons who have practiced for three years in another country. An applicant under that rule must, as well as applicants in general, be a citizen of the United States at the time of making his application; and the fact of his having declared his intention to become a citizen is not enough. *Id.*, and see, also, under Rule II.

One who applies for examination for admission after one year's law study in this State, on the ground of having been admitted and remained for one year as a practicing attorney in another

State or country, as provided by subdivision second of Rule IV, is, by the terms of subdivision first of that rule, required to prove that he is a citizen of the United States and a resident of the State of New York, as in said rules provided.

Nonresidents.—A nonresident citizen of the United States was not entitled, as matter of right, to admission to the bar of this State even before the enactment of section 56 of the Code of Civil Procedure, which limits the right to "a citizen of the State,"—as was held in Matter of Henry (1869), 40 N. Y. 560.

The question there arose under the clause in the Constitution of 1846, then in force, which provided that "Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this State;" and the words "any citizen" were construed to mean "any citizen of this State." This clause was omitted from the Constitution by the amendment of 1869, and at present the whole subject is left to the Legislature and the courts.

The verbal difference between the phrase used in the statute (§ 56, Code Civ. Proc.) "a citizen of the State," and that in the rules (Rule IV, subd. 1), "a citizen of the United States * * * and a resident of the State," is not a real variance, as, by force of the fourteenth amendment to the Federal Constitution, citizens of the United States are citizens of the State wherein they reside.

Section 58 of the Code (section 53 [subdivision 5], Judiciary Law); law schools.

The authority conferred upon the Court of Appeals by section 58 of the Code of Civil Procedure, to dispense with certain requirements in the case of graduates of the law schools named therein, has not been exercised, except in so far as attendance at those institutions, in common with other law schools, is placed by the rules upon the same footing as serving a clerkship in a law office, by permitting the whole or any part of the required period of law study precedent to examination for admission to be passed either in attendance at a law school or in serving a clerkship in a law office. See Rule V, subdivision 1. The section was adopted in order that the courts might not be compelled, as they were by former laws, to admit graduates of the law schools named, unconditionally. See Matter of Burchard (1882), 27 Hun,

429. The adoption of the section was accompanied by a repeal of the acts which had required graduates of the law schools to be admitted on production of their diploma, and although the effect of the repeal was postponed by a saving clause (Laws of 1877, chap. 417, § 3, subd. 17), and by several subsequent temporary acts, it became operative in 1882, and at present graduates of all law schools are subject to the rules and to the requirement of examination equally with other candidates for admission.

The effect of section 58 of the Code "is merely to refer the entire matter to the Court of Appeals, in the confidence that that high tribunal will establish such rules as will most effectually promote the true interests of the law schools, as well as of the legal profession and the people generally." Commissioners' note to § 58, Throop's Code Civ. Proc. (ed 1880).

Corporations not to practice law.

Section 280 of the Penal Law provides as follows:

It shall be unlawful for any corporation to practice or appear as an attorney-at-law for any person other than itself in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for any person other than itself, in any of said courts or to hold itself out to the public as being entitled to practice law, or to render or furnish legal services or advice, or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law, or to furnish legal advice, services or counsel, or to advertise that either alone or together with or by or through any person, whether a duly and regularly admitted attorney-at-law, or not, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel. It shall be unlawful further for any corporation to solicit itself or by or through its officers, agents or employees any claim or demand for the purpose of bringing an action thereon or of representing as attorney-at-law, or for furnishing legal advice, services or counsel to, a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body, or for the purpose of so representing any person in the pursuit of any civil remedy. Any corporation violating the provisions of this section shall be liable to a fine of not more than five thousand dollars and every

officer, trustee, director, agent, or employee of such corporation who directly or indirectly engages in any of the acts herein prohibited or assists such corporation to do such prohibited acts is guilty of a misdemeanor. The fact that any such officer, trustee, director, agent, or employee shall be a duly and regularly admitted attorney-at-law shall not be held to permit or allow any such corporation to do the acts prohibited herein nor shall such fact be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section. This section shall not apply to any corporation lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party, nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the Appellate Division of the Supreme Court of the department in which the principal office of said corporation may be located. [Added by L. 1909, ch. 483, in effect September 1, 1909.]

Corporations cannot practice law.

The Appellate Division is only authorized by section 280 of the Penal Law to approve the right of a corporation to practice law where it is organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy. The court will not authorize a business corporation to practice law where it is organized to do a general law and collection business to make agreements with and employ attorneys and other representatives for the transaction of such business, even though it appears that the greater part of its business is the collection of claims without resort to law. So far as the business of such corporation is confined to the collection of claims without legal proceedings, it is not within section 280 of the Penal Law, which prohibits the practice of law by corporations. Matter of Associated Lawyers' Co. (1909), 134 App Div. 350; Matter of Co-operative Law Co. (1910), 198 N. Y. 479.

Title guaranty companies.

The prohibition against corporations practicing law does not cover title guaranty companies, organized under the Insurance Law and authorized to examine titles, guarantee the correctness

of searches and insure against loss by reason of defective titles. The searching of titles is open to all and guaranty companies may employ either lawyer or laymen to transact their business. Matter of Co-operative Law Co. (1910), 198 N. Y. 479.

RULE II.

Admission After Practicing Three Years in Another State or Country, Etc.

Any person who has been admitted to practice, and has practiced three years as an attorney and counselor in the highest court of law in another State, and any person who has thus practiced in another country, or who, being an American citizen and domiciled in a foreign country, has received such diploma or degree therein as would entitle him, if a citizen of such foreign country, to practice law in its courts, may, in the discretion of [the] Appellate Division of the Supreme Court, be admitted and licensed without an examination. But he must possess the other qualifications required by these rules and must produce a letter of recommendation from one of the judges of the highest court of law of such other State or country, or furnish other satisfactory evidence of character and qualifications. A person who resides in an adjoining State, upon compliance with this rule, may, without change of residence, be admitted to practice on sufficient proof that he intends forthwith to open and permanently to maintain an office for the transaction of law business in this State. (Amended June 24, 1903.)

Changes in the Rule.

This rule is substantially the same as former Rule VII, the only material change consisting in making admission without examination dependent upon the discretion of the Supreme Court in all cases within the rule; while in the former rule the right to such admission in the case of one who had been admitted and had practiced three years in another State was not so qualified. The last sentence was added in 1903.

Qualifications of applicants.

The "other qualifications required by these rules," which it is understood all applicants for admission without examination under this rule must possess, are good moral character (see Rule III), citizenship of the United States, full age, and an actual and not constructive residence in the State of New York, for not less, etc. (See Rule IV.)

It has been expressly decided by the Court of Appeals that one who seeks admission under this rule, upon the ground that he has practiced for three years in another country, must show, among "the other qualifications required by these rules," that he is a citizen of the United States at the time of making his application; the fact that he has declared his intention to become a citizen is not sufficient. Matter of O'Neill (1882), 90 N. Y. 584.

In that case, it appeared that William L. O'Neill, a British subject, had practiced as an attorney-at-law in England from 1875 to 1881. Upon proof of that fact, and upon satisfactory evidence of his character and proof of age, and of his having declared his intention to become a citizen, the Supreme Court, at General Term in the Second Department, in May, 1881, made an order admitting him to practice as an attorney and counselor-at-law in the courts of this State. O'Neill so practiced from that time until, upon the petition of one Newman, after notice to and hearing O'Neill in his own behalf, the General Term, in September, 1882 (see 27 Hun, 599), made an order vacating its order admitting O'Neill, on the ground that it had no power or jurisdiction to grant such order, and directed that his name be stricken from the roll of attorneys and counselors.

From this last order O'Neill appealed to the Court of Appeals, where the action of the General Term was affirmed in December, 1882, with the following opinion by Tracy, J., in which an interesting history of this rule is given:

By the Constitution of 1846 it was provided, that "any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to practice in all the courts of this State." (Const. of 1846, art. 6, § 8.) This article of the Constitution of 1846 was superseded by the new article which took effect

on the 1st of January, 1871. The admission of attorneys and counselors is now regulated by statute. We have no doubt of the power of the Legislature to admit persons not citizens to practice as attorneys and counselors of the courts of this State. The question to be determined is whether, by the law of the State in force at the time of the appellant's admission, citizenship was among the qualifications required to entitle a person to be admitted as an attorney. By section 3, chapter 486, Laws of 1871, it is provided that "every male citizen of the age of twenty-one years, hereafter applying * * * shall be examined by the justices of the Supreme Court, or a committee appointed by said court at a General Term thereof, and if such person so applying shall be found to have complied with such rules and regulations as may be prescribed by the Court of Appeals, and shall be approved by said justices of the Supreme Court for his good character and learning, the court shall direct an order," etc. The rules adopted by the Court of Appeals in pursuance of this statute provided that, "to entitle an applicant to an examination as an attorney, he must prove to the court, among other things, that he is a citizen of the United States, twenty-one years of age, and a resident of the department within which the application is made, and that he is a person of good moral character." (Rule 2, 1871.) By Rule 8 it was provided, that "persons who have been admitted and have practiced three years as attorneys in the highest courts of law in another State may be admitted without examination to practice as attorneys, solicitors and counselors in the courts of this State but such persons must have been residents of this State before applying for admission." In 1877 the rules were so amended that "persons who have been admitted as attorneys in the highest courts of another State may be admitted to examination as attorneys and counselors, if they have served a regular clerkship of one year in the office of a practicing attorney of the Supreme Court of this State, and shall in other respects be entitled to such examination." As an applicant for examination is required to prove that he is a citizen of the United States, this rule plainly requires that one who seeks an examination on the ground that he has been admitted as an attorney of another State, must be a citizen of the United States. In 1880, Rule 8 of 1871 became Rule 7, and was amended by adding after the clause providing for the admission of practitioners of three years' standing from other States, the following: "And the General Term of the Supreme Court may, in its discretion, so admit and license any person who has thus practiced in another country, but he must possess the other qualifications required by these rules, and must produce a letter," etc. It is under this clause, first inserted in 1880, that the appellant was admitted. It will be observed that the clause applicable to the admission of practitioners of three years' standing from another State, as first adopted, required that such persons should have become residents of this State before applying for admission; but when the clause was added allowing the General Term in its discretion to admit and license any person who has thus practiced in another country, the clause requiring a person to have become a resident before making the application was dropped, and in its stead was inserted the requirement that he must

possess the other qualifications required by these rules. The amendment providing for the admission of persons who have practiced for three years in another country, was made to meet the case of a citizen of the United States who had thus practiced in another country. But to guard against conferring the right of admitting persons not citizens of the United States, under the general language of this amendment, the other change was made in the rule by which the applicant, whether he be a practitioner from another State or from another country, is required to possess the other qualifications required by these rules. There can be no doubt that citizenship is among "the other qualifications" required of those who apply for an examination to be admitted as attorneys, and it follows that one who seeks admission upon the ground that he has practiced for three years in the courts of another country must show that he is a citizen of this country at the time of making his application.

The appellant, not being a citizen, was not entitled to admission, and the action of the General Term in revoking his license was proper and should be affirmed, without costs.

RULE III.

Prerequisites to Admission on Examination.

All other persons may be admitted and licensed upon producing and filing with the court the certificate of the State Board of Law Examiners that the applicant has satisfactorily passed the examination prescribed by these rules and has complied with their provisions, and upon producing and filing with the court evidence that such applicant is a person of good moral character, which [must] be shown by the [affidavits of two reputable persons of the town or city in which he resides, one of whom must be a practicing attorney of the Supreme Court. Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character, and must set forth in detail the fact upon which such knowledge is based; but such affidavits shall not be conclusive and the court may make further examination and inquiry].

Changes in the Rule.

The first clause of this rule is new, being in conformity with the amendment of 1894 to section 56 of the Code of Civil Pro-

cedure. The remainder of the rule is taken from subdivision second of former Rule IV, with the substitution of the concluding words, "the court may make further examination and inquiry," for the words "the court must be satisfied on this point from examination and inquiry."

Certificate of State Board of Law Examiners.

For the statutory provision for a certificate from the State Board of Law Examiners to the Appellate Division of the Supreme Court of the successful passing of examination, as a condition precedent to admission by the Appellate Division, and for the determination by the board, before examination, of the fact of compliance, by candidates for admission, with the rules regulating admission to practice, see under Rule I.

Action of Appellate Division on application for admission; when reviewable.

It was held in Matter of Cooper (1860), 22 N. Y. 67; S. C. *sub nom.* Matter of Graduates, 11 Abb. Prac. 301, that in the admission of attorneys and counselors, the Supreme Court acts judicially, and its function is not of an executive character; that an application for such admission is a special proceeding, and an order made therein denying the applicant's right to admission is a final order, affecting a substantial right, and therefore appealable to the Court of Appeals. That court, consequently, entertained the appeal, and reversed the order.

In this case the Supreme Court had held that it was without power to admit the applicants, on the ground of the unconstitutionality of the act under which the application was made (chapter 262, Laws of 1860, since repealed, which provided for the admission of graduates of the law school of Columbia College on the production of their diplomas), and on this ground the case was distinguished in Matter of Beggs (1876), 67 N. Y. 120.

In that case it was held that the approval of the good character of an applicant for admission rests with the Supreme Court, and its exercise of this discretionary power cannot ordinarily be reviewed or interfered with by the Court of Appeals; but that it seems that if the Supreme Court should deny, in a particular

case, that it had the legal power to admit, though satisfied that the applicant was possessed of the requisite qualifications, the Court of Appeals might review the order so far as to discover whether the power existed; so, also, if a clear case of abuse of discretion appeared, the Court of Appeals might correct it. It was also held that an appeal from an order of the Supreme Court refusing to approve the good character of an applicant, and denying his admission on that ground, could not be sustained where the case did not present all the facts before the Supreme Court and on which it acted.

See, also, Matter of Droege (1909), 197 N. Y. 44.

RULE IV.

Prerequisites to Examination by State Board of Law Examiners; Periods of Law Study; Admission in Another State or Country.

To entitle an applicant to an examination as an attorney and counselor, he must prove by his own affidavit,* to the satisfaction of the State Board of Law Examiners:

First. That he is a citizen of the United States, twenty-one years of age, stating his age, and [an actual and not a constructive] resident of the State [for not less than six months immediately preceding], and that he has not been examined for admission to practice and refused admission and license within three months immediately preceding.

Second. That he has studied law, in the manner and according to the conditions hereinafter prescribed for a period of three years, and that he is the same person mentioned in his annexed preliminary papers; except that if the applicant be a graduate of any college or university† his period of study may be two years instead of three; and

* See Form for Applicant's Affidavit on page 263.

† Construed by Court of Appeals, May 14, 1900, as follows: "On reading and filing the request of the University of the State of New York, and after hearing the State Board of Law Examiners in relation thereto, It is Ordered, that applicants for examination for admission to the bar are to be deemed graduates of colleges or universities within the meaning and intent of the Rules for the Admission of Attorneys and Counselors-at-Law when they

except also that persons who have been admitted as attorneys in the highest court of original jurisdiction of another State or country, and have remained therein as practicing attorneys for at least one year, may be admitted to such examination after a period of law study of one year within this State.

Changes in the Rule.

The introductory paragraph is the same as in former Rule IV, except the words "to the satisfaction of the State Board of Law Examiners," which were substituted in 1894 for the words "to the court," in conformity with the amendment of 1894 to section 56 of the Code, and except the words "by his own affidavit," inserted.

Subdivision first is the same as in former Rule IV, with the exception of the insertion of the words "stating his age," the substitution of "a resident of the State" for "a resident of the department in which the application is made," the omission of the words "in any other department," after the word "examined" and the omission of the words "which proof must be made by his own affidavit," which formerly ended the paragraph, and with the exception of the words in brackets, inserted in 1906.

Subdivision second is new in form, but retains the same periods of preparation for examination as heretofore prescribed by Rule III, with the substitution, however, of the terms "studied law" and "law study" for "clerkship in the office of a practicing attorney," in conformity with subsequent provisions of the present rules (see Rule V) which permit the requirements for preparatory work to be fulfilled either by attendance at a law school or by service of an office clerkship. In the provision in reference to persons who have been admitted as attorneys in another State or

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have successfully completed a course of college instruction that requires as a condition of graduation at least six full years in liberal arts and sciences in advance of a completed eight year elementary course.

"It is further ordered: that the University of the State of New York may issue law students' certificates upon substantial equivalents and substitutes, to be defined by the rules of the University, in all cases not provided for by the Rules for the Admission of Attorneys and Counsellors at law now in force."

country (based upon former Rule VI), the requirement that they must have remained therein as practicing attorneys for at least one year is new.

The Amendments of 1896.

The amendments of 1896 require that all the facts mentioned in Rule IV, must be proven to the satisfaction of the State Board of Law Examiners by the affidavit of the applicant, who must in addition state his age, in order that the Board may be able to judge whether he began his law studies under the age of eighteen years; he must also swear that he is the person mentioned in the preliminary papers annexed to his application and in the proofs required by the provisions of Rule VI, *infra.*

Examination in any department.

The State Board of Law Examiners has adopted the following rule:

Rule II.— Each applicant must be a citizen of the State, of full age; he may be examined in any department, whether a resident thereof or not, but the fact of his having passed the examination will be certified to the Appellate Division of the judicial department in which he has resided for the six months prior to his examination. He must, however, entitle his papers in the department in which he resides. (See note to this Rule, page 287, *post.*)

Applicant's affidavit.

The applicant's own affidavit should set forth, in addition to the statements required by the rule, his residence for the preceding six months, with street and number, if any, in order to furnish the State Board of Law Examiners with the information necessary to enable the Board to comply with the provisions of section 56 of the Code, that "such board shall certify to the Appellate Division of the Supreme Court for the department in which each candidate has resided for the past six months, every person who shall pass the examination," and to facilitate the transmission of communications from the Board of Law Examiners. (See, further, under Rule VI.)

College graduates.

In applying the provision of subdivision second of this rule, that "if the applicant is a graduate of any college or university,

his period of study may be two years instead of three," the State Board of Law Examiners will require proof that the college or university of which an applicant claims to be a graduate, maintains a satisfactory standard in respect to the course of study completed by him. (See Rule III of State Board of Law Examiners on this subject, given under Rule V, page 239.

Admission in another State or country.

The provisions of the rules concerning admission in another State have always been construed and applied as comprehending in the term "State" the District of Columbia and the Territories.

In addition to the provisions of this rule, permitting persons who have been admitted in another State or country, and who thereafter have remained one year as practicing attorneys in such other State or country, to be examined for admission here after having subsequently studied law one year in this State it is to be observed that by force of subdivision 1 of Rule V, the prescribed year's law study in this State may be pursued either at a law school or in a law office, or partly in one way and partly in the other, instead of being restricted to a law office as heretofore, and that the exemption from Regents' examination, heretofore conferred by old Rule VI, is continued in subdivision 3 of Rule V. If a clerkship is pursued, the certificate prescribed by subdivision 4 of Rule V must be made and filed at the beginning of the clerkship by the attorney in whose office it is begun.

The words "remained therein," in this rule, imply residence in the State where the candidate was admitted during the year that he is required to practice therein, and merely practicing in that State while continuing to reside in this State is not enough. The Regents' examination cannot be evaded by a resident of this State by securing a license to practice in another State, and practicing there without a change of residence. Matter of Simpson (1901), 167 N. Y. 403.

RULE V.

Study of Law; Regents' Examination and Certificate; Vacations; Clerkship Certificate.

Applicants for examination shall be deemed to have studied law within the meaning of these rules, only, when they have complied with the following terms and conditions, viz:

First. The provisions for requisite periods of study must be fulfilled by serving a regular clerkship in the office of a practicing attorney of the supreme court in this state after the age of eighteen years; or, after such age, by [satisfactory attendance upon and successfully completing the prescribed course of instruction* at] an incorporated law school, or a law school connected with an incorporated college, or university, having a law department organized with competent instructors and professors, in which instruction [as hereinafter provided] is regularly given; or, after such age, by pursuing such course of study in part by attendance at such law school, and in part by serving such clerkship.

Second. If the applicant be a graduate of a college, or university, he must have pursued the prescribed course of study after his graduation and, if he be a person admitted to the bar of another state or country, he must have pursued his prescribed period of study after having remained [as a practicing attorney] in such other state or country for the period of one year.

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* The rules do not require a law school to certify to the State Board of Law Examiners that its students have been "graduated" or have "received a degree" in order that they may be admitted to examination; it being sufficient for the certificate to state that the student has "successfully completed the prescribed course of instruction" during the period named. A law school may properly grant a certificate of "part time" for less than a year, but the applicant should be credited only with the time actually spent in the law school, to the same extent and no more as if the time had been spent in a law office; and the proofs must show to the satisfaction of the State Board of Law Examiners that the applicant successfully pursued the prescribed course of instruction during that time. Matter of New York Law School (1907), 190 N. Y. 215.

*Third.** *Applicants who are not graduates of a college, or university, subject to the limitations and requirements hereinafter, in this subdivision, expressed, or members of the bar as above described, before entering upon the clerkship or attendance at a law school herein prescribed, shall have passed an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York in English, three years; mathematics, two years; Latin, two years; science, one year; history, two years; or in their substantial equivalents as defined by the rules of the university, and shall have filed a certificate of such fact, signed by the Commissioner of Education, with the Clerk of the Court of Appeals, whose duty it shall be to return to the person named therein a certified copy of the same, showing the date of such filing. The Regents may accept as the equivalent of and substitute for the examination in this rule prescribed, either, first, a certificate properly authenticated, of having successfully completed a full year's course of study in any college, or university; second, a certificate properly authenticated, of having satisfactorily completed a four years' course of study in any institution registered by the Regents as maintaining a satisfactory academic standard; or, third, a Regents' diploma.*

All graduates of a college or university existing under the government or laws of any foreign country other than those where English is the language of the people and all applicants who apply for law students' certificates upon equivalents or substitutes, as above provided, all or any part of which are earned or issued in said foreign countries, shall pass the Regents' examination in second year English. The Regents' certificate above prescribed shall be deemed

* In Court of Appeals, April 24, 1908. *Ordered*, That the following amendments to Rule V of the Rules regulating the admission of Attorneys and Counsellors at Law, be and the same hereby are adopted, in pursuance of the provisions of the Code of Civil Procedure, said amendments to take effect June 1, 1908.

to take effect as of the date of the completion of the Regents' examinations, as the same shall appear upon said certificate. (Amended April, 1908, to take effect June 1, 1908. See Rule IX.)

Fourth. Satisfactory attendance upon and the successful completion of the prescribed course of instruction at a law school, the school year of which shall consist of not less than thirty-two school weeks, exclusive of vacation, in which not less than twelve hours of attendance upon law lectures or recitations of such prescribed course, to be given or conducted by regular members of the faculty, are required in each week, shall be deemed a year's attendance under this rule. The Court of Appeals, on June 10, 1907, decided that "while subd. 4 of Rule five prescribes a school year of not less than thirty-two school weeks and not less than twelve hours of attendance upon law lectures or recitations each week, 384 hours of school work during a year, even if distributed over more than thirty-two school weeks, is a substantial compliance with the rule." In computing the period of clerkship a vacation actually taken, not exceeding two months in each year, shall be allowed as a part of each year.

It shall be the duty of attorneys with whom a clerkship shall be commenced, to file a certificate of the same in the office of the clerk of the Court of Appeals, which certificate shall, in each case, state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing and shall be computed by the calendar year. *In the case of a qualified law school in which the school year consists of less than an aggregate of* 384 *hours of attendance upon law lectures or recitations, but where the prescribed course for graduation is three years, a student who graduates therein upon the completion of the prescribed course shall be entitled to be credited with two years' attendance under this rule.* The same period of time shall not be duplicated for different purposes; except that a student attending a law school as herein provided,

and who, during the vacations of such school, not exceeding three months in any one year, shall pursue his studies in the office of a practicing attorney, shall be allowed to count the time so occupied during such vacation or vacations as part of the clerkship in a law office specified in these rules. (Amended April, 1908.)

Fifth. The justices for each Appellate Division may adopt for their several and respective departments such additional special rules for ascertaining the moral and general fitness of applicants as to such justice may seem proper. (Added April 24, 1908; to take effect June 1, 1908.)

Amendments to subdivisions third and fourth, and new subdivision fifth take effect on the first day of June, 1908, *but the amendment to subdivision third of Rule Five shall not apply to any student whose clerkship or attendance at a qualified law school has already begun, or shall have begun prior to June* 1, 1908, *as shown by the records of the Court of Appeals, or of any incorporated law school, or law school established in connection with any college or university.*

1. Study of Law; changes in the Rule.

Subdivision 1 of this rule contains some of the provisions of former Rule III, with the important modifications of permitting the entire periods of law study prescribed by the present rules (see Rule IV, subdivision second) to be passed either in attendance at a law school, or in serving an office clerkship, or partly in one way and partly in the other, in place of the former requirements of the service of an office clerkship for at least one year in all cases. (See former Rules III and VI.)

2. College graduation, and admission in another State or country.

The provision of subdivision 2, that the course of law study required of a graduate of a college or university (which, by subdivision second of Rule IV, is two years) must have been pursued after graduation, is new in terms, but is merely the statement of the practical construction which has always been given to the provisions on the subject, under the rules heretofore in force. The provision that the period of law study in this State

prescribed for applicants who have been admitted in another State or country (which, by subdivision second of Rule IV is one year), must have been pursued after having remained an attorney in such other State or country for one year is new, being in conformity with the provisions of present Rule IV on the subject.

3. Regents' examination and certificate.

Changes in the rule.— Changes to be especially noted, effected by the amendments of 1908, are the elimination of the provision permitting the passing of the Regents' examinations and the filing of the certificate thereof within one year after entering upon a clerkship or attendance at a law school, leaving the single requirement that such examination must be passed and the certificate thereof filed before entering upon a clerkship or attendance at a law school, and the changes in the subjects prescribed for the Regents' examination.

On this subject the State Board of Law Examiners has adopted the following rule:

Rule III.— In applying the provisions of Rules IV and V of the rules of the Court of Appeals "for the admission of attorneys and counselors at law," the board will require proof that the college or university of which an applicant claims to be a graduate, maintains a satisfactory standard in respect to the course of study completed by him. In case the college or university is registered with the Board of Regents of the State of New York as maintaining such standard, the applicant must submit to the board, with his diploma or certificate of graduation, the certificate of the said Board of Regents to that effect, which will be accepted by this board as *prima facie* evidence of the fact. Such certificate need not be filed in cases where the Board of Regents, by a general certificate, has certified to this board that the said college or university maintains a satisfactory college standard leading to the degree with which the applicant graduated. In all other cases the applicant must submit with his diploma or certificate of graduation satisfactory proof of the course of study completed by him and of the character of the college or university of which he claims to be a graduate.

Construction and application of the rule by the Regents.— The practical construction given by the Regents to the provisions of the rule, governing their action in issuing law student certificates, is set forth in "Instructions of the Board of Regents of the University to Law Students," page 267 *et seq., post.*

Former rules for Regents' examination.— The first provision for Regents' examination and certificate was made in 1882, in Rule II, adopted May 4, 1882, and which took effect July 1, 1882, in the following words:

Rule II.— Before any person shall enter upon the clerkship, or substituted course of study hereinafter provided, or within three months thereafter, he shall, if not a graduate of a college or university, pass a regents' examination, conducted under the authority and in accordance with the rules and regulations of the Board of Regents of the University of the State of New York in arithmetic, grammar, geography, orthography, English and American history and English composition, and shall file a certificate of such fact signed by the secretary of the Board of Regents and countersigned by the principal or teacher conducting such examination, in the office of the clerk of the Court of Appeals, who shall, upon filing the same, return to the person named therein a certified copy of the same, showing the date of such filing; but this rule shall not apply to students whose clerkship or substituted course of study began before the adoption of these rules.

This rule was amended March 19, 1891. The amended rule, which took effect April 13, 1891, and was readopted on the revision of the rules, October 28, 1892, remaining in force until the present revision, was as follows:

Rule II.— Before any person shall enter upon the clerkship, or substituted course of study hereinafter provided, or in one year thereafter, he shall, if not a graduate of a college or university registered by the regents as maintaining a satisfactory standard, pass an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, in English composition, first year Latin, arithmetic, geometry, English and United States history, and civics, or in their substantial equivalents defined by the rules of the University, and shall file a certificate of such fact, signed by the secretary of the university, with the clerk of the Court of Appeals, who shall return to the person named therein a certified copy of the same, showing the date of such filing.

A law student whose clerkship or substituted course of study has already begun, as shown by the records of the Court of Appeals, or of any incorporated law school in this State, or law school established in connection with any college or university within this State, may, at his option, file instead of the certificate required by this rule, that required by the rules of the Court of Appeals, adopted May 4, 1882.

This rule was superseded by original subdivision 3d of Rule V, adopted December 20, 1906, and which took effect July 1, 1907, which subdivision was as follows:

Third.— Applicants who are not graduates of a college or university or members of the bar as above prescribed, before entering upon the clerkship or attendance at a law school herein prescribed, or within one year thereafter, shall have passed an examination conducted under the authority, and in accordance with the ordinances and rules of the university of the State of New York in second year English, first year Latin, arithmetic, algebra, geometry, United States and English history, civics and economics, or in their substantial equivalents as defined by the rules of the university, and shall have filed a certificate of such fact signed by the commissioner of education, with the clerk of the Court of Appeals, whose duty it shall be to return to the person named therein a certified copy of the same showing the date of such filing. The regents may accept as the equivalent of and substitute for the examination in this rule prescribed either, first, a certificate properly authenticated of having successfully completed a full year's course of study in any college or university; second, a certificate properly authenticated of having satisfactorily completed a four years' course of study in any institution registered by the regents as maintaining a satisfactory academic standard; or, third, a regents' diploma. The regents' certificate above prescribed shall be deemed to take effect as of the date of the completion of the regents' examination, as the same shall appear upon said certificate.

Regents' law student examinations.— Examinations in the subjects prescribed by the rules are held by the Regents in all the academies and academic departments of union schools in the State, under regulations issued from their office in Albany, and special provision is, and will be made by the Regents for meeting the requirements of the rules.

Effect of failure to comply with the rule.— If the Regents' examination is not passed before entering upon the clerkship or attendance at a law school, but is passed after that time, the student will lose, in the computation of his three years' period of law study, the time passed in studying law before passing the examination, and will be required to continue his law study for three years from the date of completing his Regents' examination. That is, the period of law study under the rules cannot be computed as having begun before passing the Regents' examination, no matter how much earlier the student may, as matter of fact have commenced studying law.

Filing regents' law student certificate.—As the requirement of the rule, that the acts prescribed shall have been done "before entering upon the clerkship or attendance at a law school herein prescribed," is intended to apply to the filing of the regents' certificate as well as to the passing of the regents' examination, the student should file his certificate with the clerk of the Court of Appeals as soon as he receives it from the regents. The clerk will thereupon, on receiving a request to that effect and on payment of the fee of one dollar, make and send to the student a certified copy of the regents' certificate, showing the date of filing the original, in due form for presentation to the State Board of Law Examiners, as prescribed by subdivision 5, of Rule VI.

If the regents' examination is not completed until near entering upon the clerkship or attendance at a law school, the student should write to "Examination Department, University of the State of New York, Albany, N. Y.," stating his examination number, and calling attention to the urgency of his case; if this is done, the review of his examination papers will be expedited and a law student certificate will be sent to him as soon as possible, in case he is found to have passed the examination successfully.

Amendment of 1896.— On and after January 1, 1896, regents' certificates will be deemed to take effect as of the date of the completion of the regents' examination, as that date shall appear upon the certificate, and not from the date of filing the same in the office of the clerk of the Court of Appeals.

The requirement that before taking effect, the certificates must have been filed in the office of the clerk of the Court of Appeals was not dispensed with; in order to entitle an applicant to apply for examination, his regents' certificate must have been filed in the office of the clerk as heretofore, but if through neglect or inadvertence it was not filed at once upon its receipt from the regents, the necessity of procuring an order filing it *nunc pro tunc* as of the date of the completion of the examination is done away with, provided the date of the completion of the examination appears on the certificate. It is understood that the statement of the date of the completion of a course of study accepted by the regents under these rules as an equivalent for the regents' examination, has the same force and effect as the statement of the date of the completion of a regents' examination.

4. Vacations.

Changes in the rule.— Subdivision 4 of the present rule is based upon the last paragraph of former Rule III. The length of the vacation allowed in each year of clerkship is reduced from three to two months, and it is required that in order to be computed, the vacation must have been "actually taken."

This last provision is in accordance with what has always been the intention of the rules in reference to clerkship vacations, and removes any doubt as to the application of the provision on that subject. It was held by the General Term of the Third Department, under the former rules, that vacations not actually taken by students at law should not be allowed as part of the term of regular clerkship, and that the last three months' vacation would not be allowed to be taken by a student after his examination for admission, so as to permit him to deduct that period from his term of clerkship. Under the present rules time spent in a law office must be computed by the calendar year. An affidavit of ten months' service in an office and two months' vacation taken before or after the ten months, will not count as a year but only for time actually spent in the office. The attorney's affidavit of service of a regular clerkship in his office must show the actual service of such a clerkship, giving the date of the beginning and end thereof; the vacations taken must be within and between those dates, that is, actually taken during the actual service of the clerkship.

The new amendment as to the computation of the period of attendance upon a law school is to be noted.

5. Clerkship certificate.

The rule.— Subdivision 5 of the present rule is substantially the same as former Rule V, except the words "which certificate shall, in each case, state the date of the beginning of the period of clerkship," which were introduced in 1894; the amendment of 1896 indicated by italics; and the words "and shall be computed by the calendar year," which are taken from former Rule VIII.

Requisites of the certificate.—It was formerly held essential that the certificate should state the commencement of a "regular clerkship" and the date thereof. A certificate which merely stated, for example, that "the study of law," or "a course of law

reading," had been commenced, or that one had entered a law office as "a student at law," was insufficient. The General Term of the Supreme Court for the First Department, in March, 1894, gave the following reasons for rejecting, on an application for examination for admission, a certificate which had been filed in 1892, and which stated that the applicant had entered the office of a practicing attorney as "a student at law:"

> The certificate was rejected by us because it did not seem to comply with the rules of the Court of Appeals. Throughout the whole of the rules, the serving of a clerkship is spoken of: Rule II, "Before any person shall enter upon the clerkship," etc. In Rule III, clerkship is repeatedly spoken of; so in Rule IV; and in Rule V it is provided that a certificate of clerkship shall be filed. So in Rule VIII, the time of clerkship is spoken of; and there is but one place where "law student" is mentioned, and that for the first time in amendment of Rule II in March, 1891. Having in view the reason why the requirement of a practical clerkship was made of even graduates of law schools, it did not seem to us that the being a mere law student in an office was in any way a satisfaction of the requirement of the rule. The requirement of Rule V is certainly a very simple one, and it would seem that it could easily be complied with. We have, however, found that there exist some persons who make it a business to coach for examinations, and who give certificates of attendance as law students, in their offices,— the students not doing a particle of real clerical work,— and they have given certificates of the kind under consideration.

Although the wording and requirements of the rules in the revision of 1892, referred to by the General Term, have been changed in some important respects by the present revision as *e. g.,* in the application of the term "law study" to both attendance at a law school and clerkship in a law office, the State Board of Law Examiners gave the same construction to the present rule, in the following words:

> The certificate filed by the attorney under Rule V should state that the student has commenced a "clerkship." In our judgment the phrases "to have served a clerkship in a law office," and "to have studied law in an office," are not synonymous terms. The former is more comprehensive and includes the study of law as well as engaging in some of the practical work in the office, as generally understood. Such would be our construction of the rule.

Recently, however, a form of certificate stating, among other requirements, that one has entered an office "as a regular law

clerk and student," has, by approval and adoption of the court, superseded the earlier form which contained the statement that one had commenced "a regular clerkship." The certificate must also state where and when the student was born. For present form of certificate, see page 263.

It is the practice of the clerk of the Court of Appeals, on receiving a certificate which fails to follow the form now in force, to call attention to the defect and give an opportunity of substituting the proper certificate.

Filing certificate; commencement of clerkship.—It is the duty of the attorney to see to it that the certificate is made, and filed in the office of the clerk of the Court of Appeals, at once, on the commencement of a regular clerkship with him by a law student; many students have lost valuable time through the neglect of the attorney to do this.

Copy of certificate.— On the certificate being filed, the clerk will furnish a certified copy thereof, together with a certificate of the fact and date of filing, in proper form for presentation to the State Board of Law Examiners, as prescribed by subdivision 3 of Rule VI, whenever requested, on receipt of the fee therefor, which is one dollar.

Omission to file certificate at commencement of clerkship.— Where the attorney has failed to perform the duty imposed on him by the rule of filing the certificate at the time of the commencement of the clerkship an order may, on a proper showing, be applied for under Rule VII, filing the certificate *nunc pro tunc* as of the date when the clerkship actually commenced, which must, of course, agree with the date of the commencement of the clerkship stated in the certificate. For the practice on such application, and the showing required to obtain an order to file *nunc pro tunc,* see Rule VII.

Change of attorneys during clerkship.—The duty of filing a preliminary clerkship certificate is imposed by the rule only upon the attorney with whom the clerkship is commenced; therefore if, after this has been done, the student leaves the office of such attorney before he is entitled to apply for examination for admission, and continues his clerkship with another attorney, or with different attorneys in succession, a new certificate need not be filed on any such change of attorneys; but proof of the continu-

ance and completion of the service of a regular clerkship must be made to the State Board of Law Examiners on application for examination, as prescribed by subdivision 3 of Rule VI, by affidavits from the original attorney and each of the successive attorneys showing the period of such clerkship served with each, respectively, and the vacations taken, if any.

6. Duplication of time; law school vacations.

Application of the rule.—By force of the provisions in subdivision four of this rule, as to attendance on a law school, taken in connection with the provision that when a student attending a law school pursues his studies in the office of a practicing attorney during the vacations of the school, not exceeding three months in any one year, he shall be allowed to count the time so occupied during such vacation or vacations as part of an office clerkship, the student may take a vacation from both school and office, and have his year's work computed as covering a year and three months of the prescribed period of law study. This is the extent of duplication of time allowed.

The rule against duplication of time for different purposes does not prohibit a clerk in a law office from attending a law school out of office hours, nor does it prohibit an attendant on a law school from acting as clerk in a law office out of school hours, but it does prohibit computing the same time so as to apply it upon both clerkship and attendance at law school, in making out the term of law study prescribed by the rules, except as regards three months of the law school vacation in each calendar year. For example, to put the application of the rule in another form, if in a given calendar year, a law student serves as clerk in a law office throughout the year, after a certificate of the commencement of his clerkship has been duly filed, and also attends a law school, without interfering with the service of his clerkship, the year so employed, although it might be computed either as clerkship or as attendance on law school, cannot be computed both as a year's clerkship and also as a year's attendance at law school, so as to make up together two years of law study, under the rules, but it can be computed as a year's attendance on a law school and three months' clerkship, making in all a year and three months of law study, within the meaning of the

rules, which, as before stated, is the utmost duplication of time allowed.

With the above exception, as to three months in any one year, service of clerkship and attendance at law school, where law is studied partly in one of these modes and partly in the other, must, in order to be computed in making up the prescribed period of law study, be successive and not contemporaneous; but the order in which the two modes of law study may be pursued is immaterial.

RULE VI.

Proof of Compliance with Preliminary Requirements.

The State Board of Law Examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled; which proof shall be made as follows, viz.:

First. That the applicant is a college graduate, by the production of his diploma or certificate of graduation under the seal of the college.

Second. That he has been admitted to the bar of another State or country, by the production of his license or certificate executed by the proper authorities.

Third. That he has served a regular clerkship, in the office of a practicing attorney of the Supreme Court [in] this State, after the age of eighteen years, by producing and filing with the board a certified copy of the attorney's certificate as filed in the office of the clerk of the Court of Appeals, and producing and filing an affidavit of the attorney or attorneys with whom such clerkship was served, showing the actual service of such clerkship, the continuance and end thereof, and that not more than two months' vacation was taken in any one year. [Both of said affidavits must be to the effect that during the entire period of such clerkship, except during the stated vacation time, the applicant was actually employed by said attorney as a regular law clerk and student in his law office, and, under his direc-

tion and advice, engaged in the practical work of the office during the usual business hours of the day.]

Fourth. The time of study allowed in a law school must be proved by the certificate of the teacher or president of the faculty under whose instructions the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must also state the age at which the applicant began his attendance at such law school. [Said certificate and affidavit must also state the facts required by subdivision four of Rule V], which proofs must be satisfactory to the Board of Examiners.

Fifth. That the applicant has passed the regents' examination or its equivalent, must be proved by the production of a certified copy of the regents' certificate filed in the office of the clerk of the Court of Appeals, as hereinbefore provided.

Sixth. When it satisfactorily appears that any diploma, affidavit or certificate required to be produced has been lost or destroyed, without the fault of the applicant, or has been unjustly refused or withheld, or, by the death or absence of the person or officer who should have made it cannot be obtained, the Board of Law Examiners may accept such other proof of the requisite facts as they shall deem sufficient.

Seventh. A law student whose clerkship or attendance at a law school has already begun as shown by the records of the Court of Appeals, or of any incorporated law school, or law school established in connection with any college or university, may, at his option, file or produce, instead of the proofs required by these rules, those required by the rules of the Court of Appeals adopted December 2, 1895.*

* It is sufficient for a law student whose attendance at a law school had already begun when the present rules went into effect, to show full compliance with the rules adopted December 2, 1895, without showing compliance with the rules which went into effect July 1, 1907, but the proofs submitted, as to time of study, etc., must be satisfactory to the State Board of Law Examiners. *Matter of New York Law School* (1907), 190 N. Y. 215.

Changes in the Rule.

The differences between the present and former rules, in addition to those arising from the amendments of 1896, commented on below are as follows:

In subdivision 1 of this rule, the words "or certificate of graduation" are new;* the provision for publication of a diploma was in subdivision 3 of former Rule IV.

Subdivision 2 is new.

The first clause of subdivision 3 corresponds with the last clause of former Rule V, with the addition, however, of the requirement of filing, as well as producing, a certified copy of the certificate of commencement of clerkship; the second clause is new, being an amplification, by the addition of specific requirements, of the indefinite provision of subdivision 4 of former Rule IV, that "the clerkship may be proved by the certificate of the attorney with whom the same was served."

Subdivision 4 is the same as the last sentence of subdivision 4 of former Rule IV, with the exception of the substitution of "in a law school" for "as a substitute for any part of said clerkship," and the substitution of "board of examiners" for "court."

Subdivision 5 is the same as the corresponding provision of subdivision 3 of former Rule IV, except the words "or its equivalent," after "regents' examination," which are new.

Subdivision 6 is substantially new, being an amplification of provisions found in subdivisions 3 and 4 of former Rule IV.

Subdivision 7 corresponds to the saving clause at the end of the former Rule II (which see on page 240), but confines its permission to a compliance with the rules of 1895, and no longer permits recourse to the rules of 1892. This subdivision retains the form in which it was adopted in 1894, except that it originally used the word "certificates" where the word "proofs," substituted by amendment in 1895, now appears. In the clause limiting its operation to "a law student whose clerkship or attendance at a law school has already begun," the words "has already begun" were in 1897 construed as referring to and speaking from the date when they originally went into effect in

* As to the meaning of the word "new," see note at foot of page 216.

this subdivision. This was decided in Matter of Warde (1897), 154 N. Y. 342, which case enunciates the following conclusions:

(1.) *Amendments to the rules.*— The amendments made December 2, 1895, to the Rules for the admission of attorneys, which retained unchanged the following italicized clauses in subdivision 7 of Rule VI, adopted October 22, 1894: *A law student whose clerkship or attendance at a law school has already begun* may, at his option, file or produce, instead of the certificates required by these rules, *those required by the rules of the Court of Appeals, adopted October* 28, 1892, did not have the effect of making the words "has already begun" refer to the date of the taking effect of the amendments, namely January 1, 1896, but left them continuing to speak as of the date when they originally went into effect, namely, January 1, 1895.

(2) *Rules of* 1892.— The privilege of proceeding under the rules of 1892 does not apply to any law student whose clerkship or attendance at a law school commenced after the 1st day of January, 1895, but all such students must conform to the later rules.

(3) *Regents' certificate under Rules of* 1892.— A law student where clerkship or attendance at a law school commenced after the 1st day of January, 1895, cannot be admitted to examination for admission, upon producing a regents' certificate under the rules of 1892.

Amendments of 1896.

The amendments to this rule, which went into effect on January 1, 1896, do not add additional requirements, but ask for greater certainty in the proofs demanded by the rule.

Hereafter, all certificates of graduation annexed to the applicant's papers, as proof of his being a graduate of a college or university, must be attested by the seal of the college — a mere written declaration purporting to be signed by an officer thereof will be insufficient; and the same rule applies to certificates of law school attendance, which must also be under the seal of the school, if such there be.

Since January 1, 1896, the attorney with whom the applicant has served a regular clerkship must make affidavit to the fact of the actual service by the applicant of a regular clerkship in his law office after the age of eighteen years, showing the continuance and end thereof and that not more than two months' vacation was taken in any one year. Certificates of these facts will not be accepted.

An applicant who claims time by attendance at a law school must now state the age at which he began his attendance thereat, in order to show that he did not begin such attendance before he was eighteen years of age.

Submission of proofs to the State Board of Law Examiners.

The papers required by this rule to be produced to or filed with the State Board of Law Examiners, together with the applicant's own affidavit under Rule IV, are required by the board to be delivered to its secretary at least fifteen days before the day appointed for the examination. The address of the secretary of the board is given under Rule VIII, page 255.

The rules adopted by the State Board of Law Examiners on the subject are to be found on page 287.

It should be borne in mind that the attorney's certificate of the applicant's good moral character, required by Rule III, is to be produced to and filed with the Appellate Division of the Supreme Court, and not with the Board of Law Examiners.

Papers required from law students.

The following is a recapitulation of all the papers required by the rules to be produced or filed by law students, or on their behalf, from the commencement of law study to application for admission.

To be filed in the office of the clerk of the Court of Appeals.

(1) Regents' law student certificate. (To be filed before entering upon clerkship or attendance at a law school. Rule V, subd. 3.)

(2) Attorney's certificate of commencement of clerkship. (To be filed on entering upon clerkship. Rule V, subd. 4.)

To be submitted to the State Board of Law Examiners, on applying for examination:

(3) College diploma or certificate of graduation (Rule VI, subd. 1), with (4) regents' certificate or other proof that the institution maintains a satisfactory standard (Rule III of State Board of Law Examiners, page 287); or (5) certified copy of regents' law student certificate (Rule VI, subd. 5); or (6) license or certificate of admission in another State or country (Rule VI, subd. 2; and see Examiners' Rule V, page 288).

(7) Certified copy of attorney's certificate of commencement of clerkship and (8) attorney's affidavit of service of clerkship (Rule VI, subd. 3); and [or] (9) certificate of attendance at law school and (10) applicant's own affidavit of attendance at law school (Rule VI, subd. 4).

(11) Applicant's own affidavit of citizenship, age, residence, etc. (Rule IV and Examiners' Rule I.)

To be submitted to the Appellate Division of the Supreme Court, on applying for admission and license.

(12) Certificate of State Board of Law Examiners, of passing examination (Rule III).

(13) Affidavits of good moral character (Rule III).

Unearned examination.— In Matter of Edwards (1897), 152 N. Y. 627, an application by a law student for an order permitting him to be examined for admission to the bar, before the expiration of his term of service as law student, was denied.

RULE VII.

Filing Certificates Nunc Pro Tunc; Certain Regents' Certificates Validated.

When the filing of a certificate, as required by these rules, has been omitted by excusable mistake, or without fault, the court may order such filing as of the proper date. All certificates heretofore issued to law students by the Board of Regents and founded upon equivalents instead of an actual examination, are validated and made effectual, and may be accepted as sufficient by the Board of Examiners.

The Rule.

This rule was introduced by the revision of 1894, but its provisions are, in effect, the statement of what has always been the practice in granting relief in cases of excusable mistake or oversight in not complying with the requirements for filing certificates, and in accepting regents' certificates issued upon substitutes for an actual regents' examination, although not expressly provided for by the rules before that revision. The certificates in reference to which relief, under this rule, is of the most importance are regents' certificates which fail to state the date of the completion of the regents' examination, and clerkship certificates. If regents' certificates on which appear the date of the completion of the regents' examination (Rule V, subd. 3), are filed at any time prior to the application for examination for admission, they will be deemed to take effect as of the date of the completion of the regents' examination and need not be filed *nunc pro tunc.*

Filing regents' certificate nunc pro tunc.

Regents' certificates are no longer filed *nunc pro tunc;* when filed, they are deemed to take effect as of the date of the regular examination as the same shall appear upon said certificate (Rule V, subd. 3).

Filing clerkship certificate nunc pro tunc.

When the attorney with whom a clerkship has been commenced has failed to perform the duty imposed upon him by subdivision 5 of Rule V, of filing the prescribed certificate of that fact at the time of the commencement of the clerkship, an application may be made under this rule, for an order filing such certificate *nunc pro tunc* as of the date of the beginning of the period of clerkship as stated in the certificate. To obtain such an order, the attorney with whom the clerkship was commenced, must make and send or present to the clerk of the Court of Appeals, together with his certificate, or a reference thereto, if it has already been filed, an affidavit stating that he was, at the time of the beginning of the clerkship stated in the certificate, a practicing attorney of the Supreme Court of the State of New York; that the student commenced a regular clerkship in his law office on the date mentioned in the certificate (giving it); that the student was at that time over eighteen years of age, and that he had passed the prescribed regents' examination, or completed a course of study accepted as a substitute therefor, and filed a regents' law-student certificate, or, that he is exempt from so doing by reason of having been graduated at a college or university, or having beeu admitted and having remained as an attorney in another State or country for one year, before the beginning of the clerkship. The affidavit should also state the facts which are relied on to constitute an excuse for not filing the certificate at the time the clerkship commenced.

If the affidavit is sufficient, and it appears that the student had pased a regents' examination or completed a course of study accepted as a substitute therefor, before entering upon the clerkship, and had filed a regents' certificate, or is exempt from so doing, an order will be granted and entered, and the clerkship certificate will be deemed filed *nunc pro tunc,* accordingly, as of the date when the clerkship is stated to have actually commenced; but no order for filing *nunc pro tunc* will be granted, where the

effect would be to dispense with a regents' examination and certificate, or to give the student the advantage of an earlier rule prescribing the subjects of regents' examination than that to which he otherwise would be subject. See Matter of Michael (1897), 154 N. Y. 762.

A certified copy of the order, required for presentation to the State Board of Law Examiners on application for examination, will be furnished by the clerk when requested, on receipt of the fee therefor, which is one dollar.

RULE VIII.

State Board of Law Examiners.

The State Board of Law Examiners shall be paid as compensation, each the sum of two thousand dollars per year, and in addition such further sum as the court may direct, and an annual sum not exceeding two thousand dollars per year shall be allowed for necessary disbursements of the board. Every applicant for examination shall pay to the examiners a fee of fifteen* dollars, which shall be applied upon the compensation and allowance above provided, and any surplus thereafter remaining shall be held by the treasurer of the State Board of Law Examiners and deposited in some bank, in good standing, in the city of Albany, to his credit and subject to his draft as such treasurer when approved by the Chief Judge. The examinations held by such State Board of Examiners may be conducted by oral or written questions and answers, or partly oral and partly written, but shall be as nearly uniform in the knowledge and capacity which they shall require, as is reasonably possible. An applicant who has failed to pass one examination cannot again be examined, until at least three months after such failure.

State Board of Law Examiners.

This rule is new, being in compliance with and furtherance of the requirements of section 56 of the Code of Civil Procedure,

* "Fifteen" substituted for "ten," November 30, 1909.

as amended by chapter 760 of the Laws of 1894. (See above, under Rule I.) This act, which created the State Board of Law Examiners, provided that it should go into effect January 1, 1895, but that the examiners might be appointed and the rules for examination adopted immediately. The act was approved by the Governor May 23, 1894, and on October 31, 1894, the Court of Appeals appointed members of the State Board of Law Examiners. The board now consists of William P. Goodelle, of Syracuse; Franklin M. Danaher, of Albany, and Frank Sullivan Smith, of New York. Mr. Goodelle is president of the board, and Mr. Danaher secretary and treasurer. The office of the secretary and treasurer, to whom the proofs required by Rules IV and VI, and the fee prescribed by this rule, should be sent by applicants for examination fifteen days before the date appointed for their examination, is Rooms 41 and 42 Bensen Building, Albany.

See Rules of the State Board of Law Examiners, page 286.

Scope of the examination.

Until other or additional subjects are prescribed by the State Board of Law Examiners, applicants should be prepared for examination upon the topics prescribed by Rule I of the General Rules of Practice of this State, prior to the revision thereof of 1896, which revision leaves the scope and character of the examinations entirely in the discretion of the Board. Former Rule I required the applicant to sustain a satisfactory examination upon the law of pleadings, practice as regulated by the Code of Civil Procedure and by the General Rules of Practice, the law of real and personal property, contracts, partnership, negotiable paper, principal and agent, principal and surety, insurances, executors and administrators, bailments, corporations, personal rights, domestic relations, wills, equity, jurisprudence, criminal law and the law of evidence.

The education and course of study of candidates for admission to the bar are discussed, and the qualifications deemed essential under the circumstances existing when the only condition or restraint imposed by law upon admission to practice was the provision of the State Constitution of 1846 (art. 6, § 8), that those who possessed "the requisite qualifications of learning and ability" should be entitled to admission, are stated in an interesting report of an examining committee to the General Term of the

Supreme Court, in 1856, reported as Matter of Pratt, 13 How. Pr. 1.

See, also, Rule VI of the State Board of Law Examiners, page 288.

RULE IX.

Time of Taking Effect.

[These Rules shall take effect on July 1, 1907.]

These amendments shall take effect on the first day of June, 1908, but the amendment to subdivision third of Rule V shall not apply to any student whose clerkship or attendance at a qualified law school has already begun, or shall have begun prior to June 1, 1908, as shown by the records of the Court of Appeals, or of any incorporated law school, or law school established in connection with any college or university.*

Rule IX of 1895, which prescribed times and places for holding examinations, was dropped by the revision of 1906, but the provision thereof permitting an applicant to be examined in any department, whether a resident therein or not, is preserved by Rule II of the State Board of Law Examiners (page 286). Prior rules restricted both examination and admission thereon to the judicial department of which the applicant was at the time a resident. An exception to this restriction prevailed up to 1882, in the case of graduates of certain law schools in this State, who, by force of statutes, the repeal of which did not take effect until that year, were entitled to admission without examination by the court, on production of their diplomas. Matter of Burchard (1882), 27 Hun, 429. This exception ceased, however, with the repeal of the statutes referred to, and after 1882 graduates of law schools were subject, in common with other applicants for admission, to the requirement of making their application for admission, to the Supreme Court in the department in which they resided.

The distinction in respect to the department of examination and that of admission is to be noted. While the statute

* Of April 24, 1908, printed in italics.

impliedly and the rule expressly permits any applicant to be examined by the State Board of Law Examiners in any department, whether a resident therein or not, admission to practice is, by force of the provisions of section 56 of the Code (section 88 of the Judiciary Law), restricted to the Appellate Division of the Supreme Court of the department in which the candidate resides.

RULE OF THE SUPREME COURT.

Rule 1 of the General Rules of Practice as amended April 1, 1910, in effect September 1, 1910, is as follows:

Application for admission as attorneys.

Within ten days after the first day of January in each year, the Appellate Division in each department shall appoint a committee on character and fitness of not less than three for the department, or may appoint a committee for each judicial district within the department, to whom shall be referred all applications for admission to practice as attorney and counselor-at-law, such committee to continue in office until their successors are appointed. To the respective committees shall be referred all applications for admission to practice, either upon the certificate of the State Board of Law Examiners, or upon motion under Rule 2 of the rules of the Court of Appeals for the admission of attorneys and counselors-at-law. The committee shall require the attendance before it, or a member thereof, of each applicant, with the affidavit of at least two practicing attorneys acquainted with such applicant, residing in the judicial district in which the applicant resides, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based, and it shall be the duty of the committee to examine each applicant, and the committee must be satisfied from such examination, and other evidence that the applicant shall produce, that the applicant has such qualifications as to character and general fitness as in the opinion of the committee justify his admission to practice, and no person shall be admitted to practice except upon the production of a certificate from the committee to that effect, unless the court otherwise orders.

No applicant shall be entitled to receive such a certificate who is not able to speak and to write the English language intelligently, nor until he affirmatively establishes to the satisfaction of the committee that he possesses such a character as justifies his admission to the bar and qualifies him to perform the duties of an attorney and counselor-at-law.

An applicant for admission to practice as an attorney and counselor-at-law on motion, under the provisions of Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counselors-at-law, must present

to the court proof that he has been admitted to practice as an attorney and counselor-at-law in the highest court in another state, or in a country whose jurisprudence is based upon the principles of the common law of England; a certificate, executed by the proper authorities, that he has been duly admitted to practice in such state or country; that he has actually remained in said state or country, and practiced in such court as attorney and counselor-at-law for at least three years; a certificate from a judge of such court that he has been duly admitted to practice and has actually continuously practiced as an attorney and counselor-at-law for a period of at least three years after he has been admitted, specifying the name of the place or places in which he had so practiced and that he has a good character as such attorney. Such certificate must be duly certified by the clerk of the court of which the judge is a member, and the seal of the court must be attached thereto. He must also prove that he is a citizen of the United States and has been an actual resident of the State of New York, or of an adjoining state, for at least six months prior to the making of the application, giving the place of his residence by street and number, if such there be, and the length of time he has been such resident. He shall also submit the affidavits of two persons who are residents of the judicial district in which he resides, one of whom must be an attorney and counselor-at-law, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based. In all cases the applicant must appear in person before the court, on the motion for his admission, and also before the committee on character and fitness for the district in which the application is made. When the applicant resides in an adjoining State, and a motion is made to admit him to practice in this State without actual residence herein, in addition to the foregoing facts, the applicant must prove to the satisfaction of the court that he has opened and maintains an office in this State for the transaction of law business therein.

In all cases the applicant for admission must file with the clerk of the Appellate Division of the proper department the papers required for his admission as hereinbefore specified prior to or at the time of the motion for admission to practice.

REGISTRATION OF ATTORNEYS.

The system of registration of attorneys was created by chapter 165 of the Laws of 1898 and amended by chapter 225 of the Laws of 1899 and chapter 154 of the Laws of 1906. This legislation is now embodied in the Consolidated Laws, as follows:

Judiciary Law.

§ 468. Every person who is hereafter duly licensed and admitted to practice as an attorney and counselor-at-law in the courts of record of this State by an Appellate Division of the Supreme Court, shall subscribe and take and file an oath or affirmation which must be substantially in the following

form, the blanks being properly filled before he begins or is entitled to begin to practice for another as an attorney and counselor-at-law in the courts of this State or in any court in the county of New York or in the county of Kings:

STATE OF NEW YORK, }
.....COUNTY, } *ss.:*

I, ..., being duly sworn (or affirmed), do depose and say that I am a natural born citizen of the United States (if naturalized, state when and where) and now reside at ..... (or, if a resident of an adjoining State and admitted to practice in the courts of record of this State and whose office for the transaction of law business is within this State, state the fact). That I was duly and regularly licensed and admitted to practice as an attorney-at-law or as an attorney and counselor-at-law in the courts of record of this State at the ..... term 18.. of the General Term (or Appellate Division) of the Supreme Court (or other court as the case may be) held at ..... and that I took the constitutional oath of office.

Subscribed and sworn to before me,
this..... day of ....., 189...

which oath or affirmation shall be filed in the office of the clerk of the Court of Appeals by the person making the same, provided, nevertheless, that such affidavit or affirmation may state that the deponent or affirmant believes that he took the constitutional oath of office in lieu of stating unqualifiedly that he did so, where the affidavit or affirmation states, or in substance shows, the deponent's or affirmant's lack of positive or certain recollection of having taken such oath, or shows other substantial reason for thus qualifying the affidavit or affirmation on that subject. If any attorney or counselor-at-law or solicitor in chancery or attorney of or in the Supreme Court on the first Monday of July, eighteen hundred and forty-seven, who was entitled to file the said oath or affirmation under the provisions of Laws of eighteen hundred and ninety-eight, chapter one hundred sixty-five, as amended, before July first, eighteen hundred and ninety-nine, has failed to do so, the Special Term of the Supreme Court of the judicial district where such attorney-at-law or attorney or counselor-at-law resides, may, upon proof by affidavit showing reasonable grounds therefor, grant an order permitting the applicant to make and file the oath or affirmation required herein, with the same effect as if the same had been made and filed within the time stated, and relieving him from penalties and prosecutions by reason of failure to make affirmation hereinbefore provided shall pay to the said clerk at the time of and file such oath or affirmation within the time required.

Every person filing with the clerk of the Court of Appeals the oath or affirmation hereinbefore provided shall pay to the said clerk at the time of such filing the sum of twenty-five cents to defray the necessary disbursements incurred by him in carrying out the provisions of this article.

A person who practices any fraud or deceit or knowingly makes any false statement in the oath or affirmation in and by this section required to be made and filed is guilty of a felony.

§ 469. It shall be the duty of the clerk of the Court of Appeals to file in his office the said oaths or affirmations aforesaid, and to compile the statements contained therein, and to enter therefrom in a bound book or volume to be kept by him for that purpose, which shall be known and designated as and is hereby made the "official register of attorneys and counselors-at-law in the State of New York," in the alphabetical order of the first letter of their surnames, the names and residences and the title of the court and the time and place where admitted, and the date the oath or affirmation aforesaid was filed, of all persons who have filed in his said office the oath or affirmation as aforesaid, which said "official register of attorneys and counsellors-at-law in the State of New York," is hereby declared to be a public record and presumptive evidence that the individuals therein named are duly registered to practice at attorneys and counsellors-at-law in the courts of record of this State or in any court in the counties of New York and Kings.

It shall be unlawful for any person to practice or appear as an attorney-at-law or as attorney and counselor-at-law for another in a court of record in this State or in any court in the county of New York or in the county of Kings, or to make it a business to practice as an attorney-at-law or as an attorney and counselor-at-law for another in any of said courts, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law, or counselor-at-law, or attorney, or counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person, has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this State, or, in case of persons licensed and admitted prior to July first, eighteen hundred and forty-seven, without having first been duly and regularly licensed and admitted to practice as attorney of or in the then Supreme Court or as solicitor in chancery or of the court of chancery, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation required by section four hundred and sixty-eight of the Judiciary Law and filed the same in the office of the Court of Appeals as required by said section. Any person violating the provisions of this section is guilty of a misdemeanor and it shall be the duty of the district attorneys to enforce the provisions of this section and to prosecute all violations thereof.

The Court of Appeals has no power on original motion, to order the filing *nunc pro tunc* of an attorney's oath for the purpose of

registration under chapter 165 of the Laws of 1898. The duty imposed upon the clerk of that court under this act is independent of the court, and in that regard he should be treated as an independent public officer. Matter of Caruthers (1899), 158 N. Y. 131.

Certificate of registration — fees.—The clerk will, on request, furnish a certificate of registration; the fee for which is fifty cents. The fee for filing the oath or affirmation is, as provided by section 458 of the Law, twenty-five cents.

Additional restrictions as to the practice of law.

The Judiciary Law provides as follows:

Attorney who is judge's partner or clerk prohibited from practicing before him or in his court.

§ 471. The law partner or clerk of a judge shall not practice before him, as attorney or counselor in any cause, or be employed in any cause which originated before him. A law partner of, or person connected in law business with a judge, shall not practice or act as an attorney or counselor, in a court, of which the judge is, or is entitled to act as a member, or in a cause originating in that court; except where the latter is a member of a court, *ex officio*, and does not officiate or take part, as a member of that court, in any of the proceedings therein. (From Code of Civil Procedure, §§ 49, 50.)

Attorney who is surrogate's father or son prohibited from practicing before him.

§ 472. A surrogate's father or son shall not practice or be employed as attorney or counsel, in any case, in which his partner or clerk is prohibited by law from so practicing, or being employed. (From Code of Civil Procedure, § 2529.)

Sheriffs, constables, coroners, criers, and attendants prohibited from practicing during term of office.

§ 473. A sheriff, under sheriff, deputy sheriff, sheriff's clerk, constable, coroner, crier, or attendant of a court, shall not during his continuance in office, practice as an attorney or counselor in any court. (From Code of Civil Procedure, § 62.)

Compensation of attorney or counselor.

§ 474. The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law. (From Code of Civil Procedure, § 66.)

Attorney's lien in action or special proceeding.

§ 475. From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosesoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien. (From Code of Civil Procedure, § 66.

The Code of Civil Procedure provides as follows:

Service of paper upon attorney residing in adjoining State.

§ 60. Service of a paper, which might be made upon him at his residence, if he was a resident of the State, may be made upon a person regularly admitted to practice as an attorney and counselor, in the courts of record of this State, whose office for the transaction of law business is within the State but who resides in an adjoining State, by depositing the paper in a post office in the city or town where his office is located properly enclosed in a post paid wrapper, directed to him at his office. A service thus made is equivalent to personal service upon him.

Death or disability of attorney; proceedings thereupon.

§ 65. If an attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceedings shall be taken in the action against the party for whom he appeared, until thirty days after notice to appoint another attorney has been given to that party, either personally, or in such other manner as the court directs.

FORMS.

1.

Certificate of Commencement of Clerkship.

I, the undersigned, a practicing attorney of the Supreme Court of the State of New York, do hereby certify that , who is upwards of eighteen years of age, having been born at , on the day of , has this day entered my office at , N. Y., as a regular law clerk and student under the rules of the Court of Appeals for the admission of Attorneys and Counselors-at-law.

Dated

.....

Attorney-at-Law.

2.

Applicant's Affidavit.

Rules IV and VI.

In the Appellate Division of the Supreme Court of the State of New York.
Judicial Department.

In the Matter of the Application of
.....
for Admission to the Bar.

CITY AND COUNTY OF , }
STATE OF NEW YORK, } *ss.*.

, being duly sworn, deposes and says:

First. That he is the applicant above-named and the person mentioned in the annexed preliminary papers. That he is a citizen of the United States and of the State of New York. That he is twenty-one years of age and upwards, to wit: he is years old. That he is a resident of this State, and has not been examined for admission to practice and been refused admission and license within three months immediately preceding the time of making this application for admission to the bar. That he has resided for the past six months at No. , street, in the city of , New York, in the Judicial Department of said State.

Second. That he has studied law in the manner and according to the conditions prescribed by the rules of the Court of Appeals for the admission of attorneys and counselors-at-law, as will more fully appear by the annexed papers.

Third. Deponent further alleges that he is a graduate of college (or university), having graduated therefrom on the day of , 18 , with the degree of , as will more fully appear by deponent's certificate of graduation, under the seal of said college (or university), hereto annexed, (or deponent's diploma presented herewith), marked "A." That said college (or university) is registered with the Board of Regents of the State of New York as maintaining a satisfactory standard in respect to the course of study completed by deponent, as will more fully appear by the certificate of the Board of Regents to that effect hereto annexed, marked "B."

Fourth. Deponent further alleges, that he completed and passed the regents' examination, as required by the rules of the Court of Appeals, on day of , 18 , on which a Regents' Law Student Certificate was duly issued to him; that deponent filed a certificate of such fact, signed by the Secretary of the University, with the clerk of the Court of Appeals on the day of , 18 , as will more fully appear by the annexed certified copy of the regents' certificate filed in the office of the clerk of the Court of Appeals, showing the date of such filing, marked "C." (Or, Deponent further alleges, that on the day of , 18 , the Board of Regents of the State of New York issued to deponent a Regents Law Student Certificate, as an equivalent of and substitute for the regents' examination prescribed by the rules of the Court of Appeals, which said certificate deponent filed in the office of the clerk of the Court of Appeals on the day of , 18 , as will more fully appear by the annexed certified copy of the same, showing the date of filing, hereto annexed and marked "D.")

Fifth. Deponent further alleges that he served a regular clerkship in the law office of a practicing attorney of the Supreme Court in this State, after the age of eighteen years, to wit: in the law office of , at , from the day of , 18 , to the day of , 18 , as will more fully appear by the annexed certified copy of the attorney's certificate of commencement of the service of such regular clerkship and proof of filing thereof in the office of the clerk of the Court of Appeals, marked "E," and the annexed affidavit of , the attorney with whom such regular clerkship was served, marked "F." That deponent did not take more than two months' vacation in any one year during the service of such clerkship; the vacations taken by deponent being as follows, viz.: from to , as also appears by the affidavit of said , hereto annexed.

Sixth. Deponent further alleges that he attended the Law School, situated at , during a school year of not less than eight months, to wit, from , 18 , to , 18 , and that he was of the age of years when he began his attendance thereon. The fact of said attendance is proven by the certificate of the teacher (or president of the faculty) of the said Law School, hereto annexed, under the seal of said Law School (if such there be), and marked "G."

Seventh. Deponent further alleges that on the day of , 18 , he was admitted as an attorney in the Court of the State of , that being the highest court of original jurisdiction in said State, and that he remained in said State as a practicing attorney for at least one year, to wit, from the day of , 18 , to the day as , 18 , as will more fully appear from the annexed license or certificate of admission to practice, executed by the proper authorities, marked "H," and by the annexed authenticated certificate, marked "I," of the Hon. , a Judge of said Court (or of the Hon. , County Judge of county, in said State), as required by Rule V of the Rules of the State Board of Law Examiners.

Eighth. Deponent further alleges that his certificate of commencement of regular clerkship in the office of a practicing attorney of the Supreme Court in this State, after the age of eighteen years (or his Regents' Law Student Certificate), was filed *nunc pro tunc* with the clerk of the Court of Appeals as of the date of , 18 , in pursuance of an order of the Court of Appeals, a certified copy of which order is hereto annexed, marked "J."

Sworn to before me, this day of , 18 } Signature of Applicant.

NOTE.—The above general form covers every possible condition arising under the rules for admission to the bar, except (1) under subd. 6 of Rule VI, where diploma, affidavit or certificate has been lost or destroyed, or is unjustly refused or withheld, or cannot be procured on account of the death or absence of the person or officer who should have made it; those cases are special and exceptional—the form therefor can be readily drafted by the applicant to meet the facts in his particular case; and also except (2) under Rule III of the Rules of the State Board of Law Examiners, where a college or university is not registered with the Board of Regents of the State of New York as maintaining a satisfactory standard in respect to the course of study completed by the applicant. In such case, the applicant must submit with his diploma or certificate of graduation satisfactory proof of the course of study completed by him and of the character of the college or university of which he claims to be a graduate. That proof is special in each case, and varies with the college and course of study; it involves the filing of a statement of the curriculum, affidavit of course of study taken, proof of educational standing of the college, its requirements for admission, and graduation in the course of study completed, and such other proofs as the applicant may deem satisfactory to the board.

3.

Attorney's Affidavit of Service of Clerkship.

Rule V, subds. 1 and 4; Rule VI, subd. 3.

In the Appellate Division of the Supreme Court of the State of New York, Judicial Department.

In the Matter of the Application of
.....
for Admission to the Bar.

STATE OF NEW YORK,
CITY AND COUNTY OF } *ss.:*

, being duly sworn, deposes and says: That he is, and was at the dates hereinafter stated, a practicing attorney of the Supreme Court in this State; that the above-named applicant, after the age of eighteen years, served a regular clerkship in deponent's law office at , commencing on the day of , 18 , and ending on the day of , 18

That during the service of such clerkship as aforesaid, the said did not take more than two months' vacation in any one year; the vacations taken by the said being as follows, viz.: from to

.

Sworn to before me, this
day of , 18 .

NOTE.— See page 154, *ante*, for note on the rule concerning the taking of vacations.

APPENDIX.

INSTRUCTIONS OF THE BOARD OF REGENTS OF THE UNIVERSITY TO LAW STUDENTS.

Rule V of the Court of Appeals.

Subd. 3. Applicants who are not graduates of a college, or university, subject to the limitations and requirements hereinafter, in this subdivision, expressed or members of the bar as above-described, before entering upon the clerkship, or attendance at a law school herein prescribed, shall have passed an examination conducted under the authority and in accordance with the ordinances and rules of the University of the State of New York, in English, three years; mathematics, two years; Latin, two years; science, one year; history, two years; or in their substantial equivalents as defined by the rules of the University, and shall have filed a certificate of such fact, signed by the Commissioner of Education, with the clerk of the Court of Appeals, whose duty it shall be to return to the person named therein a certified copy of the same, showing the date of such filing. The regents may accept as the equivalent of and substitute for the examination in this rule prescribed, either, first, a certificate, properly authenticated, of having successfully completed a full year's course of study in any college, or university; second, a certificate, properly authenticated, of having satisfactorily completed a four years' course of study in any institution registered by the regents as maintaining a satisfactory academic standard; or, third, a Regents' diploma. All graduates of a college or university existing under the government or laws of any foreign country other than those where English is the language of the people and all applicants who apply for law students' certificates upon equivalents or substitutes, as above provided, all or any part of which are earned or issued in said foreign countries, shall pass the Regents' examin-

ation in second year English. The Regents' certificate above prescribed shall be deemed to take effect as of the date of the completion of the Regents' examination, as the same shall appear upon said certificate.

Notes on law-student examinations.

1. The rules and other details of the regents' examinations are given in the Examination Handbook, to be had free on application.

2. The court does not allow any equivalents for the individual studies here named, but only the equivalents for the entire group. The obvious purpose of excluding equivalents for individual studies is to fix the normal standard at the completion of a high school course, as is definitely provided by law in the case of medical students. Equivalents are therefore reckoned only on this basis, and not on the minimum of specified examinations which are still accepted from those unable to offer certificates of having completed the regular preparation.

3. The acceptance of equivalents by the regents is permissive, not mandatory. They accept equivalents, therefore, only in accordance with the rules found necessary to protect the State against unqualified candidates.

4. Certificates should be issued in due form by the president, dean or principal of the institution; and should be signed under seal or acknowledged before a notary, unless the institution is in the University of the State of New York, and the signature of the officer issuing is well known in the regents' office.

5. The regents count forty weeks as a full academic year. If the candidate has passed successfully in a registered institution all the examinations for a full year's work the question of actual attendance is not raised.

6. The court and the regents both refuse to recognize as a college or a university an institution which, though taking the name, in reality does work of a lower grade. Colleges of medicine, pharmacy, dentistry, business colleges and all similar professional and technical schools are not registered as colleges. Applicants for examination for admission to the bar are to be deemed graduates of colleges or universities, within the meaning and

intent of the rules for the admission of attorneys and counselors-at-law, when they have successfully completed a course of college instruction that requires as a condition of graduation at least six full years in liberal arts and sciences in advance of a completed eight-year elementary course.

The court also refuses to recognize as "study in a college" work in an academic or lower department conducted and supervised by a college. To be accepted as an equivalent by the regents the work must have been of college grade.

7. Besides the institutions of higher education in the State of New York, inspected by the regents, institutions in other States and countries are registered on reliable information that the minimum standard is fully met. If credentials are offered from any institution not yet registered (or rejected as below the registration standard) the necessary investigation will be made as promptly as possible and the candidate notified whether the credentials can be accepted. The frequent changes in organization and standards, and the practical difficulties of recording the grade of work outside regularly organized institutions, have made necessary the rule that candidates instructed by private tutors or in unregistered private schools, however excellent, cannot be excused from taking the examinations by presenting certificates similar to those accepted from regularly organized and registered institutions.

8. The term "regents' diploma" refers not alone to the classical, English and academic diplomas which bear that specific name, but to all graduating credentials whether called certificates or diplomas, which certify from the university to the completion of a full academic course. As some candidates prefer to pass examinations in the higher branches more recently studied rather than in more elementary subjects in which they have become rusty, they are allowed to select from the entire list of over sixty studies in which the regents examine, provided that the total academic counts equal a full course.

Court Rule II, in effect July 1, 1882, prescribes that any person not a graduate of a college or university shall, before entering upon the clerkship or substituted course of study or within three months thereafter, pass a regents examination in (1) arithmetic, (2) English composition, (3) grammar, (4) geography,

(5) orthography, (6) English history, (7) American history, or their substantial equivalents.

Court Rule II, in effect April 13, 1891, prescribes that any person not a graduate of a college or university registered by the regents shall, before entering upon the clerkship or substituted course of study or within one year thereafter, pass a regents examination in (1) arithmetic, (2) English composition, (3) English history, (4) United States history, (5) first year Latin, (6) geometry, (7) civics, or their substantial equivalents. The law student whose course had begun as shown by the records of the Court of Appeals or an incorporated law school of this State at the date of this rule, could file the law student certificate required by the court rule of July 1, 1882.

Court Rule II, in effect October 28, 1892, prescribes that any person not a graduate of a college or university registered by the regents shall, before entering upon the clerkship or substituted course of study or within one year thereafter, pass a regents examination in (1) arithmetic, (2) English composition, (3) English history, (4) United States history, (5) first year Latin, (6) geometry, (7) civics, or their substantial equivalents. The law student whose course had begun, as shown by the records of the Court of Appeals or an incorporated law school of this State at the date of this rule, could file the law student certificate required by the court rule of April 13, 1891.

Court Rule V, 3, in effect January 1, 1895, prescribes that any person not a graduate of a college or university registered by the Regents, or a member of the bar, shall, before entering upon the clerkship or substituted course of study or within one year thereafter, pass a Regents examination in (1) arithmetic, (2) English composition, (3) advanced English, (4) English history, (5) United States history, (6) first year Latin, (7) geometry, (8) civics, (9) algebra, (10) economics, or their substantial equivalents. The law student whose course had begun, as shown by the records of the Court of Appeals or an incorporated law school of this State at the date of this rule, could file the law student certificate required by the court rule of October 28, 1892.

Law students, who filed the certificate of clerkship or who began the study of law in a registered law school subsequent to

July 1, 1907, and prior to June 1, 1908, may obtain the law student certificate by passing Regents examinations at seventy-five per cent. in any subjects aggregating sixty counts, or in the set subjects mentioned in the preceding paragraph except that second year English must be substituted for first year English.

The exact ground covered by these examinations is shown in the Regents' Academic Syllabus, mailed prepaid for twenty-five cents. The calls for sample examination papers grew so burdensome that further free distribution became impracticable. All the papers for the year are mailed for twenty-five cents in paper covers. Unbound sample papers can be had for ten cents for not exceeding ten subjects.

Law student certificate.

As is seen from above notes, the regents' law student certificate may be secured by passing an examination in the subjects specified in subdivision 3 of Rule V: in English, three years; mathematics, two years; Latin, two years; science, one year; history, two years, or in other subjects, on which examinations are held, aggregating sixty academic counts, which number of counts represents the completion of a full four-year academic course. The meaning of the term "counts" will be seen from the figures prefixed to the different studies in the following table of subjects of examination, denominated "Regents' Studies."

On receiving this certificate, the candidate must send it to the clerk of the Court of Appeals at Albany, who will file it and return a certified copy on payment of one dollar. The Examination Department issues but one certificate to each candidate.

The law student certificate takes effect the date of the completion of the Regents' examination or the equivalent. Regents' examination in second year English is required of applicants from foreign countries other than those where English is the language of the people for certificates upon equivalents or substitutes.

ACADEMIC SUBJECTS.

GROUP 1 — LANGUAGE AND LITERATURE.

English, first year	4	English grammar	2
English, second year	3	History English literature	2
English, third year	3	English, 3 years	10
English, fourth year	3		

Latin, first year	5	Latin grammar	0
Latin, second year	5	Latin composition	0
Latin, third year	5	Prose at sight	0
Latin, fourth year	5	Verse at sight	0
Greek, first year	5	Greek composition	0
Greek, second year	5	Prose at sight	0
Greek, third year	5	Verse at sight	0
Grammar	0		
Hebrew, first year	5	Hebrew, second year	5
French, first year	5	French, third year	5
French, second year	5	French, fourth year	5
German, first year	5	German, third year	5
German, second year	5	German, fourth year	5
Spanish, first year	5	Spanish, third year	5
Spanish, second year	5		
Italian, first year	5	Italian, second year	5

GROUP 2 — MATHEMATICS.

Advanced arithmetic	2	Plane geometry	5
Algebra	5	Solid geometry	2
Intermediate algebra	2	Trigonometry	2
Advanced algebra	3		

GROUP 3 — SCIENCE.

Physics	5	Physiology and hygiene	2½
Chemistry	5	Advanced botany	5
Biology	5	Advanced zoology	5
Elementary botany	2½	Physical geography	5
Elementary zoology	2½		

GROUP 4 — HISTORY AND SCIENCE.

Ancient history	3 or 5	Modern history II	3
History of Great Britain and Ireland	3 or 5	American history and civics	5
Modern history I	3	Civics	2
		Economics	2

GROUP 5 — COMMERCIAL SUBJECTS.

Elementary bookkeeping and business practice	3	Commercial law	2½
Advanced bookkeeping and office practice	5	History of commerce	3
Commercial arithmetic	2½	Commercial geography	2½
Business writing	0	Commercial English and correspondence	3
Typewriting	2½	Shorthand I	5
		Shorthand II	5

GROUP 6 — MUSIC.

Chorus singing and rudiments of music	2	Musical form and analysis	4
Harmony and counterpoint	7	Dictation and melody writing	3
		Acoustics and History of music	4

GROUP 7 — DRAWING.

Design	2	Mechanical drawing II	3
Representation	2	Mechanical drawing III	2
Advanced design	2	Mechanical drawing IV	2
Advanced representation	2	Architectural drawing	2
Mechanical drawing I	3		

GROUP 8 — OTHER SUBJECTS.

History and principles of education	3	Psychology and principles of education	3

NOTES.

Order of studies.— There is no restriction in the order in which studies may be taken.

Time limit.— There is no limit of time, but all credentials issued by the University are good till canceled for cause.

Seventy-five per cent. of correct answers is required in all subjects.

Duplicate credentials.— On request at any time for a fee of five cents each, duplicates of record cards will be issued, and for a fee of twenty-five cents a formal certificate showing in individual cases all subjects passed to date. Such credentials will meet the needs of those who wish official verification of the school records either for admission to other schools or before regular certificates or diplomas have been earned. Duplicates of professional credentials, however, such as law and medical student certificates, will not be issued except on satisfactory evidence of loss or destruction of originals.

Candidates not attending schools in which Regents' examinations are held should send notice at least ten days in advance, stating at what time and in what studies they wish to be examined, that required desk room may be provided at the most convenient place.

Candidates who fail to send this advance notice can be admitted only so far as there are unoccupied seats.

Professional students.— Candidates having credentials which can be accepted in place of examinations, should send them to the Examinations Division, State Department of Education.

Special academic tests for professional students are held in New York city, Albany, Syracuse and Buffalo. A fee of twenty-five cents for each half day session or one dollar for the sessions of the

entire week is required for admission to these examinations. Candidates should secure tickets from Albany ten days in advance. Those failing to secure tickets in advance will be admitted so far as accommodations will permit, but will be charged an extra fee of twenty-five cents.

A fee of twenty-five cents is required for each law, . . . credential.

INSTRUCTIONS TO CANDIDATES.

To be read aloud to all candidates by the principal or deputy in charge at the beginning of each session.

1. No candidate shall communicate in any way or bring to the examination, books or helps of any kind, or question any examiner.

2. At the close of the examination in each subject each candidate must affix to his answer paper, in the line following the last answer, the following declaration, subscribe his name and then deliver his answer paper to the examiner:

I now, at the close of the examination in (name subject), declare that prior to this examination I had no knowledge of what questions were to be proposed, and have neither given nor received explanations or other aid in answering any of them.

Every set of answers lacking this declaration, however satisfactory in other respects, will be rejected.

3. Any candidate detected in trying to give or obtain aid will be instantly dismissed from the room and his papers for the entire week will be canceled.

4. Any candidate who, with fraudulent intent, endeavors to obtain any credential of the University shall be debarred from entering any Regents' examination till admitted by special permission from the University on written application to the secretary. The University reserves the right to revoke any of its credentials obtained by disregard or violation of any of its rules. Ignorance of these rules will not be accepted as an excuse.

5. No candidate shall enter the examination more than forty-five minutes late; and no candidate shall leave the room within forty-five minutes after the distribution of question papers.

6. Heed strictly all directions on the question papers and read the questions very carefully. Do not give information that is not asked for. Write in ink on both sides of the paper. Give special

attention to general order, legibility and neatness. Use only paper distributed by the examiners.

7. Write answers in the order of the questions. Do not copy the questions, but write the number of each question in the left margin before the answer. Leave a line blank after the answer to each question.

8. Papers should not be folded. At the top of each sheet or half sheet, should be written, on two separate lines: 1 (subject), 2 (date), 3 (place), 4 (name); e. g.

Arithmetic	Albany High School
June 15, 1905.	James Burns

Communications.—All communications should be addressed to Examinations Division, State Department of Education, Albany, N. Y.

DAILY PROGRAM OF REGENTS' EXAMINATION.

SEPTEMBER 1911–1915.

September examinations are for professional and technical students only. The day of the week of the September examinations will vary from year to year.

9:15 A. M.

Advanced arithmetic.
German, first year.
Latin, first year.
Elementary algebra.
Intermediate algebra.
Ancient history.
Modern history, 1 and 2.

1:15 P. M.

English, first year.
English, second year.
English, third year.
English, 3 years.

9:15 A. M.

German, second year.
Plane geometry.
Physics.
English grammar.
Commercial geography.

1:15 P. M.

French, first year.
French, second year.
French, third year.
Physiology and hygiene.
Economics.
Elementary bookkeeping.
Chemistry.
Advanced bookkeeping.
Latin, third year.

9:15 A. M.

German, third year.
Arithmetic.
American history and civics.
Stenography.
Latin, second year.

1:15 P. M.

Physical geography.
History of Great Britain and Ireland.
Civics.
Typewriting.
Drawing, design.
Drawing, representation.

JANUARY AND JUNE, BEGINNING JUNE, 1911.

The oral examination in reading may be held any time during examination week at the convenience of the examiner.

MONDAY.

9:15 A. M.	1:15 P. M.
Geography.	Spelling.
Elementary algebra.	Ancient history.
Intermediate algebra.	American history with civics.
Solid geometry.	Civics.
Advanced algebra.	Shorthand, 1 and 2.
Advanced bookkeeping and office practice.	Rudiments of music.
Harmony and counterpoint.	Dictation and melody writing.

TUESDAY.

9:15 A. M.	1:15 P. M.
Arithmetic.	Elementary English.
Plane geometry.	English, first year.
Advanced arithmetic.	English, third year.
Commercial arithmetic.	English, 3 years.
Chemistry.	Trigonometry.
Physics.	
Drawing 1, design.	
Typewriting.	
Acoustics and history of music.	
Musical form and analysis.	

WEDNESDAY.

9:15 A. M.	1:15 P. M.
Biology:	Elementary United States history with civics.
Botany.	Physical geography.
Zoology.	Advanced botany.
Physiology.	Advanced zoology.
History English language and literature.	History of Great Britain and Ireland.
Latin, 3.	Modern history, 1.
Latin grammar.	Elementary bookkeeping and business practice.
Psychology and principles of education.	Business writing.
Economics.	
Commercial law.	
Advanced drawing:	
1 Representation.	
2 Advanced design.	
3 Advanced representation.	

THURSDAY.

9:15 A. M.	1:15 P. M.
Latin, 2.	Latin, 1.
Latin, 4.	History of commerce.
Latin prose composition.	English, 2.
Latin prose at sight.	English grammar.
Commercial geography.	English, 4.
Mechanical drawing, 1, 2, 3, 4.	Commercial English and correspondence.

FRIDAY.

9:15 A. M.	1:15 P. M.
Greek, 1.	Greek verse at sight.
Greek, 3.	Greek, 2.
Greek prose composition.	Greek grammar.
Greek prose at sight.	French, 1, 2, 3, 4.
German, 1, 2, 3, 4.	Spanish, 1, 2, 3.
History and principles of education.	Hebrew, 2.
Italian, 1, 2.	
Hebrew, 1.	
Architectural drawing.	

TIMES OF EXAMINATIONS.

REGENTS' EXAMINATIONS.

TIMES AND PLACES.

September examinations are for professional and technical students only.
September — New York, Albany, Syracuse, Buffalo.
January — New York and about 550 academies and high schools.
June — New York and about 575 academies and high schools.

	1911.	1912.	1913.	1914.	1915.
January	16–20	15–19	20–24	19–23	18–22
June	12–16	17–21	16–20	15–19	14–18
September	18–20	9–11	15–17	14–16	13–15

THE JURISDICTION OF THE COURT OF APPEALS.

The jurisdiction of the Court of Appeals is defined by section 9 of article 6 of the State Constitution:

§ 9. After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them. The Appellate Division in any department may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals.

The Legislature may further restrict the jurisdiction of the Court of Appeals and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved.

The provisions of this section shall not apply to orders made or judgments rendered by any General Term before the last day of December, one thousand eight hundred and ninety-five, but appeals therefrom may be taken under existing provisions of law.

The Legislature has the power to further restrict the jurisdiction of the court, and also to enlarge such jurisdiction, save only in those special cases which are expressly withdrawn from review. People ex rel. Com'rs of Charities v. Cullen, 153 N. Y. 629; Hoes v. Edison General Electric Co., 150 N. Y. 87.

Statutes Regulating the Jurisdiction of the Court.

The following sections of the Codes of Civil and Criminal Procedure have been enacted by the Legislature defining the powers of the Court of Appeals:

Section 190 of the Code of Civil Procedure:

The jurisdiction of the Court of Appeals in civil actions.— The Court of Appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, eighteen hundred and ninety-five, at a General Term of the Supreme Court, or by either of the superior city courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the Court of Appeals. From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the Court of Appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determination made by the Appellate Division of the Supreme Court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court, from judgments of orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

2. Appeals may also be taken from determinations of the Appellate Division of the Supreme Court in any department where the Appellate Division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the Court of Appeals shall certify to the Appellate Division its determination upon such questions. [Amended by chap. 61 of 1882 and chap. 946 of 1895.]

See also §§ 1324–1339.

In condemnation proceedings in city of New York, see § 989, Greater New York charter.

Appeals as of right can only be taken from final judgments and final orders. Van Arsdale v. King, 155 N. Y. 325; Stevens v. Cent. Nat. Bank, 162 N. Y. 254. Appeal will not lie from order in action. Hammond v. Nat. Life Ass'n, 168 N. Y. 262. Burden of showing that appeal was not well taken is upon respondent. Laidlaw v. Sage, 158 N. Y. 87. What are orders, "finally determining." See Matter of Small, 158 N. Y. 120; Village of Champlain v. McCrea, 165 N. Y. 264; Hammond v. Nat. Life Ass'n, 168 N. Y. 262.

Limitations, exceptions and conditions:

§ 191. *Code of Civil Procedure.*— The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court, in any civil action or proceeding commenced in any court other than the Supreme Court, Court of Claims, County Court, or a Surrogate's Court, unless the Appellate Division of the Supreme Court allows the appeal by an order, made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors, or in an action to recover wages, salary or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, or in an action upon an individual bond or individual undertaking on appeal, when the decision of the Appellate Division of the Supreme Court is unanimous, unless such Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the Court of Appeals.

3. The jurisdiction of the court is limited to a review of questions of law.

4. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals.

Subd. 1. As to questions certified, see Re Westerfeld, 163 N. Y. 209; Pringle v. L. I. R. Co., 157 N. Y. 101.

Subd. 2. On motion to dismiss appeal under this subdivision burden is on moving party. Kaplan v. N. Y. Biscuit Co., 151 N. Y. 171. Applies to special proceedings. People ex rel. v. Barker, 152 N. Y. 417. Unanimous affirmance by Appellate Division affirms all findings of fact. People ex rel. v. Barker,

152 N. Y. 417. See, also, Cronin v. Lord, 161 N. Y. 90. What questions may be reviewed on certificate. Commercial Bk. v. Sherwood, 162 N. Y. 310.

Subd. 3. Court of Appeals may determine whether a question of fact is involved. Hershfeld v. Fitzgerald, 157 N. Y. 166.

Subd. 4. Fact that decision was unanimous should appear in record. Laidlaw v. Sage, 158 N. Y. 173. See, also, Hershfeld v. Fitzgerald, 157 N. Y. 166. Section applies to general findings of fact. People ex rel. v. Barker, 152 N. Y. 417. What may be reviewed upon order allowing appeal. Kleiner v. Fid. & Dep. Co. of Maryland, 33 Misc. Rep. 188. What questions open to review. See City of Niagara Falls v. N. Y. C. & H. R. R. Co., 168 N. Y. 610.

As to sufficiency of the certificate required by subdivision 2 of section 191, see Young v. Fox, 155 N. Y. 615.

The order of Appellate Division should show that the decision was unanimous. People ex rel. Man. Ry. Co. v. Barker, 152 N. Y. 417.

As to what is a judgment of affirmance. See Huda v. Am. Glucose Co., 151 N. Y. 549; Warren v. N. Y. C., etc., R. Co., 163 N. Y. 525.

Section 517 of the Code of Criminal Procedure:

In what case appeal may be taken by defendant.—An appeal to the Supreme Court may be taken by the defendant from the judgment on a conviction after indictment, *except that when the judgment is of death the appeal must be taken direct to the Court of Appeals,* and, upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred and eighty-five, may be reviewed. [Amended chap. 493 of 1887. See § 2, id., Sup., § 485.] People v. O'Brien, 164 N. Y. 57.

Section 519 of the Code of Criminal Procedure:

Appeal to the Court of Appeals.—An appeal may be taken from a judgment or order of the *Appellate Division* of the Supreme Court to the Court of Appeals in the following cases and no other:

1. From a judgment affirming or reversing a judgment of conviction;

2. From a judgment affirming or reversing a judgment for the defendant on a demurrer to the indictment, or from an order affirming, vacating, or reversing an order of the court arresting judgment;

3. From a final determination affecting a substantial right of the defendant. [Amended by chap. 880 of 1895. In effect Jan. 1, 1896.] People v. Drayton, 168 N. Y. 10.

Section 528 of the Code of Criminal Procedure:

Stay upon appeal to the Court of Appeals, et cetera.—An appeal to the Court of Appeals, from a judgment *of the Appellate Division* of the Supreme Court, affirming a judgment of conviction, stays the execution of the judgment appealed from, upon filing, with the notice of appeal, a certificate of a judge of the Court of Appeals, or of *a justice of the Appellate Division* of the Supreme Court, that, in his opinion, there is reasonable doubt whether the judgment should stand, but not otherwise. When the judgmeut is of death, an appeal to the Court of Appeals stays the execution of course until the determination of the appeal. When the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below. [Amended by chap. 427 of 1897. In effect May 14, 1897.]

Jurisdiction prior to 1895.— Prior to the adoption of the Constitution of 1895 the Court of Appeals had the power to review a decision of an inferior tribunal which reversed upon the facts a judgment of the court below. Shultz v. Hoagland, 85 N. Y. 464.

How changed by Constitution.— But now, however, where the reversal is upon the facts the Court of Appeals cannot review. People ex rel. Broadway Imp. Co. v. Barker, 155 N. Y. 322; Bini v. Smith, 161 N. Y. 120; Spies v. Lockwood, 165 N. Y. 481.

But see, also, Benedict v. Arnaux, 154 N. Y. 714; Rice v. Culver, 172 N. Y. 60.

It is held in Ostrau v. Green (161 N. Y. 353), that the rule that the Court of Appeals cannot review questions of fact does not apply when the affirmance by the Appellate Division was not

unanimous, and there is a question as to whether there is any evidence in the case to support a finding of fact.

But the unanimous affirmance by the Appellate Division of a judgment directed on uncontroverted evidence does not deprive the Court of Appeals of jurisdiction to consider whether the evidence justified the verdict. Second Nat. Bk. v. Weston, 172 N. Y. 250.

As to what decisions are unanimous. See McDonnell v. N. Y. C. & H. R. R. Co., 159 N. Y. 524; Wangner v. Grimm, 169 N. Y. 421.

Section 1337 of the Code of Civil Procedure:

What questions are brought up for review.—An appeal to the Court of Appeals from a final judgment, or from an order, granting or refusing a new trial in an action, where the appellant stipulates that upon affirmance judgment absolute shall be rendered against him, brings up for review in that court only questions of law; but where the justices of the Appellate Division from which an appeal is taken are divided upon the question as to whether there is evidence supporting, or tending to support, a finding or verdict not directed by the court, a question for review is presented. In any action on an appeal to the Court of Appeals, the court may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to. [Amended by chap. 688 of 1894, and chap. 946 of 1895.]

Court controlled by record. Schoephlin v. Coffey, 162 N. Y. 12. When constitutional questions will be considered when covered by exception, though not specifically set forth. Man. Nat. Bank v. Shinn, 163 N. Y. 360. Objection that statute on which action for penalty is based is violative of Federal Constitution must be raised below. Purdy v. Erie R. R. Co., 162 N. Y. 42.

Where the Appellate Division reverses upon the facts and grants a new trial, the order cannot be reviewed by the Court of Appeals. Bini v. Smith, 161 N. Y. 120.

Section 1338 of the Code of Civil Procedure:

What questions of fact to be reviewed.— Upon an appeal to the Court of Appeals from a judgment, reversing a judgment

entered upon the report of a referee or a determination in the trial court; or from an order granting a new trial, upon such a reversal; it must be presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from. From Co. Proc. parts of §§ 268 and 272. [Amended by chap. 946 of 1895.]

Finding of fact, unanimously affirmed conclusive. Genet v. D. & H. C. Co., 167 N. Y. 608. Order stating that reversal is upon law and facts, if no dispute as to facts, judgment reviewable upon questions of law. O'Brien v. East River Bridge Co., 161 N. Y. 539. Order reversing judgment not stating that reversal was not upon facts, immaterial when no disputed facts arise. Buffalo & L. S. Co. v. Bellevue L. & I. Co., 165 N. Y. 247. As to whether there is question of fact is always question of law. Fairchild v. Edson, 154 N. Y. 199.

In the case of the Nat. Harrow Co. v. Bement & Sons (163 N. Y. 505), it was held that upon an appeal to the Court of Appeals from an order and judgment of the Appellate Division reversing a judgment entered upon the report of a referee, without stating that the reversal was upon the facts, it must be presumed, under section 1338 of the Code of Civil Procedure, that the reversal was upon the law and the Court of Appeals could consider only three questions:

1. Whether a material error was committed in receiving or rejecting evidence.

2. Whether the conclusion of law is supported by the facts found.

3. Whether any material finding of facts is without any evidence to support it.

See also 164 N. Y. 501. See also Sweet v. Henry, 175 N. Y. 268.

Exceptions, when necessary.— In the case of Hecla Powder Co. v. Sigua Iron Co., 157 N. Y. 441, the court, per Vann, J., said: "In a civil action we can only reverse upon exceptions and are compelled to disregard all errors committed by the trial court, unless they are pointed out by an objection and saved by an exception, no matter how serious those errors may be."

An exception to this rule is created, however, by section 1339 of the Code of Civil Procedure, which provides that "An excep-

tion is not necessary to enable the Court of Appeals to review the determination of a question of law, arising upon the verdict." Duryea v. Vosburgh, 121 N. Y. 57.

For the purpose of affirming a judgment the Court of Appeals will consider any question, even though not urged in the court below.

See Cardoza's Jurisdiction of the Court of Appeals, p. 48.

But the contrary seems to be the rule as regards the reversal of a judgment.

See Dodge v. Cornelius, 168 N. Y. 241; "Jurisdiction of the Court of Appeals," Cardoza, p. 47.

NOTE.— The jurisdiction of the Court of Appeals is further discussed at length in the notes to the Rules of Practice, *ante*.

Rules of the State Board of Law Examiners in Relation to the Admission of Attorneys and Counselors-at-Law.

(As amended, to take effect June 1, 1908.)

RULE I.

Each applicant for examination must file with the Secretary of the Board at least fifteen days before the day appointed for holding the examination at which he intends to apply, the preliminary proofs required by the "Rules for the admission of attorneys and counselors-at-law," as adopted by the Court of Appeals, December 20, 1906, and amended to take effect June 1, 1908, from which it must appear affirmatively and specifically that all the preliminary conditions prescribed by said rules have been fulfilled, and also proof of the residence of the applicant for six months prior to the date of the said examination, giving place, with street and number, if any, which must be made by his own affidavit. Said affidavit must also state that such residence is actual and not constructive. The Board in its discretion may order additional proofs of residence to be filed, and may require an applicant to appear in person before it, or some member thereof, and be examined concerning his qualifications to be admitted to the examinations. The examination fee of $15 must be paid to the Treasurer at the time the application for examination is filed.

To entitle an applicant to a re-examination, he must notify the Secretary by mail of his desire therefor, at least fifteen days before the examination at which he intends to appear and file with him, at the same time, his own affidavit stating that he is and has been for the six months prior to such examination an actual and not constructive resident of this State, giving the place of such residence, and street and number, if any.

RULE II.

Each applicant must be a citizen of the State, of full age; he may be examined in any Department, whether a resident thereof

or not, but the fact of his having passed the examination will be certified to the Appellate Division of the Judicial Department in which he has resided for the six months prior to his examination. He must, however, entitle his papers in the Department in which he resides.

Note.—An applicant must appear for examination in the Department in which he entitles his papers, unless permission of the Board otherwise be granted at least fifteen days before the day appointed for holding the examination.

RULE III.

In applying the provisions of Rules IV and V of the Rules of the Court of Appeals, "For the admission of attorneys and counselors-at-law," the Board will require proof that the college or university of which an applicant claims to be a graduate, maintains a satisfactory standard in respect to the course of studies completed by him. In case the college or university is registered with the Board of Regents of the State of New York as maintaining such standard, the applicant must submit to the Board, with his diploma or certificate of graduation, the certificate of the said Board of Regents to that effect, which will be accepted by this Board as *prima facie* evidence of the fact. Such certificate need not be filed in cases where the Board of Regents, by a general certificate, has certified to this Board that the said college or university maintains a satisfactory college standard leading to the degree with which the applicant graduated. In all other cases the applicant must submit with his diploma or certificate of graduation satisfactory proof of the course of study completed by him and of the character of the college or university of which he claims to be a graduate.

RULE IV.

The papers filed by each applicant must be attached together, and there must be endorsed upon them the name of the applicant. The papers must be entitled, "In the matter of the application of —— —— for admission to the Bar." Each applicant must state the beginning and the end of each term spent in a law school, as well as the beginning and the end of each vacation that he has had.

RULE V.

An applicant who has been admitted as an attorney in the highest court of original jurisdiction of another State or country, and who has remained therein as a practicing attorney for at least one year, may prove the latter fact by his own affidavit, and must present also a certificate from a judge of the court in which he was admitted or from a county judge in said State, certifying that the applicant had remained in said State or country as a practicing attorney for said period of one year, after he had been admitted as an attorney therein. The signature of the judge must be certified to by the clerk of the court or by the county clerk under the seal of the court.

RULE VI.

The Board will divide the subject of examination into two groups, as follows: Group 1, Pleading and Practice and Evidence; Group 2, Substantive Law. Each applicant will be required to obtain not only the requisite standard on his entire paper but also in Group 1 to entitle him to a certificate from the Board. If he obtains the required standard on his entire paper but fails to obtain the same in Group 1, he will receive a pass card for Group 2 and will not be required to be re-examined therein. He will be re-examined in Group 1 at any subsequent examination for which he gives notice as required by these rules.

NOTE.—Applicants should file their papers at the earliest possible moment; amendable defects may be discovered, which can be corrected if attended to promptly.

Rules of the Court of Appeals Relating to Applications to Practice as Official Examiners of Title.

IN THE COURT OF APPEALS.

December 9, 1908.

Present — Hon. Edgar M. Cullen, Chief Judge, presiding.

Ordered, That the following Rules providing for the methods of ascertaining the fitness of individual applicants for license to practice as Official Examiners of Title, be and the same hereby are prescribed, in pursuance of the provisions of section 9 of chapter 444 of the Laws of 1908, entitled "An act in relation to registering titles to real property and facilitating and expediting its transfer,* to take effect February 1, 1909.

* Now section 377 of the Real Property Law; Consolidated Laws, chapter 50; Laws 1909, ch. 52, which section is as follows:

Official Examiners of Title.— Before application is made for the registration of a title, it must be thoroughly examined and certified by an "official examiner of title." A person duly admitted to practice as an attorney and counselor-at-law in the courts of record of this state, or a corporation duly incorporated under and by virtue of the laws of this state, and by said laws duly authorized to guarantee or insure titles to real property in this state, and no other person, corporation, or institution, may be admitted to the office or position of, and licensed to practice as, an official examiner of title. The court of appeals shall prescribe rules providing for the methods of ascertaining the fitness of individual applicants for license to practice as such examiners, and in doing so, shall take into account the length of time during which applicants have practiced law and the amount of work that they have done in the examination of titles to real property. In the case of experienced examiners of such titles, provision may be made for licensing them, without examination, to practice as "official examiners of title." After complying with the rules and requirements prescribed by the court of appeals pursuant to this section, an individual applicant may be licensed and admitted to practice as an official examiner of title in this state, by an order of the appellate division of the supreme court of the department in which he resides, or in which he has an office for the regular practice of law. He may be required to give such a bond as the court may prescribe. A corporation may be licensed and admitted to practice as an official examiner of title by an order of the appellate division of the supreme court of the department in which it has its principal place of business, which order shall be made on the certificate of the proper state official that such corporation is duly incorporated under and by virtue of the laws of this state, and by said laws authorized to guarantee or insure titles to real property within this state. Any official examiner of title in counties not exceeding three hundred thousand inhabitants may base the certificate and affidavits required by this article, upon searches and abstracts of title made by a corporation duly organized under and by virtue of the laws of this state, and by said laws duly authorized to make and to certify to searches and abstracts of title, provided, however, that said abstract company shall have been incorporated for a period of at least two years before the passage of this article.

RULES RELATING TO APPLICATIONS TO PRACTICE AS OFFICIAL EXAMINERS OF TITLE.

RULE I.

Examination of Applicants.

Any person duly admitted to practice as an attorney and counselor-at-law in the courts of record of this State, desiring to be licensed to practice as an Official Examiner of Title, may apply to the State Board of Law Examiners for an examination as to his fitness. Examinations for this purpose shall be held by the Board either at the same times and places as designated for the examinations for admission to the bar, or at such separate times and places as the Board may specially designate.

Each applicant for examination must file with the Secretary and Treasurer of the Board, at least fifteen days before the day appointed for holding the examination at which he intends to apply, a written application for examination, together with the fee of fifteen dollars and an affidavit stating his age, residence and office address, when and where he was admitted to practice as an attorney and counselor-at-law, the length of time during which he has practiced law, that he has duly filed in the office of the clerk of the Court of Appeals the oath or affirmation required by chapter 165 of the Laws of 1898, as amended,* with the date of such filing, and stating the nature and amount of work that he has done in the examination of titles to real property.

RULE II.

Experienced Examiners of Title.

Any person duly admitted to practice as an attorney and counselor-at-law, claiming to be an experienced examiner of titles to real property, may be licensed by the Appellate Division of the Supreme Court to practice as an official examiner of title, without having passed the examination prescribed by Rule I, provided the fact of sufficient experience is found and certified to by the State Board of Law Examiners. For this purpose, the applicant may submit, at any time, to the Secretary and Treasurer of the Board,

* Now embodied in section 468 of the Judiciary Law.

together with the fee of fifteen dollars, an affidavit, stating his age, residence and office address, the date of his admission to practice as an attorney and counselor-at-law, his compliance with chapter 165 of the Laws of 1898, the length of time that he has practiced law, the nature and amount of work that he has done in the examination of titles to real property, which must have covered a period of at least five years, the number of titles that he has examined upon the transfer or mortgage of real property in this State, and specifying in detail the general location of the property and the names of one or more of the owners or mortgagors thereof.

The applicant shall also procure and file an affidavit of the register, clerk or deputy having charge of the records of the county in which the applicant resides or where his law office is situated, stating the nature and amount of his work in searching titles in such register's or clerk's office, together with an affidavit of at least two attorneys-at-law, actually engaged in the practice of their profession in that judicial department for at least five years last past, who are personally acquainted with the applicant, stating their knowledge of his work as an examiner of titles, and expressing their judgment as to his competency to discharge the duties of an official examiner of titles, which proof must be satisfactory to the State Board of Law Examiners.

RULE III.

Bonds.

No person shall be licensed or admitted, nor authorized or empowered to practice, as an official examiner of title, until he has executed and filed a bond, joint and several in form, with two or more sufficient sureties, to the People of the State of New York, in the penal sum of not less than $5,000, conditioned faithfully to perform and discharge the trust reposed in him as an official examiner of title, to obey all lawful decrees and orders of the court touching the administration of his office, and to pay all loss or damage which the assurance fund created by chapter 444 of the Laws of 1908 may sustain through, or which may be occasioned to any person by, any fraud, negligence, omission, mistake or misfeasance by him in his office or position of examiner of title as aforesaid.

The sureties upon said bond shall each make his affidavit, subjoined thereto, to the effect that he is a resident of, and a householder or a freeholder within the State and is worth the amount of the penalty of the bond specified over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution. Said bond shall be approved by the presiding, or acting presiding, justice of the Appellate Division of the department in which the applicant is licensed, and such justice may require the sureties to appear before him and to justify. The bond shall be filed in the office of the clerk of that court, and the obligors therein shall be liable for any loss or damage sustained thereunder by reason of any defect in any title certified by the examiner for the period of ten years from the date of such certificate of title. Such bond shall be renewed at least once in every five years, and any failure to renew the same within such period shall, of itself, operate as a revocation of the license. In case of the insolvency of either of the sureties, the Appellate Division must order the renewal of the bond forthwith.

RULE IV.

Certificate of Board of Examiners.

If the State Board of Law Examiners, upon examination, finds an applicant qualified under Rule I, or finds an applicant to be an experienced examiner of title, under Rule II, it shall certify to the Appellate Division of the Supreme Court of the department in which the applicant resides, or in which he has an office for the regular practice of law, the fact that the applicant has complied with the rules and requirements prescribed by the Court of Appeals, as precedent to admission to practice as an official examiner of title in this State.

RULE V.

Suspension from Practice and Removal from Office.

An individual official examiner of title, who is guilty of any deceit, malpractice, crime, misdemeanor or negligence as such examiner, or who is guilty of any fraud or deceit in the proceedings by which he was admitted to practice as such examiner, may

be suspended from practice, or removed from office and his license revoked, by the Appellate Division of the Supreme Court by which he was licensed as an official examiner, upon notice and hearing had.

Suspension from practice as an attorney and counselor-at-law shall, of itself, work a suspension from practice as such examiner, and his disbarment as an attorney and counselor-at-law shall, of itself, work a revocation of his license as an examiner.

RULE VI.

Appellate Division Rules.

The justices for each Appellate Division may adopt for their several and respective departments such additional special rules for ascertaining the fitness of applicants as to such justices may seem proper.

RULE VII.

Board of Examiners' Rules.

The State Board of Law Examiners may adopt such rules for carrying out and applying these rules as may be consistent therewith.

RULES OF THE STATE BOARD OF LAW EXAMINERS IN RELATION TO APPLICATIONS FOR LICENSE AND ADMISSION TO PRACTICE AS OFFICIAL EXAMINERS OF TITLE, TO TAKE EFFECT FEBRUARY 1, 1909.

RULE I.

Applicants who are citizens of the State will be certified for admission to the Appellate Division of the department of their residence. A nonresident applicant will be certified for admission to the department in which he has and maintains an office for the regular practice of the law.

RULE II.

The papers filed by each applicant must be attached together, and there must be indorsed upon them the name, residence and office address of the applicant. The papers must be entitled "In

the matter of the application of ..... for license and admission to practice as an official examiner of title," and in the department in which the applicant applies for admission.

RULE III.

To entitle an applicant to a re-examination he must notify the Secretary by mail of his desire therefor, at least fifteen days before the examination at which he intends to appear, and file with him at the same time his own affidavit stating his place of residence and the post-office address of his office which he maintains for the regular practice of the law.

RULE IV.

Applicants will be examined as to their fitness to be licensed to practice as official examiners of title, and in the Real Property Law, Wills Law, Domestic Relations Law, Surrogate's Law and Practice, and in other topics relating to the work of examining and dealing with titles to real property in the State of New York.

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